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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARTIN KESSLER
Appellant

V.

CITY OF WINTER PARK
Appellee

SUPREME COURT
CASE NO. 89,501

LOWER TRIBUNAL
CASE No. 4803

COVER SHEET

TYPE OF BRIEF: INITIAL BRIEF, SECOND AMENDED

FILED BY: MARTIN KESSLER, APPELLANT, PRO.SE.

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V.

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"Shall a validation be permitted to stand when the referendum as a condition thereto was conducted by a municipality that knowingly omitted material facts from the ballot, but argues, in defense, that such facts may be found within public documents or local newspapers; therefore, such facts need not be included within the ballot to adequately inform the voters of the measure before them, which argument was upheld by the Lower Court "

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II CASES AND STATUTES

Appellant makes reference to the following Cases and Statutes within the body of the Initial Brief in support of his argument. The court is advised the full text of each following item cited will be found in the appendix and first appears at the page indicated herein:

a. *Advisory Opinion To The Attorney General* , 592 So.2nd. 225 (Fla. 1991) 9

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARTIN KESSLER,
Appellant/Defendant

V.

THE CITY OF WINTER PARK,
Appellee/Plaintiff

SUPREME COURT
CASE No. 89,501

LOWER TRIBUNAL
CASE No. C196 - **4803**

INITIAL BRIEF [SECOND AMENDED]

Comes now the Appellant , under authority of Chapter ***75***, Florida Statutes and in accordance with Rules of Appellate Procedure, Rule 9.030 (a)(1)(A)(i) , to offer his Initial Brief ,amended, prepared in accordance with Rule 9.210 of the Rules of Appellate Procedure, and submits to this Court (1) a statement of the case, (2) the facts in the case, (3) his arguments with regard to each issue, briefly rendered, and **(4)** concludes with a prayer for the precise relief sought. (Note: References to the Exhibits in the Appendix **will** be shown in a form **as** : [Exhibit X, **Apx.** page X]. Reference to the transcript will be by page and line.)

A. STATEMENT OF THE CASE AND THE FACTS

Appellant , in accordance with Fla. R. App. P 9.210 (b)(3), provides the following Statement of the Case and of the facts. We include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal. For each and every statement and fact there will be cited the

page of the record, reproduced copies of which will be page numbered in the appendix for ease of reference, or reference will **be** to the transcript, as required.

1. Appellee , as Plaintiff, filed a complaint under the authority of Chapter *75*, Florida Statute , in the Ninth Judicial Circuit for validation of bonds. A Final Judgment Validating General Obligation Bonds was entered November 6, 1996. [Exhibit 1, **Apx.** Page.1 3

2. The State of Florida answered **the** complaint [Exhibit 2 ,Apx. page 7]

3. Appellant/Defendant came forth as an Intervenor. [Transcript, Page 2]

3. As a condition precedent to filing a complaint for the validation of bonds , Appellee called an election to be held June **4**, 1996. [**Exhibit** 11, **Apx.** page 62]

4. Hereinafter , to and including Page **4**, we briefly state in chronological order the course of the proceedings and the sequence of factual events preceding the complaint for validation **up** to rendition of the Final Judgment of the Circuit Court.

a. City Ordinance No. **2137 was** issued March 12, 1996 : [Exhibit 11, Page 62] which, among other things, provided:

> AN ORDINANCE OF THE CITY OF WINTER PARK, CALLING **A** BOND REFERENDUM TO BE HELD ON THE QUESTION OF ISSUANCE OF NOT EXCEEDING **$5,125,000** OF GENERAL OBLIGATION BONDS, SERIES 1996, OF THE

CITY OF WINTER PARK, FLORIDA, TO FINANCE ***THE*** COST OF ***THE ACQUISITION*** OF THE GREEN SPACE KNOWN AS THE WINTER PARK GOLF COURSE: AUTHORIZING THE ISSUANCE OF SUCH BONDS IF APPROVED BY REFERENDUM; PROVIDING AN EFFECTIVE DATE. [ITALICS ADDED]

This Ordinance, in Section 2 therein, stated that the bonds, and the *cost* of the acquisition of the property and all purposes incidental thereto *is defined* collectively as the "Project"

b. A Referendum **was conducted June 4, 1996 under the *direct auspices* and** *control* **of the City Commission , with the following ballot title and summary as specified in " Section 6, Official Ballot" [Exhibit 11,** Apx. **Page 63] reproduced here as follows:**

GREEN SPACE (GOLF COURSE) ACQUISITION

SHALL THE CITY OF WINTER PARK ISSUE NOT EXCEEDING $5,125,000 GENERAL OBLIGATION BONDS, BEARING INTEREST AT NOT EXCEEDING THE MAXIMUM LEGAL RATE, MATURING WITHIN 20 YEARS FROM DATE OF ISSUANCE, PAYABLE FROM AD VALOREM TAXES LEVIED ON ALL TAXABLE PROPERTY IN THE CITY **AREA,** WITHOUT LIMITATION AS TO RATE OR AMOUNT, FOR ***FINANCING THE ACQUISITION OF THE GREEN SPACE*** KNOWN AS THE WINTER PARK GOLF COURSE, AS PROVIDED IN ORDINANCE NO. 2137? [ITALICS ADDED]

c. Following the referendum the city issued Resolution No. 1635, June 11,1996, canvassing the results of the referendum. Votes **were cast** by **4573 electors of which 3497 were in favor of the bonds and 1076 voted against the bonds.[Exhibit 12 , Apx.** page 65]

d. Resolution No. **1636** , **"The Bond Resolution"**, **dated June 25, 1996** , **followed 21 days after the referendum** , **and said in part:**

> **A** RESOLUTION PROVIDING FOR THE ISSUANCE OF NOT EXCEEDING $5,125,000 GENERAL OBLIGATION BONDS, SERIES **1996,** OF THE **CITY** OF WINTER PARK, FLORIDA, FOR THE PURPOSE OF ***FINANCING THE*** COST ***OF THE ACQUISITION OF THE GREEN SPACE*** KNOWN **AS** THE WINTER PARK GOLF COURSE; AND PROVIDING AN EFFECTIVE DATE.[ITALICS ADDED **]** [EXHIBIT **13 ,** APX. PAGE 67]]

In Section **2.K.** of this **Resolution** No.1636 we **now read:**

> "PROJECT" SHALL MEAN THE ACQUISITION OF THE GREEN SPACE KNOWN **AS** THE WINTER **PARK** GOLF COURSE PROPERTY OWNED BY THE ELIZABETH MORSE GENIUS FOUNDATION, INC. (THE FOUNDATION); ALL IN ACCORDANCE WITH THE OPTION CONTRACT FOR PURCHASE *AND* SALE BETWEEN THE ISSUER AND THE FOUNDATION REGARDING SUCH PROPERTY (THE "OPTION CONTRACT"), **AS** AMENDED **AND** SUPPLEMENTED FROM TIME TO TIME. [ITALICS ADDED]

In Section 3.A. of this Resolution No. 1636 we now read:

> THE COMMISSION, BY ORDINANCE NO. 2137 OF THE ISSUER, HAS HERETOFORE DETERMINED THAT IT IS NECESSARY AND DESIRABLE TO ISSUE THE BONDS IN THE AGGREGATE PRINCIPAL AMOUNT OF NOT EXCEEDING $5,125,100 FOR THE PURPOSE OF FINANCING PART ***OF*** TEE ***COST OF PROJECT. TEE TOTAL COST OF THE PROJECT IS $8,000,000*** AND ***THE BALANCE THEREOF SHALL BE PAID FROM OTHER LEGALLY AVAILABLE FUNDS OF*** THE ISSUER. THE PROJECT IS A PUBLIC PURPOSE AND A CAPITAL PROJECT FOR WHICH THE ISSUER MAY ISSUE BONDS IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 166, **PART** 111, FLORIDA STATUTES. **[** ITALICS ADDED]

e. Judge John H. Adams , Sr. heard the case on November 6, 1996 [A Transcript of the proceeding is attached]

5. The state's attorney's argument pointed out, in its amended answer to the complaint, that material facts were absent from the ballot. We quote from the State's answer: [Exhibit 2, Apx. page 7 **Amended Answ**er of the State Attorney, paragraph 1, b. and referenced also in Transcript, page *76*, line *8* to page *77*, line 6]

> " b. the Referendum ballot is defective and misleading in that plaintiff failed to state therein that it already owned two (2) holes of the Winter Park Golf Course and that the total purchase price for the acquisition of the remaining Winter Park Golf Course property was $8,000,000, a portion of which would be paid from other funds."

6. The Appellant/Intervenor argued : That the ballot ordinance and ballot summary was misleading and **in** violation of F.S.100.341 [Exhibit **3** , Apx. page 10] in that three material facts were absent **from the** ballot. [Transcript, page *65*, line 19 to page 76, line 5]

7. Judge John H. Adams, Sr. having heard the arguments from Plaintiff / Appellee, the Intervenor , and the State Attorney , issued his judgment for the City and thereupon signed **a** Final Judgment Validating General Obligation Bonds [Exhibit 1, Apx. page 1] which had been prepared in advance by the Appellee and submitted for signature at the

conclusion of the hearing. [Transcript, page 81, line 25 to page 82 line 8]

8. This concludes the Appellant's Statement of the Case and the Facts.

B. SUMMARY OF THE ARGUMENT

1. Appellant summarizes his argument to this court in the form of a concise and direct question, to wit:

"Shall a validation be permitted to stand when the referendum as a condition thereto was conducted by·a municipality that knowingly omitted material facts from the ballot, but argues, defense, that such facts may be found within public documents or local newspapers; therefore, such facts need not be included within *the* ballot to adequately inform the voters of the measure before them, which argument was upheld by the Lower Court."

2. Appellant also offers for this court's consideration a series of six inferential questions which can logically be derived out of the substance of his arguments. The inferential questions are:

a. What is the ultimate test as to the legality of a ballot?

b. May a municipality in the State of Florida issue a ballot and omit material facts that are otherwise contained within public records which, but far their

omission, would have caused a voter to cast his ballot differently ?

c. Who is the competent authority to decide what facts are material or not material that can render a ballot defective ?

d. Can a ballot be considered legally sufficient if material facts are not included but the voter is *obliged or required or directed or instructed or expected* to undertake a search of the public records prior to an election to decide for himself whether facts included in a proposed ballot are or are not material ?

e. Should a voter be confident all material facts that ought to be known to cast a ballot intelligently are included in the ballot by his government or must he assume nothing in the ballot can be trusted to be accurate and material *unless* he undertakes his own independent investigation. ?

f. Is it legally sufficient for a voter to assume facts relating to an upcoming election as reported in the newspapers or disseminated by a Political Action Committee can be relied upon to be material and true , notwithstanding other facts described in a ballot summary ?

g. Is it *unreasonable* to expect a voter to hold a presumption of *honesty* that his government will issued ballots not misleading or deceptive, or shall voters assume all ballots are fair, and if so, who can ever raise a complaint?

C. APPELLANT'S ARGUMENTS

Appellant s now proceeds to offer specific factual detail and argument to be discussed with greater particularity in Sections C.1, *C.2* and C.3 below on each of the three material facts **he** avers **the** omission of which rendered the referendum ballot defective , the election illegal and the subsequent validation improper.

1. Appellant will argue the ballot was defective and therefore unfair to the electorate. The ultimate test as to the legality of a ballot is whether or not voters were afforded an opportunity to express themselves fairly. ***State v. Special Tax School District*** No. 1, **86** So.2nd. 419 (Fla. 1956). [Exhibit **8** , Apx. page **48**]. Appellant argues the omission of material facts **from a** ballot is *prima* facie Unfair. How **can** fraud **be** fair? **How can** misrepresentation **be** fair? Unfairness is self-evident and needs no torturous argument for proof. ***Whenever a ballot fails to provide material details necessary to adequately inform the electorate on the measure before him, what is before him is unfair.***

2. Appellant suggests at least two critical questions need an answer by this court in order to determine the litigation, namely: (1) When is a fact said to be material and who decides whether such facts shall or shall not be on a ballot ? and **(2)** Did the ballot in the referendum preceding the validation in question unfairly omit material

facts and fail equally to meet the mandatory direction of F.S. 100.341 which calls for , among other things, "....*details necessary to inform* the electorate. " ?

3. As to the first question, we cite in support of our argument: [Exhibit 6 , Apx. page 29]

> From: *Hauben* v. Harmon, 605 F. 2nd 921,923, 924 (5th Cir 1979):
>
> " A fact is material if but for the alleged non-disclosure or misrepresentation the complaining party would not have entered into the transaction;
>
> " furthermore, the issue of materiality of alleged nondisclosure or misrepresentation is a *question* of fact under Florida law." [Emphasis added]

4. As to the second question, Appellant's major contention in arguing a defective ballot rested an the authority that a ballot summary may be defective if it omits material facts necessary to make the ballot not misleading .*Advisory Opinion to the Attorney General* 592 So.2nd. 228 (Supreme Court of Florida 1991).

[Exhibit 4, Apx. page 11]

> From: *Advisory Opinion* To *The Attorney General - Limited Political Terms In Certain Elected Offices* 592 So. 2nd 228 (Supreme Court of Florida 1991): " A ballot summary may be defective if it omits *material facts* necessary to make the summary not misleading" [Italics Added]

5. Appellant also argues the language calling for **" .... *together with other details necessary to inform the*** *electors."* as mandated in Florida Statutes, 100.341 [Exhibit 3, Apx. page 10] were not intended by the legislature to mean trivial details. The language in the Law establishes a mandatory obligation on a municipality issuing a ballot to render a fair ballot. It is well established that mandatory provisions of election laws are those the violation of which invalidates the election. Disregarding mandatory requirements, or matters of substance will vitiate the election. ***State*** v. ***City of West Palm Beach,*** **174** ***So.*** **334,338** (**Fla.** 1937). **[** Exhibit **9 ,** Apx. page 51]

6. Failure on the part of the Appellee to comply fully with the statute is not a mere **"irregularity"** but constitutes an clear violation. The **words** within the Statute are manifestly comprehensible for anyone to understand. The details called for must be of such a nature that not only is the measure clear and not misleading but the information is sufficiently informative (i.e., "material **",** Appellant asserts) that but for it's omission the voter may very well have **cast** his ballot another way. Indeed, the specific language mandating "...together with other details necessary to inform the **electorate". ** is precisely the compelling statutory guard ***erected by the Legislature to ensure material facts are not omitted*** from a ballot lest it render the referendum null and void, otherwise what are **we to take those words to mean!**

C.1 AS TO THE FIRST OMITTED MATERIAL FACT

1. Facts which if ***knowingly withheld*** and could be said to have altered the outcome of an referendum if not otherwise concealed from ballot, are judged to be material facts and its omission is deemed sufficiently misleading to render a ballot null and void. ***Advisory Opinion To The Attorney*** General , 592 So.2nd. **225** (Fla. 1991) [Exhibit **4** , **Apx.** page **11**] and ***Winterfield v. Town of Palm Beach,*** **455** So.2nd 359, 361 (Fla. 1984)[Exhibit 10, Apx. page 57]

2. Due to the Appellee's misrepresentation and omission of material facts, we do not know how many voters would have cast their ballot against the bonds had the Project, the purchase price, and method of payment been overtly and legally displayed in the language in the ballot. Moreover, if **a** fraud has occurred, are the voters to decide whether the outcome would have been different ? This is only possible by invalidation of the referendum and the conduct of an election with a ballot **now** incorporating the facts said to be material. ***But*** it **is** ***manifestly obvious an election cannot be an experiment done twice, one with the other without facts alleged to be material , the omission of which is the question to be decided.*** Appealing a validation judgment to a court on the question of the legality of a ballot is to ask, in effect, for Justices to

be sitting surrogates and conduct a "second election" , so to speak , and determine how , in their opinion, a reasonable man would have cast his ballot knowing facts now that were unknown before. There is clear and convincing evidence on the record on appeal that some voters would have rejected the referendum had they not been misled by the omission of facts Appellant argues were material. [For example, see Evidence Control Report, Defendant's exhibit #2 , reproduced herein as Exhibit #19 , Apx. page 117 , and testimony of the witness in the Transcript at page 50, line 4 to page 53, line 14]

3. We now turn to the question of fraud. Appellant avers he may logically conclude the standard for fraud has been met by following *Hauben v. Harmon, 606* F.2nd 921 (5th Cir. 1979) [Exhibit 6 , Apx. page 29]:

a. First, the Appellee's Resolution and ballot issued a false statement as to the cost *of the project* for the property to be purchased which the city knew was false.

b. Second, the Appellee became an ardent and non-neutral advocate for passage of the referendum, with the intent to ***induce*** the *electorate to act on the representations* made in the ballot summary by lecture and its official publications.

c. As a consequence, the electorate is to *suffer* ***damage*** in the form of an increase in property taxes for the next 20 years as a result of this misguided and fraudulent action on the part of the city, and on the part of City

officials and their advisors who, having superior knowledge, should have known not to misrepresent the cost *of the project and the method of payment and the property to be acquired in the ballot* **summary.**

> From: *Hauben v. Harmon, 605* F. 2nd 923, 924 (5th Cir 1979):
>
> "Generally, in order to establish a cause of action in fraud under Florida law, a Plaintiff must establish that : (1) a Appellant knowingly made a *false statement concerning* a *material* fact; (2) the Appellant intended that the Plaintiff rely on the statement: (3) the Plaintiff relied on the statement; and (4) the Plaintiff was damaged as a result of that reliance" [Italics Added]

4. Florida Statutes 100.341, Bond Referendum Ballot, [Exhibit 10, Apx. page 10] directs the authority calling for the referendum to comply with four specifically mandated requirements and , in addition, "...... *together with other details necessary to inform the electors,"* as the full and complete issue before the electorate and on which representations they are to cast a ballot.

5. Appellant avers it is fair , reasonable and relevant to argue (1) it is *not enough* to print the ballot on plain white paper, (2) it is *not enough* to describe the bonds, (3) it is *not enough* to state the amount of the bonds, (4) it is *not enough* to state the interest rate for all such items are specific by enumeration. The statute clearly mandatesip

addition "...together with other details necessary to inform the electors".

6. Appellant argues the phrase,"....together with other details....", is not to be interpreted as redundant prose, but is ,we aver , legislatively intended to mean just what *it* says, "...*other [i,e,"material"] details* necessary *to inform ..."* to ensure , that is to say, no omission *or* misrepresentation will occur to deceive the voters. The ballot here at issue fails to meet the test of "....other details necessary . . . ..". We are not quibbling with words. We suggest to this court a difference in the "Cost of the Project " of $3,000,000 is a *necessary and material detail to be included* in the ballot summary and not withheld for one can never know what may pass in the mind of a voter when he enters a private and secret polling booth and decides -- after all the election paraphernalia and politicking has ended -- whether he would be for or against the purchase of real estate for $8,000,000 rather than $5,125,000 and also depleting city reserved by $3,000,000. We have no way of knowing , now that the election is over, how many of the electorate would have balked at a cost of the project of $8,000,000 , had the ballot so stated .

7. The failure of the ballot to state the purchase price in a real estate acquisition and stating *only* the amount to be borrowed for such purchase, where the amount to be borrowed is significantly *less than* the purchase price, is a serious and material omission. Is not the electorate to

believe the stated amount to be borrowed can be assumed to be the full purchase price if the ballot is silent on this material detail ? The voter has no way of knowing the true ***property tax impact*** of his financial burden for it could conceivably be based on any purchase price over the amount to be financed if he is not informed of the purchase price.

8. The property tax impact, however is explained to the electorate by the city's publication as a " Green Space Tax **Calculation"** The city produces a newsletter, called **"The** Update", [Exhibit 21, Apx. 120] which is mailed to all citizens. Prior to the June 4th election , in the April 1996 issue, page 5 and 6, ***the city advises the citizen how to calculate the property tax impact,*** This is a faulty and misleading calculation . Is based ***only on the partial amount of money to be borrowed*** to pay for the " Green Space " purchase. This is grossly misleading for what is clearly implied suggests to the electorate by the **Appellee's** own publication that " $5 million borrowed to pay for the purchase of the **"Green Space"** at current interest rates would be approximately $402,190 per year,(see page 5 and 6) leaving the clear impression to a voter that the ***tax burden will be $5 million*** , and not $8 million. A flagrant misrepresentation of the truth of the **matter.**[Exhibit 21, Apx. page 120. See also Appellee's Evidence **#7** on the record , the **"Update",** April 1996, a city publication, page 5 and 7 therein.]

9. The Appellee knew the total cost of the project was to be $8,000,000. The Appellee entered into a contract - *three months prior to the referendum* *without **appraisal** of the aolf course* - offering $8,000,000 , which the seller - without having stipulated an asking price - readily accepted without complaint ! [Exhibit 14 , Apx. page 86]

10. Appellee may argue the purchase price may be found in the Contract, since it is a public record. But the contract is *not* a ballot. There is no defense or compelling reason that can be offered by the city commission why the ballot should stand mute on this material fact. Furthermore, Appellee is not afforded a defense by saying: "but everyone knew what the price was. It was in the newspaper!" ***Appellant*** asserts *only what is written in* **the** *ballot is understood.* The burden placed on a governmental body of informing the electorate of what they will be called upon to vote, rests with the bond referendum ordinance and the ballot summary. It is the ballot ordinance and ballot summary , Appellant argued, that should have prominately informed the electorate of these three material facts, which was not described in any official public record available to the electorate until *after the election* had taken place. Due to this nondisclosure the electorate have been fraudulently misled and the outcome of the referendum may have been otherwise. We cite the following in support of our argument: [Exhibit 5 , Apx. page 20]

From: Askew *v. Firestone, 421* So.2nd,
154,155,156,157 (Fla. 1982):
Excerpts:

" The burden of informing the public should not fall only on the *press* and *opponents* of the measure --- *the ballot title and* summary *must do this"*
[Italics Added]

"Simply put, the ballot must give the voter fair notice of the decision he must make"

" Fair notice in terms of ballot summary must be actual notice consisting of a clear and unambiguous explanation of the measure's chief purpose".

11. When entering into a real estate transaction , Appellant wishes to observe the city cannot avail itself of its magisterial authority to act as a free agent -- simply because, unlike other types of purchases, this city by charter must seek the approval of its electorate for General Obligation Bonds pledging a lien on all property holders as the source of repayment. The city commissioners may enter into a contract for purchase and sale of real property without referendum, but in this case the city has no authority to bind the electorate without prior approval but by calling for a referendum to seek such approval.

12. It would be incredulous to suppose that , if this were a private transaction , as distinct from a public one, that the contracting agent [e,g, the city] would fail to inform a buyer [e,g, the voters] of the purchase price within the document requiring authorizing signatures to bind the contract [e,g, the ballot].

Appellant avers what ***is prudent in private can scarce be folly if practiced*** in ***public.***

13. Appellant , accordingly, concludes that local newspapers, political advertisements, city produced newsletters, purchase and sale contracts, and - will even go so far as to assert - public records of public hearings - - none of these can be defended -- or should be permitted to be defended -- as an ***equally valid alternative substitute for*** determining the legality of a ballot and its content sufficient to inform the electorate of material facts and ***especially if no affirmative and well-publicized effort is put forth*** by ***city officials prior to the referendum to inform the public,*** Newspapers should not be accorded the same standing as a ballot.

14. Appellee can show no evidence where the Appellee , *and* ***specifically the Appellee,*** undertook to affirmatively Carry on an aggressive public information campaign disseminating material ***facts*** to the voters to avail itself Of the defense of having sufficiently informed the electorate. ***We cannot support Appellee's position that holding such facts are in the city's files absolves a municipal government from fairly including such material information in the ballot , otherwise, why have a ballot at all, or a ballot that simply is logically reduced to asking the electorate to say : "FOR BONDS" or "AGAINST BONDS" , and nothing else , since everyone is presumed to know all the***

material facts anyway ***from*** *reading local newspapers* or *presumed to have* made *a full* ***search*** *of the public records.*

15. Appellee's hollow argument ought not stand as a standard of municipal ballot construction . Appellee's position reduces to this: "We don't have to tell the electorate in a *ballot* exactly what we are contracting to buy; we don't have to tell how much we intend to pay , and we don't have to tell how we exactly intend to pay for it, since , after all, it was reported in the newspaper or it's in the public records!" This is precisely what the lower tribunal has upheld in paragraph 11 of the Final Judgment.

16. Appellant now directs the court's attention *specifically* to *the reasoning* in Paragraph 11 of the Final Judgment , provided here in its entirety:

> " 11. Failure of the Referendum Ballot to state that Plaintiff already owned 2 holes of the Winter Park Golf Course, or that the total purchase price for acquisition of the remaining Winter Park Golf Course property was $8,000,000 a portion of which would be paid from &her legally available funds of Plaintiff. , did not mislead voters in the referendum since ownership of Plaintiff of 2 holes of the Winter Park Golf Course, and the option of Plaintiff to purchase the remaining Winter Park Golf Course property for $8,000,000, was a matter of public record prior to the referendum, *Winterfield v. Town of Palm Beach,* 445 So.2nd. 359,363 (Fla. 1984); *Grapeland Heigths Civic Ass'n V. City of Miami,* 267 So.2nd 321,324 (Fla. 1972). Furthermore, any inconsistency in the description of the project in the referendum ballot and the Bond Resolution is immaterial. *State V. City of West* Palm Beach, 174 So. 334,338 (Fla. 1937). " (Emphasis added)

18. What constitutes the sufficiency of a defense that asserts material information necessary to be an informed elector " was a matter of public record".? Is the test to be met by an occasional and oblique reference to a subject or fact or question in dispute? What preponderance of citation within the public record is required before a municipality can claim to have met the test? Appellee has submitted to the lower court documents termed as "evidence" in support of its claim of such sufficiency. The documents are listed in an "Evidence Control Report", prepared by the trial clerk, and contain the following in the record on appeal:

a. A "composite" of 25 documents comprising 215 pages of city commission minutes reflecting , at different times and places in the minutes, discussion of the referendum between commissioners and staff, and a preponderance of other completely unrelated information. How is an elector to find material facts in the public records, assuming material facts can be found ? The City of Winter Park has approximately 14,000 electors. If an elector visits the clerk's office, makes a formal request to examine the public records, the municipality is not required by the Public Records Act, F.S., Ch.119, to give affirmative direction or assistance in locating within documents the precise information being sought? This Appellant made an examination of the 215 pages and did discover in the public record , dated February 26, 1996, 2, and no more than 2,

references by a city official to a purchase price of **$8,000,000** for the golf course property. [not counting the contract, obviously,][Exhibit 24, Apx., page 127 , shown therein as Plaintiff's exhibit **#6**]

b. A **"composite"** of 30 newspaper clippings . The overwhelming majority relate to an unrelated election for a seat on the city commission and not the referendum. Those few that relate specifically to the issues in the referendum are either silent on the material facts or misstate them. [Exhibit 24, Apx. , page 127 , shown therein as Plaintiff's exhibit **#7**]

17. The Final Judgment's reliance on the three cases in the quoted paragraph **above** are improper, equivocal and not a logical parallel for inferential or Authoritative support to the Final Judgment. ***Appellant avers this reliance is erroneous as a matter of law.*** In fact, Appellant believes the court is misled ! We explain **as** follows:

a. In " ***Winterfield***" , **455** So.2nd. 359, [Exhibit 10, Apx. page 57] The Supreme Court in that **case** , relating to the single-purpose rule, affirmed the validation judgment of the circuit court not because information was a matter of public record , but because the ***question of material facts were not*** at ***issue or were claimed to be omitted from the*** *ballot* .

b. We will also find in ***"Winterfield" , 455*** **So.2nd,** 363, the following:

"[2,3] Where discrepancies on a bond referendum ballot mislead the voters, or fail to *adequately inform them of the* project, the ballot is subject to invalidation" [Italics Added].

Appellant suggests the phrase"...." fail to adequately inform...." can be rendered as " fail to provide material facts" . Moreover, the information distributed by the Town of Palm Beach ***prior*** to *the referendum* ***affirmatively provided all material facts adequately explaining the referendum..***

c. In *"Grapeland Heigths"* , 267,So.2nd., 324 [8]. This same principle -- that is, *no complaint was raised on the question of material facts omitted* -- is equally applicable and on the same basis since *highly detailed documentation advised the voters of* each *project and the* ***material facts were widely disseminated prior to the elec 'on*** to the public in the media by means of specially prepared maps and diagrams.

d. Lastly, In *"State v. City of West Palm Beach"*, 174 so. 338 [5] Fla. 1937). It is hardly likely that a court would assert so categorical a pronouncement as to say, as the Judgment seems to imply, that any inconsistency between ballot and Bond resolution is immaterial. What the court said in the case cited was that the inconsistency claimed therein to exist -- between Bond maturity dates -- was immaterial, and since the statute did not require it, so was surplusage to the ballot.

e. Furthermore, **"State".** 174 So. 338, also observes, quoting **McQuillin** on Municipal Corporations, vol. 5, **pp.1021-1023:**

> ". . ..a disregard of mandatory requirements, or matters of substance, will vitiate the election and preclude valid contemplated action thereunder"

18. Appellant also directs the court's attention to paragraph 13 of the Final Judgment, reproduced here in its entirety:

> " 13. The officers and employees of Plaintiff were authorized to prepare and or disseminate information to electors regarding the referendum and the Project, and to advocate the passage of the referendum. Peoples **Against** Tax Rev. v. County **of Leon,** 583 So. **2nd,** 1373, 1375 (Fla. 1991 **).** "

19. The Appellee , *and specifically the Appellee,* did **not** fully , fairly and ***affirmatively*** *inform* , advocate and ***disseminate facts herein alleged*** *to* ***be material*** *to* ***the public*** *prior* ***to*** *the* ***referendum*** At no time did any official Of the city government -- The Mayor, the Commissioners or any city employee -- inform the electorate by ***official documentation*** produced by ***the city*** of the facts herein said to be material by the Appellant. [Please see the Evidence Control Report, Plaintiff's exhibit 7, a composite Of 30 newspaper clippings and 2 city newsletters submitted as evidence to the record by Appellee in its defense.]

20. Appellant suggests a ballot title and summary could have been easily crafted within 67 words that would

be fair and not misleading and still include all material and non-material details necessary to inform the electorate by example, such as:

A SAMPLE BALLOT

GOLF COURSE ACQUISITION

Shall the city of winter park purchase the 7 holes of the golf course owned by the Elizabeth Morse Genius Foundation for $8,000,000 and pay for it by issuing General Obligation Bonds for $5,000,000 at a legal rate of interest, maturing within 20 years, to be repaid by property taxes levied on all taxpayers , together with $3,000,000 to be taken out of city reserves?

21. THEREFORE , Appellant argues the Final Judgment of the circuit court validating the bonds ought not be permitted to stand because :

(1) the ballot was unfair and defective and illegal .

(2) the Appellee perpetrated a fraud .

(3) the Appellee violated Florida Statutes by omitting material facts from a ballot rendering all proceedings taken in connection therewith illegal and the referendum null and void.

c.2 AS TO THE **SECOND OMITTED MATERIAL FACT**

1. Appellant finds within the city commission minutes the explanation to seek electorate approval for but a part of the purchase price by the sale of bonds and the remainder to be payable by utilizing reserve funds for the balance of the purchase price. This was said to save the voters money, or lessen the burden of the purchase price or " buy down" the bonds.[Exhibit 22, Apx. page 121]

2. By simple arithmetic, Appellant fails to see how this objective could have been possible. The city will lose *interest* it now enjoys and will pay interest on the borrowed funds, which the electorate may have voted against borrowing had this material fact been on the ballot. The city currently is earning a higher interest rate on $3 million of its reserves in a pooled account , (5.52%), which will no longer be earned , and the city will thereupon obligate the taxpayers for 20 years to bear an interest burden (approximately 4.7%) on the proceeds of a $5 million bond issue. [Please see transcript, page 73, line 3 to line 22]

3. This pool of " other available legal funds" caught the attention of the mayor and commissioners and, upon inquiry to financial consultants as to the effect on the city's financial rating should this fund be drawn down, and to what extent could the city draw down these funds and still maintain its financial rating, the consultant's

answer was the city's fund is far in excess of prudent management, and , quoting from the evidence on the record:

> " . . ..according to the Bond advisors, the commission can commit up to $3 million from the Contingency Fund without jeopardizing the city's bond rating" , [Exhibit 25, Apx. page 128, City Commission Work Session, dated February 26, 1996, page 2 therein]

4. The minimum safe level for this community is 15% of the general fund, which gave the city the "green light" to extract from the contingency fund sufficient "other legal reserves" for the "green space" purchase and the city would be no worse off than before in the opinion of bond rating firms but it decided to hold a referendum and ask the voters for something less than the contract purchase price without the *legal obligation to materially inform the voters of the contract price or the intent* to *deplete the reserves.* [Please see Appellee's exhibits on the record, specifically plaintiff's exhibit # 6, on the Evidence Control Report, item City Commission Work Session, dated February 26, 1996, page 2 therein .]

5. The contingency fund is the beneficiary of ad valorem taxes and it is only ad valorem taxes that is the basis for repayment of the general obligation bonds to be issued , so by extension, Appellant argues, the "other available legal funds" (which should have been explicitly identified as the city's reserves to be drawn down) is a material fact the amount of which the electorate may have preferred to maintain as reserves, but obtain funds in

Ways other than by reducing the reserve amounts to a financial minimum'and contrary to the city's own policies. It is well known there is a growing sentiment on the part of the electorate to limit increases in taxation by defeating Bonding proposals for non-essential city services. Appellant argues the city had an obligation to make this material fact perfectly clear and legally noticed in the Referendum Resolution and Ballot.

C.3 AS TO THE THIRD OMITTED MATERIAL FACT

1. In Resolution No. 1636 , Dated June 25, 1996, Section 2, Paragraph K, we observe the *definition of the "Project"* is *now revised* and amended to include and designate the part owner of the golf course, namely, the Elizabeth Morse Genius Foundation. Whereas the Ordinance calling for an election , Ordinance No.2137 , defined the Project , without identifying ownership, *prior to the election,* simply as "Green Space known as the Winter Park Golf Course", which became the *electioneering slogan* of the city officials and a Political Action Committee created by the mayor. [Exhibit 22, Apx. page 121. For reference to the mayor's action please also see Appellee's exhibits on the record, specifically plaintiff's exhibit # 6, on the Evidence Control Report, item City Commission Joint Work Session, December 12, 1996, page 3, last paragraph therein

and City Commission Joint Work Session, January 4, 1996, page 4 therein.]

2. Appellant argues the "Winter Park Golf Course" is not the "Project" as defined in the Ordinance No. 2137 ,which called for the referendum and was described in the ballot summary. The City was already the owner in fee simple Of a large part of the golf course -- holes # 1 and # 9 -- having purchased the property in 1927 and, since 1974, was the lessee of holes 2 through 8 under a lease arrangement paying annual rent and real estate property taxes for the lessor, The Elizabeth Morse Genius Foundation, now the seller of the property to be purchased. The electorate ought to have been widely informed the city does not intend to purchase what it already owns. Appellant grants the city *but one time , and only one time* identified by a graph in its newsletter with no accompanying narrative the portion of the property owned by the city . [Exhibit 26, Apx. page 128. Please also see Appellee's Exhibit #7 on the record , specifically item "City of Winter Park Update", page 4 therein, dated April 1996]

3. Appellant furthermore avers, compounding the omission of material facts , the ballot was *affirmatively misleading* in critical respects by *deceptive* language *emphasizing the acquisition of green space as if it were the primary object of the referendum* and as something to be acquired independent from and incidental to the golf course property, as is shown in the language used in the ordinances

and ballot summary , quoted above on page 2 and 3 in this Brief from official documents shown herein as appendix Exhibits 11 and 13 The Appellee explicitly decided to adopt this misleading clarity of language and confusing terminology to refer to the golf course as **"green space"** in the ballot summary . ***Metropolitan Dade County v. Dexter Lehtinen,*** 528 **So.2nd.** 394 (Fla. 1988). [Exhibit **7A,** Apx. page 46 and also Please see **Appellee's** exhibits on the record, shown as Plaintiff's exhibit # 6, on the Evidence Control Report, item City Commission Work Session, page 3 therein , dated February 26, 1996.]

G. PRAYER FOR JUDICIAL **RELIEF**

FOR THE REASONS SET FORTH ABOVE, Appellant respectfully requests the Final Judgment Validating General Obligation bonds be overturned and the referendum preceding thereto be rendered null and void.

Martin Kessler, Appellant, Pro se.
1555 Wilbar Circle
Winter Park, Florida, 32789
407-645-3113

CERTIFICATE OF SERVICE

I certify **that** a true and exact copy of the foregoing has been sent by U.S. Mail on February 28, 1997 to:

C. BRENT **McCAGHREN,** Esquire
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and to:

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Jacksonville, Florida 32202
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Attorneys for **Appellee**

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MARTIN KESSLER,
Appellant

V.

THE CITY OF WINTER PARK,
Appellee

SUPREME COURT
CASE No. 89,501

LOWER TRIBUNAL
CASE No. 4803

APPENDIX, SECOND AMENDED

Appellant provides this appendix as documentary support to Appellant's Initial Brief in accordance with Rule 9.220, Appendix. Appellant makes reference to the following exhibits within the body of the Initial Brief in support of his argument. The court is advised the full text of each following item cited is provided herewith:

Exhibit No.	ITEM	PAGE
1.	FINAL JUDGMENT VALIDATING **GENERAL** OBLIGATION BONDS	1
2.	Amended Answer of the State Attorney	7
3.	Florida Statute 100.341: Bond Referendum Ballot	10
4.	***Advisory Opinion To The Attorney General,592*** So.2nd.225 (Fla. 1991)	11
5.	***Askew v. Firestone,*** 421 **So.2nd** 151 (Fla.1982)	*20*
6.	***Hauben v. Harmon,*** 606 **F.2nd** 921 (5th Cir. 1979)	29

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7. ***Grapeland Heigths Civic Ass'n v. City of Miami,*** 267 **So.2nd** 321,324 (Fla. 1972). 41

7A ***Metropolitan*** Dade ***County V. Dexter Lehtinen,*** 528 **So.2nd.** 394 (Fla. 1988). 46

8. State ***v. Special Tax School District No.1,*** 86 **So.2nd** 419 (Fla. 1956) 48

9. State v. ***City of West*** Palm ***Beach,*** 174 so. 334,338 (Fla. 1937) 51

10. ***Winterfield v. Town of Palm Beach,*** 455 **So.2nd** 359, **361** (Fla 1984) 57

11. City of Winter Park, Ordinance No. 2137, Adopted March 12, 1996 62

12. City of Winter Park, Ordinance No.1635, Adopted June 11, 1996 65

13. City of Winter Park, Ordinance No. 1636, Adopted June 25, 1996 67

14. Option Contract for Purchase and Sale, Effective March 4, 1996 86

[Exhibits 15, 16, 17, 18, omitted]

19. Carl F. Weber & Margret J. Weber, to Martin Kessler, dated August 14, 1996 112

[Exhibit 20 omitted]

21. Selected page, City **"Update",** April 1996 119

22. Selected pages, City of Winter Park Commission Minutes 121

[Exhibit 23. omttied]

Addendum: Joint Stipulation Regarding Exhibit **#19.** 123

24. Evidence Control Report 127

25. Selected page, City of Winter Park Commission Minutes 128

26. Selected page, City **"Update",** April 1996, 129

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI 96-4803

Orange Co FL 5837666
11/11/96 08:26:02am
OR Bk 5153 Pg 693

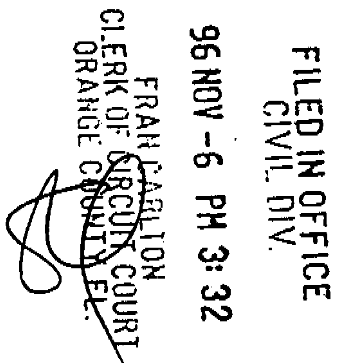
CITY OF WINTER PARK, FLORIDA, a political subdivision of the State of Florida,

Plaintiff,

vs.

STATE OF FLORIDA, Taxpayers, Property **Owners and Citizens** of Winter Park, Florida, including nonresidents owning property or subject to taxation therein, et al.;

Defendants.



FINAL JUDGMENT VALIDATING GENERAL OBLIGATION BONDS

The above and foregoing cause having come on for final hearing on the date and at the time and place set forth in the amended order to show cause heretofore issued by this court and in the notice addressed **to the State** of Florida and the several property owners, taxpayers and citizens of the City of Winter Park, Florida (the **"Plaintiff"**), including nonresidents owning property or subject to taxation therein and all others having or claiming any right, title or interest in property to be affected by the issuance by Plaintiff of bonds hereinafter more particularly described, or to be affected in any way thereby, and as heretofore issued against the State of Florida; and the State Attorney for this circuit and intervenor Martin Kessler having filed pleadings herein; and the court having considered the same and the evidence, and heard argument of counsel and the intervenor, finds as follows:

1. Plaintiff is, and at all times hereinafter mentioned was, a duly and legally organized and existing political subdivision of the State of Florida, as described in Section 1.01(8), Florida Statutes, created and incorporated under the provisions of the Constitution and the laws of the State of Florida.

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2. Plaintiff is authorized pursuant to Chapter 166, Florida Statutes, and other applicable provisions of law (collectively, the "Act"), to issue the bonds, hereinafter described, to finance part of the cost of acquisition of the Green Space known as the Winter Park Golf Course (the "Project"); all as more particularly described and in accordance with the Bond Resolution (defined below) and other documents on file with Plaintiff.

3. The City Commission of Plaintiff (the "Governing Body"), by Ordinance No. 2137 (the "Ordinance"), duly and legally enacted on March 12, 1996, and in accordance with the pertinent provisions of law, authorized, ordered and provided for a bond referendum (the "Referendum") to be held in the area of Plaintiff on June 4, 1996, for the purpose of submitting to the qualified electors the proposition of issuing not exceeding $5,125,000 General Obligation Bbnds, Series 1996 (the "Bonds"), to finance the Project. A certified copy of such Ordinance has been received into evidence.

4. The Governing Body did thereafter cause notice of the Referendum to be published in full compliance with all statutory requirements pertaining to such Referendum. Proofs of publication of such notice have been received into evidence,

5. At such Referendum the issuance of the Bonds was approved in accordance with the requirements of the Constitution and laws of the State of Florida.

6. The inspectors and clerks of the Referendum made due returns thereof in accordance with law and the Governing Body, during a meeting held on June 5, 1996, and by resolution duly and legally adopted on June 11, 1996, a certified copy of which, along with minutes from such June 5, 1996, meeting, have been received into evidence, did canvass and declare the results of the Referendum and did find the Referendum to have duly authorized the issuance of the Bonds.

7. The Referendum was properly and duly called and held in conformity with all applicable provisions of the Constitution and laws of the State of Florida.

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Orange Co FL 5037666

8. On June 25, 1996, the Governing Body duly adopted a resolution (the "Bond Resolution") pursuant to the Act and the Ordinance, a certified copy of which has been received into evidence, whereby it further authorized the issuance of the Bonds. The Bond Resolution provides that the Bonds shall be dated, shall bear interest at not exceeding the maximum rate authorized by applicable law, payable at such times, and shall mature on such dates and in such years (within the limitation prescribed by the Referendum) and in such amounts; all as shall be fixed by subsequent resolution of the Governing Body adopted at or prior to the sale of the Bonds. The Bond Resolution further provides that the Bonds and the interest thereon shall be payable from and secured by a lien upon and pledge of the proceeds of ad valorem taxes levied without limitation as to rate or amount on all taxable property in the area of Plaintiff (the "Pledged Funds"), all in the manner described in the Bond Resolution.

9. Due and proper notice addressed to the State of Florida, and the several property owners, taxpayers and citizens of Plaintiff, including nonresidents owning property or subject to taxation therein, and all others having or claiming any right, title or interest in property to be affected by the issuance by Plaintiff of the Bonds herein validated, was duly published by the clerk of this court in a newspaper of general circulation in Orange County, Florida, once each week for 2 consecutive weeks, the first publication being at least 20 days prior to the date of the validation hearing, as required by law; all as will more fully appear from the affidavit of the publisher of The Orlando Sentinel filed herein.

Orange Co FL 5837666

10. Matters dealing with the purchase price of the Winter Park Golf Course property, and other business judgments of the City Commission of Plaintiff regarding the Project, are beyond the scope of judicial review in a bond validation proceeding. State v. Dade County, 142 So.2d 79, 89, 90 (Fla. 1962).

11. Failure of the Referendum ballot to state that Plaintiff already owned 2 holes of the Winter Park Golf Course, or that the total purchase price for acquisition of the remaining Winter Park Golf Course property was $8,000,000, a portion of which would be paid from other legally available funds of Plaintiff, did not mislead voters in the Referendum since ownership by Plaintiff of 2 holes of the Winter Park Golf Course, and the option of Plaintiff to purchase the remaining Winter Park Golf Course property for $8,000,000, was a matter of public record prior to the Referendum. Winterfield v. Town of Palm Beach, 455 So.2d 359, 363 (Fla. 1984);

Grapeland Heights Civic Ass'n. v. City of Miami, 267 So.2d 321, 324 (Fla. 1972). Furthermore, any inconsistency in the description of the Project in the Referendum ballot and the Bond Resolution is immaterial. State v. Citv of West Palm Beach, 174 So. 334,338 (Fla. 1937).

12. The amended answer of the State Attorney, for and on behalf of the State of Florida, and the answer of intervenor Martin Kessler have been carefully considered by this court. Such answers show no cause why the prayers of Plaintiff should not be granted and disclose no irregularity or illegality in the proceedings set forth in the complaint for bond validation, and the objections contained in the answers are hereby overruled and dismissed.

13. The officers and employees of Plaintiff were authorized to prepare and/or disseminate information to electors regarding the Referendum and the Project, and to advocate the passage of the Referendum. People Against Tax Rev. v. County of Leon, 583 So.2d 1373, 1375 (Fla. 1991).

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Orange Co FL 5837666

14. This court has found that all requirements of the Constitution and laws of the State of Florida pertaining to the proceedings in the above-entitled matter have been strictly followed.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED,, that the issuance of not exceeding $5,125,000 aggregate principal amount of General Obligation Bonds, Series 1996, of the City of Winter Park, Florida; to be dated, to bear interest at not exceeding the maximum rate authorized by applicable law, payable at such times, and to mature on such dates and in such years (within the limitation prescribed by the Referendum) and in such amounts; all as shall be fixed by

subsequent resolution of the Governing Body adopted at or prior to the sale of the Bonds; is for a proper, legal and corporate public purpose and is fully authorized by law; and that the Bonds and each of them to be issued as aforesaid and all proceedings incident thereto, including those proceedings with respect to the Referendum, are hereby validated. The Bonds are to be issued to finance the cost of the Project and as and when so issued shall be payable solely from and secured by a lien upon and pledge of the Pledged Funds, all in the manner specified in the Bond Resolution.

DONE AND ORDERED at the courthouse in Orlando, Orange County, Florida, this 6th day of November, 1996.

Circuit Judge

OR Bk 5153 Pg 698
Orange Co FL 5837666
Recorded - Martha O. Haynie

Copies furnished to:

Paula Coffman
C. Brent McCaghren
Judson Freeman, Jr.
Martin Kessler

STATE OF FLORIDA - COUNTY OF ORANGE
I HEREBY CERTIFY that this is a copy of the document recorded in this office.
MARTHA O. HAYNIE COUNTY COMPTROLLER
By: D.C.
DATED: NOV 14 96

COUNTY COMPTROLLER SEAL ORANGE COUNTY, FLORIDA

EXHIBIT 2

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CITY OF WINTER PARK, FLORIDA, a political subdivision of the State of Florida,

Plaintiff,

vs.

STATE OF FLORIDA, Taxpayers, Property Owners and Citizens of Winter Park, Florida, including nonresidents owning property or subject to taxation therein, et al.

Defendants.

CASE NO: CI96-4803

AMENDED ANSWER OF THE STATE ATTORNEY

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney for the Ninth Judicial Circuit, in and for Orange County, Florida, and for amended answer to the complaint for bond validation of not exceeding $5,125,000 General Obligation Bonds, Series 1996, of the City of Winter Park, Florida (the "Bonds"), and to the Order to Show Cause requiring the State of Florida, through the State Attorney for the Ninth Judicial Circuit of such State, to show cause before this Court why the prayers of such complaint should not be granted and the Bonds as described in such complaint, and the proceedings authorizing the issuance thereof, should not be validated by judgment of this Court, says that:

1. The State of Florida, through its Assistant, State Attorney, has investigated and considered the allegations and the law and proceedings set forth in such complaint; an examination

of the exhibits attached to such complaint has been made; and the State of Florida respectfully alleges and would show the Court that such complaint, and the proceedings authorizing the issuance of the Bonds, including the Referendum described in the complaint, may be defective and contrary to law for the following reasons:

a. Plaintiff is without authority to issue the Bonds herein sought to be validated.

b. The Referendum ballot is defective and misleading in that Plaintiff failed to state therein that it already owned two (2) holes of the Winter Park Golf Course, and that the total purchase price for the acquisition of the remaining Winter Park Golf Course property was $8,000,000, a portion of which would be paid from other funds.

2. Further answering the complaint, the State of Florida, by and through the undersigned Assistant State Attorney, says that it is without knowledge and is not advised except by the allegations of the complaint and the exhibits attached thereto as to the truth of any of the matters and things alleged and set forth, and the State of Florida, does, therefore, demand strict proof of each and every allegation in the complaint.

WHEREFORE, the State of Florida respectfully prays that this Court will consider the issue or issues of this cause, and will inquire into and determine the authority of Plaintiff to issue the Bonds in the manner and form as prayed for by Plaintiff in the complaint for bond validation, and the legality of all proceedings had or taken in connection therewith.

DATED this 9th day of August, 1996.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Answer of the State Attorney was furnished by facsimile transmission and U.S. mail delivery this 9th day of August, 1996, to C. Brent McCaghren, 250 Park Avenue South - 5th Floor, Winter Park, Florida 32790, and Judson Freeman, Jr., One Enterprise Center, Suite 2100, Jacksonville, Florida 32202, Attorneys for the Plaintiff, and Martin Kessler, 1555 Wilbar Circle, Winter Park, Florida 32789.

Respectfully submitted,

LAWSON LAMAR
NINTH JUDICIAL CIRCUIT

Susan L. Maupin for
PAULA C. COFFMAN
Florida Bar No: 390712
Assistant State Attorney
P.O. Box 1673
Orlando, Florida 32802
Telephone: (407)836-2406

EXHIBIT 3

100.321 Test suit.—Any taxpayer of the county district, or municipality wherein bonds are declared to have been authorized, shall have the right to test the legality of the referendum and of the declaration of the result thereof, by an action in the circuit court of the county in which the referendum was held. The action shall be brought against the county commissioners in the case of a county or district referendum, or against the governing authority of the municipality in the case of a municipal referendum. In case any such referendum or the declaration of results thereof shall be adjudged to be illegal and void in any such suit, the judgment shall have the effect of nullifying the referendum. No suit shall be brought to test the validity of any bond referendum unless the suit shall be instituted within 60 days after the declaration of the results of the referendum. In the event proceedings shall be filed in any court to validate the bonds, which have been voted for, then any such taxpayer shall be bound to intervene in such validation suit and contest the validity of the holding of the referendum or the declaration of the results thereof, in which event the exclusive jurisdiction to determine the legality of such referendum or the declaration of the results thereof shall be vested in the court hearing and determining said validation proceedings. If said bonds in the validation proceedings shall be held valid on final hearing or an intervention by the taxpayer shall be interposed and held not to have been sustained, then the judgment in said validation proceedings shall be final and conclusive as to the legality and validity of the referendum and of the declaration of the results thereof, and no separate suit to test the same shall be thereafter permissible.

History.—s. 18, ch. 14715, 1931; CGL 1936 Supp. 457(16); s. 4, ch. 26870, 1951; s. 12, ch. 77-175.
Note.—Former s. 103.18.

100.331 Referendum for defeated bond issue.—If any bond referendum is called and held for approving the issuance of bonds for a particular purpose and such referendum does not result in the approval of the bonds, then no other referendum for the approval of bonds for the same purpose shall be called for at least 6 months.

History.—s. 13, ch. 14715, 1931; CGL 1936 Supp. 457(13); s. 4, ch. 26870, 1951; s. 12, ch. 77-175.
Note.—Former s. 103.13.

100.341 Bond referendum ballot.—The ballots used in bond referenda shall be on plain white paper with printed description of the issuance of bonds to be voted on as prescribed by the authority calling the referendum. A separate statement of each issue of bonds to be approved, giving the amount of the bonds and interest rate thereon, together with other details necessary to inform the electors, shall be printed on the ballots in connection with the question "For Bonds" and "Against Bonds."

History.—s. 11, ch. 14715, 1931; CGL 1936 Supp. 457(11); s. 4, ch. 26870, 1951; s. 12, ch. 77-175.
Note.—Former s. 103.11.

100.342 Notice of special election or referendum.—In any special election or referendum not otherwise provided for there shall be at least 30 days' notice of the election or referendum by publication in a newspaper of general circulation in the county, district, or municipality, as the case may be. The publication shall be made at least twice, once in the fifth week and once in the third week prior to the week in which the election or referendum is to be held. If there is no newspaper of general circulation in the county, district, or municipality, the notice shall be posted in no less than five places within the territorial limits of the county, district, or municipality.

History.—

100.351 Referendum election; certificate of results to Department of State.—Whenever an election is held under a referendum provision of an act of the Legislature, the election officials of the governmental unit in which the election is held shall certify the results thereof to the Department of State, which shall enter such results upon the official record of the act requiring such election on file in the office of the Department of State.

History.—s. 1, ch. 25438, 1949; s. 4, ch. 26870, 1951; ss. 10, 35, ch. 69-106; s. 12, ch. 77-175.
Note.—Former s. 99.59.

100.361 Municipal recall.—

(1) RECALL PETITION.—Any member of the governing body of a municipality or charter county, hereinafter referred to in this section as "municipality," may be removed from office by the electors of the municipality. When the official represents a district and is elected only by electors residing in that district, only electors from that district are eligible to sign the petition to recall that official and are entitled to vote in the recall election. When the official represents a district and is elected at-large by the electors of the municipality, all electors of the municipality are eligible to sign the petition to recall that official and are entitled to vote in the recall election. Where used in this section, the term "district" shall be construed to mean the area or region of a municipality from which a member of the governing body is elected by the electors from such area or region. Members may be removed from office by the following procedure:

(a) A petition shall be prepared naming the person sought to be recalled and containing a statement of grounds for recall in not more than 200 words limited solely to the grounds specified in paragraph (b). If more than one member of the governing body is sought to be recalled, whether such member is elected by the electors of a district or by the electors of the municipality at-large, a separate recall petition shall be prepared for each member sought to be recalled.

1. In a municipality or district of fewer than 500 electors, the petition shall be signed by at least 50 electors or by 10 percent of the total number of registered electors of the municipality or district as of the preceding municipal election, whichever is greater.

2. In a municipality or district of 500 or more but fewer than 2,000 registered electors, the petition shall be signed by at least 100 electors or by 10 percent of the total number of registered electors of the municipality or district as of the preceding municipal election, whichever is greater.

3. In a municipality or district of 2,000 or more but fewer than 5,000 registered electors, the petition shall be signed by at least 250 electors or by 10 percent of the total number of registered electors of the municipality or district as of the preceding municipal election, whichever is greater.

EXHIBIT 4

ADVISORY OPINION TO THE ATTORNEY GENERAL-LIMITED POLITICAL TERMS IN CERTAIN ELECTIVE OFFICES.

No. 78647.

Supreme Court of Florida.

Dec. 19, 1991.

The Attorney General Petitioned the Supreme Court for an advisory opinion on the validity of an initiative petition providing for limited political terms for certain elected offices. The Supreme Court, Grimes, J., held that (1) initiative met single-subject requirement, and (2) initiative's ballot title and summary were clear and unambiguous.

So ordered

Overton, J., concurred in part, dissented in part, and filed opinion, in which Kogan, J.. concurred.

Kogan, J., concurred in part, dissented in part, and filed opinion

1. Constitutional Law ⇐69

Despite numerous challenges to initiative petition, Supreme Court, upon petition for advisory opinion, was limited to addressing whether initiative complied with single-subject requirements and whether its ballot title and summary were sufficiently clear and unambiguous. West's F.S.A. §§ 16.061(1), 101,161; West's F.S.A. Const. Art. 4, § 10; Art. 11, § 3.

2. Constitutional Law ⇐9(1)

Constitutional amendment meets single-subject requirement if it has logical and natural oneness of purpose or if it may be logically viewed as having natural relation and connection as component Parts or aspects of single dominant plan or scheme. West's F.S.A. Const. Art. 11, § 3.

3. Constitutional Law ⇐9(1)

Proposing term limits met single-subject requirement even though it purported to affect office holders in three different branches of government. West's F.S.A. Const. Art. 11, § 3.

4. Constitutional Law ⇐9(1)

Ballot title and summary of initiative must state in clear and unambiguous language the chief purpose of measure, but need not explain every detail or ramification of proposed amendment West's F.S.A. § 101.161.

5. Constitutional Law ⇐9(1)

Initiative's ballot title and *summary,* which indicated that amendment would limit terms of incumbents in identified elected offices by prohibiting incumbent who had held office for preceding eight years from appearing *on* ballot *for reelection, was* sufficiently clear and unambiguous to meet statutory requirements even though summary did not indicate current lack of term limits or that proposed amendment Contained severability clause. West's F.S.A. § 101.161.

6. Constitutional Law ⇐9(1)

Initiative's ballot summary may be defective if it omits material facts necessary to make summary not misleading. West's F.S.A. § 101.161.

Robert A. Butterworth, Atty. Gen. and Louis F. Hubener, III, Asst. Atty. Gen., Tallahassee, Michael L. Rosen and David E. Cardwell of Holland & Knight, Tallahassee, for Citizens For Ltd Political Terms.

Cleta Deatherage Mitchell, Oklahoma City, Okl., for Term Limits Legal Institute, and Richard N. Friedman, Miami, for amicus curiae. In Support Of Proposed Amendment

Arthur J. *England.* Jr., Chet Kaufman and Ross A. McVoy of Fine Jacobson Schwartz Nash Block & England, Miami, and James S. Portnoy of Arnold & Porter, Washington, D.C.. for respondents: Let the People Decide—Americans For Ballot Freedom, R. Ed Blackburn, former Sheriff of Hillsborough County and former member of the Florida House of Representatives. J. Hyatt Brown, former Speaker of the Florids House of Representatives, Doyle E. Conner, former Com'r of Agriculture,

Louis de la Parte, former President of the Florida Senate, Raymond Ehrlich, former Chief Justice of the Florida Supreme Court, Richard W. Ervin, former Chief Justice of the Florida Supreme Court, Richard A. Pettigrew, fonner Speaker of the Florida House of Representatives, T. Terrell Sessums, former Speaker of the Florida House of Representatives, Parker D. Thomson, Partner, Thomson, Muraro, Bohrer & Razook, and Ralph Turlington, former Speaker of the Florida House of Representatives and former Com'r of Educ.

Jonathan B. Sallet, Donald B. Verrilli, Jr. and Scott A. Sinder 'of Jenner & Block, Washington, D.C., for respondents, Nat. Conference of State Legislatures and Southern Legislative Conference of The Council of State Governments.

Steven R. Ross, Gen. Counsel to the Clerk and Charles Tiefer, Deputy Gen. Counsel to the Clerk, US. House of Representatives, Washington, D.C., for amicus curiae, U.S. Representative Lawrence J. smith, In Opposition to the Proposed Amendment.

GRIMES, Justice.

The Attorney General has petitioned the Court for an advisory opinion on the validity of an initiative petition providing for limited political terms for certain elective offices.[1] In response to the Attorney General's request. we issued an order permitting interested parties to file briefs and heard oral argument on the validity of the proposed amendment

The initiative petition provides as follows:

> The people of Florida believe that politicians who remain in office too long may become preoccupied with reelection and become beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.
>
> Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:
>
> 1) Article VI, s. 4 of the Constitution of the State of Florida is hereby amended by a) inserting "(a)" before the first word thereof and, b) adding a new sub section "(b)" at the end thereof to red
>
> "(b) No person may appear on the ballot for re-election to any of the following offices:
>
> "(1) Florida representative,
>
> "(2) Florida senator,
>
> "(3) Florida Lieutenant governor,
>
> "(4) any office of the Florida cabinet,
>
> "(5) U.S. Representative from Florida, or
>
> "(6) U.S. Senator from Florida
>
> "if by the end of the current term of office, the person will have served (or. but for resignation, would have served in that office for eight consecutive years."
>
> 2) This amendment shall take effect on the date it is approved by the electorate, but no service in a term of office which commenced prior to the effective date of this amendment will be counted against the limit in the prior sentence.
>
> 3) If any portion of this measure is held invalid for any reason. the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application. The people of Florida declare their intention that persons elected to offices of public trust will continue voluntarily to observe the wishes of the people as stated in this initiative in the event any provision of this initiative is held invalid.

[1] The Attorney General has concluded that the proposed amendment meets the single-subject requirement of article XI, section 3. Florida Constitution, and the ballot title and summary requirements of sec-

1. We have jurisdiction pursuant to article IV, section 10, Florida Constitution, and section 16.061, Florida Statutes (1989).

tion 101.161, Florida Statutes (1939). In addition to those issues, opponents of the proposed amendment have raised various constitutional challenges.[2] However, based on the following provisions, we find that those issues are not jurticiable in the instant proceeding. The Florida Constitution provides that "[t]he attorney general shall, as directed by general law," request this Court's opinion "as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Art. N, § 10, Fla Const. General law provides that the attorney general shall seek an advisory opinion "regarding the compliance of the text of the proposed amendment or revision with a 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161." § 16.061(1), Fla.Stat. (1939). Thus, we are limit ed in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989).[3] *See Grose v. Firestone*, 422 So.2d 303,306 (Fla. 1982) (question of whether proposed amendment violated due process not justiciable in challenge to ballot summary).

SINGLE-SUBJECT REQUIREMENT

Article XI, section 3, Florida Constitution, provides, in relevant part that:

> **The power to propose the** revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any *such revision or amendment shall embrace but me subject and mutter directly connected therewith.*

(Emphasis added.)

[2] A proposed amendment meets this single-subject requirement if it has "a logical and natural oneness of purpose[.]" *Fine v. Firestone*, 448 So.2d 984,990 (Fla. 1994). To state the test another way, a proposed amendment is valid if it "may be logically viewed as having 8 natural relation and connection as component parts or aspects of a single dominant plan or scheme." Id (quoting *City of Cod Gables v. Gray*, 154 Fla. 881, 883–84, 19 So.2d 318, 320 (1944)). The single-subject requirement imposes a "functional as opposed to a locational restraint on the range of authorized amendments." *Fine*, 448 So.2d at 990. Its intent is to "protect against multiple precipitous changes in our state constitution." Id at 983.

[3] We fmd that the proposed amendment meets the single-subject requirement The sole subject of **the proposed amendment** *is limiting the number of* consecutive terms that certain elected public officers may serve. Although the proposed amendment affects officeholders in three different branches of -government, that fact alone is not sufficient to invalidate the pro posed amendment. We have found proposed amendments to meet the single-subject requirement even though they affected multiple branches of government. For example, in *Weber v. Smathers*, 338 So.2d 819 (Fla.1976), we upheld the proposed "Ethics in Government" amendment against a single-subject attack. That amendment required financial disclosure by all elected constitutional officers and candidates, provided for forfeiture of rights under the public retirement system for any public official who violated the public trust, and limited the ability of legislators and statewide elected officers to represent persons before the governmental bodies of which they were members.

We do not agree with opponents that the proposed amendment fails to identify constitutional provisions with which it conflicts or which it substantially affects. The initiative proposal is intended to amend article VI, section 4 of the state constitution, which provides that "[n]o person convicted

2. Opponents argue that the proposed amendment unconstitutionally restricts First Amendment rights and that the limitation on the terms of federal legislators violate the Supremacy Clause of the united States Constitution.

3. Although section 16.061(1), Florida Statute (1989), provides that the petition for an advisory opinion "may enumerate any specific factual issues which the Attorney General believes would require a judicial determination[ ]," the constitutional issues raised by the initiative's opponents are legal rather than factual issues.

of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." The amendment, if passed, will add term limits as a further disqualification on holding office. The proposed amendment does not change or affect the age or residency requirements of article III, section 15 (state legislators) or article IV, section 5 (lieutenant governor and cabinet members) of the Florida Constitution. Further, should the proposed amendment be approved by the voters, state senators will still be elected for four-year terms and state representatives for two-year terms as provided in article III, section 15. Cabinet members and the lieutenant governor will still serve four-year terms as provided in article IV, section 5.

BALLOT TITLE AND SUMMARY REQUIREMENTS

Section 101.161(1), Florida Statutes (1989), provides in relevant part:

> Whenever a constitutional amendment ... is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.... The substance of the amendment ... shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The proposed ballot title and summary at issue here provide:

> LIMITED POLITICAL TERNS IN CERTAIN ELECTIVE OFFICES
>
> Limits terms by prohibiting incumbents who have held the same elective office for the preceding eight years from appearing on the ballot for re-election to that office. Offices covered are: Florida Representative and Senator, Lieutenant Governor, Florida Cabinet, and U.S. Senator and Representative. Terms of office beginning before amendment approval are not counted.

[4] We have construed section 101.161 to require that "the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot" Askew *v. Firestone*, 421 So.2d 151, 155 (Fla.1982) (emphasis omitted) (quoting *Hill v.* Milander, 72 So.2d 796, 798 (Fla.1954)). The ballot title and summary *must state* "in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So.2d at 155. However, it need not explain every detail or ramification of the proposed amendment. *Carroll v.* firestone, 497 So.2d 1204, 1205 (Fla.1986); *Grose v. Firestone*, 422 So.2d at 305; *Miami Dolphins Ltd. a. Metropolitan Dadt County,* 394 So.2d 981, 987 (Fla.1981).

[5] The chief purpose of the proposed amendment is to limit the terms of incumbents in certain elective offices. The proposal seeks to achieve this, as the ballot summary indicates, by prohibiting an incumbent who has held the office for the preceding eight years from appearing on the ballot for reelection. The language of the summary and ballot title are clear and unambiguous. The summary identifies the offices affected.

[6] Opponents of the proposed amendment argue that the ballot summary is invalid because it' does not advise voters that there are presently no limits on the terms of the affected offices and does not reveal that the proposed amendment contains a severability clause. A ballot summary may he defective if it omits material facts necessary to make the summary not misleading. See *Askew v. Firestone*, 421 So.2d at 158 (Ehrlich, J., concurring). However, we do not find the failure to indicate the current lack of term limits to be misleading. This is not a situation in which the ballot summary conceals a conflict with an existing provision. There is no existing constitutional provision imposing a different limitation on terms of office, In effect, this proposed amendment writes on a clean slate. Furthermore, we do not fmd the lack of reference to the severability provision to be misleading. We have

approved other ballot summaries that did not refer to severability provisions in the proposed amendments. See *In re Advisory Opinion to the Attorney General—Homestead Valuation Limitation.* 581 So.2d 586 (Fla.1991); *In re Advisory Opinion to the Attorney General, Limitation Damages in Civil Actions,* 520 So.2d 284 (Fla.1988).

Accordingly, we hold that the initiative petition and proposed ballot summary meet the requirements of article XI, section 3 of the Florida Constitution, and section 101.-161, Florida Statutes (1989). Thii opinion should not be construed as favoring or opposing the passage of this proposed amendment.

It is so ordered

SHAW, C.J. and McDONALD, BARKETT and HARDING, JJ., concur.

OVERTON, J.. concurs in part and dissents in part with an opinion, in which **KOGAN,** J., concurs.

KOGAN, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring *in* part and dissenting in part.

My &agreement with the majority opinion is with its failure to address the question of whether the limitation of terms for United States Representatives and United States Senators is in violation of article I, sections 2 and 3, of the Constitution of the United States.

Contrary to the majority, I find that we are mandated by the Florida Constitution, specifically, article IV, section 10, to consider the validity of an initiative petition that is presented to the voters under article XI, section 3. Article IV, section 10, of the Florida Constitution, states that we should consider "the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Granted, we must consider whether the proposed amendment and the ballot title and summary comply with article XI, section 3, of the Florida Constitution, and section 101.161, Florida Statutes (1989). However, I find that those provisions do not limit our responsibility in considering whether or not the proposed amendment to this constitution meets constitutional requirements of validity under the Constitution of the United States. A reasonable interpretation of article III, section 10, requires a construction that mandates our consideration of this question, particularly in view of the prior case law of this Court.

This Court has previously recognized that we have the responsibility to consider a facial violation of the Constitution of the United States in proposed amendments to our constitution. In *Gray v. Winthrop,* 115 Fla 721, 156 So. 270 (19343, and *Gray v. Moss,* 115 Fla. 701,156 So. 262 (1934), we considered violations of the United States Constitution before allowing a proposed amendment to' our state constitution to be placed on the ballot In doing so. we stated:

> If a proposed amendment to the state Constitution by its terms specifically and necessarily violates a command or limitation of the Federal Constitution, a ministerial duty of an administrative officer, that is a part of the prescribed legal procedure for submitting such proposed amendment to the electorate of the state for adoption or rejection, may be enjoined at tbe suit of proper parties in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.

Winthrop, 115 Fla. at 726-27, 156 So. at 272. Subsequent to our adoption of the 1963 Constitution, we again acknowledged that responsibility in *Weber v. Smathers,* 338 So.2d 819, 821 (Fla.1976), stating that the *citizens* of Florida "have a right to change, abrogate or modify [the Florida Constitution] in any manner they see fit so long as they keep within the confines of the Federal Constitution." To accept the construction of the majority means that we should wait until after the election to address a strictly legal issue. A review at this time, should this legal issue be resolved adverse to the proponents of the

amendment, would save both proponents and opponents of the amendment considerable expense and the considerable expense to the state of a futile election. To allow the people to vote and then, if adopted, hold the provision unconstitutional on its face perpetuates a fraud on the voting public. I find that both our constitution and case law recognizes our authority to resolve this strictly legal issue now, without further court proceedings. The Washington Supreme Court's decision in *League of Women Voters v. Munroe, No. 58438-9* (Wash. Aug. SO, 1991), is not persuasive. The Washington Supreme Court refused to address the question because the issues were complex and the court would have to decide the case without adequate time for briefing, argument, and deliberation. I note that the Washington Supreme Court was under considerably greater time constraints than we are in this case. It was forced to make a decision approximately sixty days before the election. We, on the other hand, have this matter before us a year before the election.

The question is a straight legal question and I find that the public is entitled to know the answer before members of the public, as well as public entities, expend funds and energy to have an election on a proposal #at may be unconstitutional. Deciding it now would further judicial economy. If this Court believes that additional briefing and argument are necessary, then that should be done. *We* should address and decide the question, not put it off.

The question of the limitation of terms for federal officials is a significant one and, although it has not directly addressed this question, the United States Supreme Court has, in related cases, indicated that this type of limitation on a candidate for the United States Senate *or the* House of Representatives is unconstitutional.

This state has already been told that it cannot put any limitations on candidates for federal offices. In *Stack v. Adams,* 315 F.Supp. 1295 (N.D.Fla.1970), the United States District Court enjoined tbe State of Florida from holding an election for the United States House of Representatives be--use a Florida statute had disqualified incumbent state officeholders fmm running for federal offices. That court found that our resign-&run statute conflicted with the qualification clause of the federal constitution. We, *in State ex rel. Davis v. Adams,* 238 So.2d 415 (Fla.1970), disagreed with the United States District Court, believing that the State of Florida could impose that type of restriction on its state officeholders. Recognizing the dispute between the United States District Court decision and our decision, we agreed, consistent with the United States District Court's decision in *Stack, to temporarily stay* another congressional election and expressed our concerns for comity, equity,. and fairness. Justice Black, in considering that stay, agreed with the United States District Court and found, in *Davis v. Adams, 400* U.S. 1203, 91 S.Ct. 1, 27 L.Ed.2d 20 (1970), that Florida's resign-to-run statute violated the federal constitution and that, under those circumstances, the election should not be held until all the parties were given an opportunity to qualify and run for that federal office.

Next, the United States Supreme Court explained in *Powell v. McCormack, 395* U.S. *486, 89* S.Ct. 1944, 23 L.Ed.2d 491 (1969), that the qualification provisions set forth in article I, sections 2 and 3, of the United States Constitution [4] are exclusive and cannot be expanded without amending the United States Constitution. In *Powell,*

4. The qualifications provisions contained in article I. sections 2 and 3. of the United States constitution. read as follows:

SECTION 2....

No person shall be a Representative who shall not have attained to tbc Age of twenty five Years, and been seven Years a Citizen of the United States. and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

SECTION 3....

....

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and ban nine Years a Citizen of the United States, and who shall not, when elected, be an fnhabitant of that State for which he shall be chosen.

a congressman, A&m Clayton Powell, had ken elected to represent New York in the United States Congress. The House of Representatives refused to seat him because a congressional investigation in the previous term concluded that Powell had misrepresented travel expenses and may have made illegal salary payments to his wife. The United States Supreme Court directed that Powell be seated. In doing so, the Court concluded that "the Constitution leaves the [Congress] without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescrii in the Constitution." 295 U.S. at 522, 89 S.Ct. at 1964 (footnote omitted). Just as Congress had no authority to exclude a person who has "all the requirements for membership expressly prescrii in the Constitution," the State of Florida, through its Constitution, also lacks the authority to exclude a person by placing an additional qualification on his or her ability to seek that office.

I find that the qualifications provisions in the Constitution of the United States are exclusive and cannot be expanded. To hold otherwise would allow the United States Senate and the United States House of Representatives to be composed of persons with differing qualifications, and states with a limitation on the terms might find their representation in these two bodies unequal because of the seniority system that operates under those legislative bodies' rules.

The issue of severability of the congressional officeholders from the state officeholders, although mentioned in some of the briefs, has not been fully addressed and, consequently, should be addressed in supplemental briefs. Preliminarily at least, I would fmd that this Court has no authority to sever the provisions in this petition, and, accordingly, I would conclude that the proposed initiative petition must be declared invalid. I should note that, if the initiative petition applied only to state officeholders, I would agree that it would be a valid initiative petition and would not violate single subject principles for the reasons expressed by the majority.

KOGAN, J., *concurs.*

KOGAN, Justice, concurring in part, dissenting in part.

The single-subject requirement contained in article XI, section 3 of the Florida Constitution states that

> any . . . revision or amendment shall embrace but one subject and matter directly connected *therewith.*

Art. XI, § 3, Fla. Const. As the *majority* correctly notes, we traditionally have stated that this constitutional provision requires an initiative to contain a logical and natural "oneness of purpose." E.g., *Fine v. Firestone, M B* So.2d 984 (Fla.1984). However, the erratic nature of our own case law construing article XI, section 3 shows just how vague and malleable this "oneness" standard is.. What may be "oneness" to one person might aeem a crazy quilt *of* disparate topics to another. "Oneness," like beauty, is in the eye of the beholder; and our conception of "oneness" thus has changed every time new members have come onto this Court.

I think the only proper way to resolve this issue is by looking to the fundamental policies underlying article XI, section 3. Why was the single-subject clause put into this provision?

The obvious and unmistakable purpose underlying article XI, section 3 is to reserve to the voters the prerogative to separately decide discrete issues. Therefore, one way of deciding the question before us today is to determine whether the proposed initiative contains more than one separate issue about which voters might differ.[5] In other words. is there at least one discrete,

5. I do not suggest that an initiative contains multiple subjects if reasonable voters might disagree with some integral component by which the initiative achieves its purposes. Rather, such disagreement must be about matters that, if severed, would leave at least two complete and workable proposals. If so, the component is discrete and not integral. If the disagreement is about a matter that cannot be severed without rendering the remainder absurd, then the initiative must stand or fall as a unit when put to the voters.

severable portion of the ballot language that reasonable voters[6] might reject if given the choice, even while accepting the remainder of tbe ballot language? If the answer is yes, then this Court must find that the initiative contains more than one subject and lacks "oneness." *Accord Evans v. Firestone,* 457 So.2d 1351, 1354 (Fla. 1984).

The policy underlying thii requirement is self-evident. Where reasonable voters may differ, then the voters should not be placed in the position of accepting an all-or-nothing grab-bag initiative. Each discrete issue should be placed separately on the ballot so that voters can exercise their franchise in a meaningful way. No person should be required to vote for something repugnant simply because it is attached to something desirable. Nor should any interest group be given the power to "sweeten the pot" by obscuring a divisive issue behind separate matters about which there is widespread agreement. *Accord Evans v. Firestone.*

I believe the present initiative clearly and unmistakably violates these principles, rendering it conclusively defective. Here, the voters of Florida are being asked to approve or disapprove an initiative designed to *limit* the terms of persons who hold public office at many different levels of government Under the proposed ballot language, the voter can only decide to limit all, or limit none. Those voters who might desire, for example, to limit the terms of state legislators but not members of Congress have no meaningful way to make this choice, even though there are many valid reasons for taking such a position.

For example, voters might decide that the advantages outweigh the disadvantages on the question, of term limitations for state legislators. This is because the delegations from all portions of the state will be treated equally in the statehouse. No geographical region would suffer any disadvantage with respect to any other region. The rules of the political game in Tallahassee would be the same for everyone.

However, a substantial number of reasonable voters might decide that a similar limitation on the congressional delegation should be rejected because it would weaken Florida's effectiveness in Congress. This could occur, for example, if other states refuse to follow Florida's lead in limiting the terms of their congressional delegations. Because of the seniority require ments needed to obtain key committee appointments and chairmanships in Congress, Florida thus could be placed at a gross disadvantage with respect to other states. In effect, Florida would relegate its delegation to a perpetual "junior" status that could deprive Florida of the clout other states would be able to obtain simply by climbing the seniority ladder.

These are valid differences of opinion that reasonable voters would entertain. I believe my conclusions are especially compelling in light of the fact that Washington state votes recently rejected a similar term-limitation proposal in part because it would have caused the state to lose the substantial clout it now enjoys in Congress. As everyone knows, the present Speaker of tbe House of Representatives is from Washington state, and the state has other senior congressional delegates whose political strength provides Washington state with a significant advantage, even over some more populous states.

Finally, I agree with the majority's holding regarding the ballot summary and title. However, I do have some reservations about this particular summary. The voters would have been far better served if the summary explained both the current state of affairs and the changes proposed I concur with the result reached by the majority on this question primarily because I believe it is reasonable to conclude that most voters know or can *infer* from the ballot language what the present state of affairs is. Were this not true, I would not concur with the majority on thii question.

6. Obviously, the role of this Court is not to determine how the vote will go, but merely whether at least one reasonable and legitimate controversy Might exist that voters should decide separately from the rest.

For the foregoing reasons, I would hold that the proposed ballot language violates the single-subject requirement and cannot be placed on the ballot in its present form.

In re FORFEITURE OF 1969 PIPER NAVAJO, MODEL PA-31-310, S/N-31-395, U.S. REGISTRATON N-1717G.

No. 77076.

Supreme Court of Florida.

Jan. 2, 1992.

County sheriff brought action seeking to forfeit aircraft with fuel tanks that did not conform to Federal Aviation Administration (FAA) regulations. The Circuit Court, Broward County, Constance R. Nutaro, J., ruled that forfeiture statute was unconstitutional, and appeal was taken. The District Court of Appeal, 570 So.2d 1357, affirmed. On review, the Supreme Court, Barkett, J., held that statute permitting forfeiture of aircraft with fuel tanks that do not comply with FAA regulations violated due process.

Affirmed.

1. Constitutional Law ⟹274(1)

In considering whether statute violates substantive due process, basic test is whether state can justify infringement of its legislative activity upon personal rights and liberties. U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⟹5

When legislature enacts penal statutes under authority of state's police power, legislature's power is confined to those acts which reasonably may be construed as expedient for protection of public health, safety, and welfare. West's F.S.A. Const. Art. 1, § 9.

3. Constitutional Law ⟹258(1)

Due process requires that penal statute shall not be unreasonable, arbitrary, or capricious, and therefore courts must determine that means selected by legislature bear reasonable and substantial relation to purpose sought to he attained. U.S.C.A. Cm&Amends. 5, 11; West's F.S.A. Const. Art. 1, § 9.

4. Aviation ⟹8

Statute prohibiting possession of aircraft equipped with fuel tanks that do not conform to Federal Aviation Administration (FM) regulations by assuring conformity with FAA regulations for purpose of public safety, was within legislative province. West's F.S.A. § 330.40; West's F.S.A. Const. Art. 1, § 9; Federal Aviation Act of 1958, § 601(a), 49 App.U.S.C.A. § 1421(a).

5. Aviation ⟹8

Constitutional Law ⟹303

Statute permitting forfeiture of aircraft with fuel tanks that do not comply with Federal Aviation Administration (FAA) regulations violated due process; method chosen by legislature to prohibit operation of aircraft with nonconforming fuel tanks was not sufficiently narrowly tailored to objective of flight safety in air commerce to survive constitutional scrutiny. West's F.S.A. Const. Art. 1, §§ 2, 9, 23; West's F.S.A. § 330.40.

John W. Jolly, Jr, of Shailer, Purdy & Jolly, P.A., Fort Lauderdale, for appellant.

Jorge L. Tabares, Mimi, for appellee.

Robert A. Butterworth, Atty. Gen. and Walter M. Meginniss, Asst. Atty. Gen., Tallahassee, amicus curiae.

BARKETT, Justice.

We have for review *In re Forfeiture of 1969 Piper Navajo*, 570 So.2d 135'7 (Fla. 4th DCA 1990), in which the district court declared section 330.40 of the Florida Stat-

EXHIBIT 5

court granted the motion over the defendant's objection, thus bringing this case squarely within the clear rule stated in *Beamon*. No inquiry into prejudice is needed. Prejudice, in such a situation. is to be presumed.

Furthermore, I believe that once the state began to present evidence based *on an* inaccurate bill of particulars, so that, absent the improper amendment of the bill. a judgment of acquittal would have been required based on what the evidence showed, the second attempt to prove the alleged offenses was barred by the Double Jeopardy Clause. In *State v. Katz*, 402 So.2d 1184, 1189 (Fla.1981), I stated in dissent:

> One of the most awesome powers exercised by officials of the state is the power of out state attorneys and grand juries to institute criminal proceedings by accusing a person *of* the commission of, a crime. The exercise of such authority sets in motion the machinery *of* the criminal justice system and brings the prosecutorial resources of the state to bear upon an individual. The constitutional prohibition against allowing the state a second opportunity to prove the commission of a crime should extend to situations such as the present cases and should be held to require that when accusatory pleadings are being drafted, they be drafted correctly. If the proof at trial fails to sustain the allegations. retrial should no more be permitted on the basis *of* corrected allegations than it is on the basis of augmented proof.

The same principle applies here and, in my view, precludes another trial.

ALDERMAN, Chief Justice, dinting.

I agree with most of what is said in the majority opinion. My only diiment is with this Court's finding that circumstances establishing no prejudice do not affirmatively appear in this record. *Instead. I* concur with the findings of the trial court and the district court that the defendant was not prejudiced by the amended statement of particulars. As stated by Chief Judge Letts in his concurring opinion in the district court:

> Justice may indeed be blind, but Judges should *not* be blinded. It is apparent that the defendant knew all *along* with what crime he was charged and on what date it was committed. Nonetheless he chose to wait in ambush, secure in the thought that he could defeat the prosecution by exposing a scrivener's error of which he was only too well aware.... The accused visited the result upon himself by relying on a technical mistake as his sole defense and should not now be heard to complain.

403 So.2d at 544 (Letts, C.J., concurring specially).

The prejudice against the defendant did not result *from* the amendment of the statement of particulars which did *nothing* more than conform the pleading to a true fact already known to the defendant. What prejudiced the defendant and resulted in hi conviction was the overwhelming evidence of hi guilt, including a taped confession in which the defendant freely and voluntarily admitted his guilt. We should not put the people of the State of Florida to the expense of a new trid for thii confessed forget because of a technical defect which has no bearing upon hi substantive rights I conclude, as did Chief Judge Letts, "that if we reverse this conviction, justice will not be served." 403 So.2d at 545 (Letts, C.J., concurring specially).

X&DONALD. J., concurs.

Reubin ASKEW, et al., Appellants,

v.

George FIRESTONE, as Secretary of State, Appellee.

No. 62719.

Supreme Court of Florida.

Oct. 21, 1982.

Suit was instituted to obtain injunctive and declaratory relief *against* the ballot ti-

tle and summary to a proposed constitutional amendment The Trial Court, Leon County, Ben C. Willis, J., entered older upholding validity of proposed ballot title and summary and, following appeal, the District Court of Appeal certified the iaue to be of great public importance. The Supreme Court, McDonald, J., held that the ballot title and summary to the proposed constitutional amendment prohibiting former legislators and statewide elected officers from lobbying for two years following vacation of office unless they file a financial disclosure do not set out the chief purpose of the amendment so as to give the electorate fair notice of the actual change wrought therein and, hence, are invalid since they neglect to advise the public that thm is presently a complete two-year ban on lobbying before one's agency and also neglect to inform the public that the chief effect of the amendment is to abolish the present two-year total prohibition.

Reversed

Boyd, J., concurred and filed opinion.

Overton, J., concurred and filed opinion in which McDonald and Ehrlich, JJ., concurred.

Ehrlich, J., concurred and filed opinion in which Alderman, C.J., and McDonald, J., concurred.

Adkins, J., dinted and filed opinion.

1. Constitutional Law ⇐9

In order for a court to interfere with the right of the people to vote on a proposed constitutional amendment, the record must show that the proposal is clearly and conclusively defective. West's F.S.A. § 101.161.

2. Constitutional Law ⇐9(1)

The ballot title and summary for a proposed constitutional amendment must state in clear and unambiguous language the chief purpose of the measure. West's F.S.A. § 101.161.

3. Constitutional Law ⇐9(1)

Lawmakers who are asked to consider constitutional changes, and tbe people who are asked to approve them, must be able to comprehend sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be. West's F.S.A. § 101.161.

4. Constitutional Law ⇐9(1)

The ballot title and summary to the proposed constitutional amendment prohibiting former legislators and statewide elected officers from lobbying for two years following vacation of office unless they file a financial disclosure do not set out the chief purpose of tbe amendment so as to give the electorate fair notice of the actual change wrought therein and, hence, are invalid since thty neglect to advise the public that there is presently a complete two-year ban on lobbying before one's agency and also neglect to inform the public that the chief effect of the amendment is to abolish the present two-year total prohibition. West's F.S.A. § 101161; West's F.S.A. Const. Art. 2. § s(e).

Albert J. Hadeed, John K. McPherson, and Terri Wood of Southern Legal Counsel, Inc., Gainesville, for appellants.

Jim Smith, Atty. Gen., and Eric J. Taylor, Asst. Atty. Gen., Tallahassee, for appellee.

McDONALD, Justice.

Reubin Askew, Common Cause, and the League of Women Voters of Florida, Inc. appeal a trial court order validating the caption and summary of a proposed constitutional amendment scheduled to appear on the November 1982 general election ballot Acceding to the parties' joint suggestion, the First District Court of Appeal certified the trial court order to be of great public importance and to require immediate resolution by the Supreme Court. We have jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution, and reverse the trial court order.

In the November 1976 general election the electorate of Florida approved adding section 8, the "Sunshine Amendment," to article II of the state wnstitution. Section

8 declares a public office a public trust which should be secure against abuse. To that end, the section requires full. public financial disclosure by elected officers and candidates for elected offices, provides for loss of pension or retirement benefits if a public officer or employee is convicted of a felonious breach of the public trust, and, central to this appeal, prohibits members of the legislature and statewide elected officers from lobbying their, former governmental bodies or agencies for two years following vacation of office. As this Court has previously stated: "Clearly the primary purpose for which the Sunshine Amendment was adopted was to impose stricter standards on public officials so as to avoid conflicts of interest" *Plante* v. *Smathers*, 372 So.2d 933, 936–37 (Fla.1979).

On the next to the last day of the 1982 regular session the legislature passed Senate Joint Resolution 1035, the title of which reads: "A joint resolution proposing an amendment to Section 8 of Article II of the state Constitution relating to lobbying by former legislators and statewide elected office=" [1] SJR 1035 would amend the first sentence of subsection 8(e) as follows:

> (e) No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before <u>any state</u> ~~the~~ government body or agency, <u>unless such person files full and public disclosure of his or her financial interests pursuant to subsection (a),</u> ~~of which the individual was an officer or member~~ for a period of two years following vacation of office.

(Material to be added underlined, material to be deleted struck through-) The proposed amendment, therefore, would remove the absolute two-year ban on lobbying by former legislators and elected officers. retaining that ban only if an affected person failed to make *financial* disclosure

Section 101.161, Florida Statutes (1981), provides for submission to popular vote of constitutional amendments and other public measures. The wording of the substance of the amendment and the ballot title must be included in the joint resolution and must be prepared by the amendment's sponsor and approved by the secretary of state. § 101.161, Fla.Stat.

> The substance of the amendment or other public measure shall be an explanatory statement. not exceeding 75 words in length, of *the chief purpose of the measure.* The ballot title shall consist of a caption, not exceeding 15 words in length, *by which the measure is commonly referred to or spoken of.*

id. (emphasis supplied). Section 101.161 also requires that the substance of a proposed amendment be in "clear and unambiguous language." In response to these requirements SJR 1035 includes the following proposed title and substance:

> FINANCIAL DISCLOSURE REQUIRED BEFORE MBBYING BY FORMER LEGISLATORS AND STATEWIDE ELECTED OFFICERS
>
> Prohibits former legislators and statewide elected officers fmm representing other persons or entities for compensation before any state government body for a period of 2 years following vacation of office, unless they file full and public disclosure of their financial interests.

1. The legislature can propose amendments to the state constitution. Art. xI. § 1, Fla.Const. Subsection 8(e) currently provides as follows:

> (e) No member of the legislature or statewide elected offii shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the legislature shall personally represent another person or entity for compensation during term Of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.

SJR 1035 would amend only the first sentence of subsection 8(e), leaving the rest of the paragraph intact.

The appellants sued Secretary of State Firestone, in his official capacity, seeking injunctive and declaratory relief, to prevent inclusion of the proposed title and substance on the November ballot. They alleged, among other things. that: 1) the ballot summary is required to be an explanatory statement of the chief purpose of the proposed amendment, written in clear and unambiguous language; 2) the instant summary discloses only the proposed addition of financial disclosure as a condition to after-term lobbying and fails to reveal that the proposal would repeal the existing. more stringent after-term prohibition on lobbying; and 3) the instant summary creates the impression that adopting the proposal would fill a void in conflict of interest pro tections instead of diluting them. The appellee answered that the language is clear and unambiguous, giving fair notice of the intent and purpose of the proposed amendment, and that the proposal will, in fact. bring former state officials into line with the true intent of the Sunshine Amendment.

After receiving the complaint and the parties' joint stipulation, Judge Willis, in an extensive and thoughtful order, found that the proposed ballot title and summary meet the requirements of section 101.161. Among others, the court made the following finding:

> 20. As previously noted, SJR 1035 would achieve two purposes. First, it would eliminate the limited lobbying prohibition against a former legislator from lobbying in the legislature, and a former statewide officer from lobbying in the body or agency of which he was an officer or member for a period of two years following hi leaving office Second, it would impose an absolute prohibition to those officers from lobbying in any government body or agency for the two-year period following vacation of the office, unless such persons filed the financial disclosure required of incumbents or candidates. Under the present law, a former legislator could lobby in any state agency or body except the legislature without financial disclosure during the two years following vacation of his office. It the amendment is adopted, he could lobby in the legislature or elsewhere if he files the necessary financial disclosure.

Askew v. Firestone, case no. 82-2371 (Fla.2d Cir.Ct. Oct. 6, 1982), slip op. at 8-9. The court went on to state that the

> *inquiry of this Court is limited to whether or not the "substance" has clearly missed the mark of furnishing the electorate of an explanatory statement in clear and unambiguous language of the chief purpose of the measure. I do not find that this is clearly and conclusively shown.* It ix quite true that the Sunshine Amendment sought and achieved more than financial disclosure of public officials. It deals with deterrence of corruption and conflicting interest. Subsection (e) is directed toward curbing of so-called influence peddling, by setting a *limited* lobbying quarantine on former officers for a two-year period following their leaving off- However, it was not general quarantine, but it permitted uninhibited lobbying in most areas without disclosure of interests which might be conflicting. *The amendment is not a repeal, but a modification of those regulations, relaxing some requirements and imposing others not previously made. I* do *not find* that the *failure to* state *the relaxation* of *the absolute limited ban on lobbying has rendered the substance inadequate to explain the chief purpose of the measure.*

Id. at 9-10 (emphasis supplied). After careful deliberation, we find no factual basis for the trial court's ruling and hold that he reached the wrong conclusion and that his order must be reversed.

[1, 2] In order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly and conclusively defective. *Weber v. Smathers*, 338 So.2d 819 (Fla.1976), *disapproved on other grounds sub nom Floridians Against Casino Takeover v. Let's Help Florida*. 363 So.2d 337 (Fla.1978). As previously stated. section 101.161 requires that the ballot title and summary for a proposed consti-

tutional amendment state in clear and unambiguous language the chief purpose of the measure. The requirement for proposed constitutional amendment ballots is the same as for all ballots, i.e.,

> that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide.... What the law requires is that the ballot be fair ... voter sufficiently to enable him intelligently to cast his ballot.

Hill v. Milander, 72 So.2d 796, 798 (Fla.1954) (emphasis supplied).

[3] Simply put, the ballot must give the voter fair notice of the decision he must make. *Miami Dolphins, Ltd. v. Metropolitan Dade County,* 394 So.2d 981 (Fla.1981). We find that the proposed title and substance do not set out the chief purpose of the amendment so as to give the electorate fair notice of the actual change in subsection 8(e) wrought by SJR 1035. While the wisdom of a proposed amendment is not a matter for our review, Weber v. Smathers, we are reminded that the "proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation." *Crawford v. Gilchrist,* 64 Fla. 41, 54, 59 So. 963, 968 (1912).[2] We reiterate that "lawmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." *Smathers v. Smith,* 338 So.2d 825, 829 (Fla.1976).

[4] Section 8 embodies four important state concerns: The public's right to know an official's interest, the deterrence of corruption and conflicting interest, the creation of public confidence in state officials, and assistance in detecting and prosecuting officials who have violated the law. *Plante v. Gonzalez,* 575 F.2d 1119, 1134 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). Subsection 8(e)

> was designed specifically to prevent those who have plenary budgetary and statutory control over the affairs of public agencies from potentially influencing agency decisions (or giving the appearance of having an influence) when they appear before the agencies as compensated advocates for others.

Myers v. Hawkins 362 So.2d 926, 930 (Fla. 1978).[3] As it stands, subsection 8(e) precludes lobbying a former body or agency for two years after an affected person leaves office. The ballot summary neglects to advise the public that there is presently a complete two-year ban on lobbying before one's agency and, while it does require the filing of financial disclosure before anyone may appear before any agency for the two years after leaving office, the amendment's chief effect is to abolish the present two-year total prohibition. Although the summary indicates that the amendment is a restriction on one's lobbying activities, the

2. The appellants quote Justice Roberts in dissent to *Weber v. Smathers,* 333 So.2d at 824: "Where an amendment is by Legislative Resolution ... there are always public hearings, committee studies, and public debate in developing the format of the proposal...." They charge that the legislature violated the virtues of legislatively proposed amendments, as described by Justice Roberts, by passing SJR 1035 on the next to the last day of the session "without prior public notice, without opportunity for public input, without reference to legislative committees for study, and with less than five minutes of deliberation and debate in each chamber." The trial court found SJR 1035 to have been properly passed, and we do not disturb that finding.

3. We note the house debate where Representative Batchelor made an eloquent plea for not passing the joint resolution, reminding his colleagues of the public's interest in the Sunshine Amendment and warning them about the importance of appearances. Transcript of Tape of House Debate on SJR 1035, Mar. 17, 1982, at 3-4. In response Representative Richmond stated that the legislature was more concerned with righting wrongs than with appearances. Id. at 4.

amendment actually gives incumbent office holders. upon filing a financial disclosure statement. a right to immediately mmmence lobbying before their former agencies which is presently precluded.' The problem, therefore, lies not with what the summary says, but, rather. with what it does not say.

Had SJR 1035 *not* been an amendment to an existing provision. if it bad been a totally new provision, its ballot summary and title would probably have been permissible The change to subsection 8(e) is as stated, but the stated change is only incidental to the true purpose and meaning of section 8 in its *entirety.* Public financial disclosure is needed to assure the accountability of state officers and is the heart of section 8. But. in subsection (e). section 8 also expresses another vital concern—the ban on lobbying. The ballot summary fails to give fair notice of an exception to a present prohibition.

If the legislature feels that the present prohibition against appearing before one's former colleagues is wrong, it is appropriate for that body to pass a joint resolution and to ask the citizens to modify that prohibition. But such a change must stand on its *own merits* and not be disguised as something else The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment. A proposed amendment cannot fly under false colors; this one does. The burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do tbii

Fair notice in terms of a ballot summary must be actual notice consisting of a dear and unambiguous explanation of the measure's chief purpose. The chief purpose of SJR 1035 is to remove the two-year ban *on* lobbying by former legislators and elected officers. The ballot summary, however, does not adequately reflect that purpose and, therefore, does not satisfy the requirements of section 101.161. The Court *must* act with extreme care, caution. and restraint before it removes a constitutional amendment from the vote of the people. Nevertheless. it is clear and mnvincing to us that the ballot language contained in SIR 1035 is so misleading to the public mnoeming material changes to an existing constitutional provision that this remedial action *must* he taken. We therefore find SIR 1035 invalid The trial court order is reversed, and we order that the ballot caption and summary included in SIR 1035 be stricken from the November 1982 general election ballot.

It is so ordered.

NO MOTION FOR REHEARING WILL BE ALLOWED.

ALDERMAN, C.J., concurs.

BOYD, J., concurs with an opinion

OVERTON, J., concurs with an opinion with which McDONALD and EHRLICH, JJ., concur.

EHRLICH, J., concurs with an opinion with which ALDERMAN, C.J., and McDONALD, J., concur.

ADKINS, J., dints with an opinion.

BOYD, Justice, concurring specially.

Nothing in the government of this state or nation is more important than amending our state and federal constitutions The law requires that before voting a citizen must be able to learn from the proposed question and explanation what the anticipated results will be.

In the proposed amendment considered hero a voter would think a limitation is to be placed upon legislators for the first time to prohibit lobbying that body for two years after leaving office and permitting it if they file financial disclosure. In fact, the present Florida Constitution prohibits lob bying the Legislature for two years after leaving office. A person who may vote to adopt the amendment for the purpose of

4. We note that § 11.045, Fla.Stat. (1981). sets requirements on those who would lobby the legislature itself.

limiting lobbying by legislators will actually achieve directly opposite results in removing the present lobbying ban.

When questions are presented to voters courts should not nmove such issues from the ballot without compelling constitutional reasons. I do not feel there is a lawful basis to dissent and, with reluctance, I concur in the majority opinion to remove the proposed amendment from the November 1982 general election ballot

OVERTON, Justice, concurring specially.

I concur with the majority opinion and agree that the ballot language conclusively misleads the public concerning material changes contained in the proposed constitutional amendment.

I am, however, concerned with the sub stantial power this Court is exercising in removing from the ballot a constitutional amendment which has been placed there by the legislature of this state on a vote of 29 to 6 in the senate and 96 to 15 in the house. Because of the defective ballot language, the public is now prohibited from voting on this amendment Infringing on the people's right to vote on an amendment is a power this Court should use only where the record clearly and convincingly establishes that the public is being misled on material elements of the amendment It concerns me that the public is being denied the opportunity to vote because no process has been established to correct misleading ballot language in sufficient time to change the language

To avoid future situations in which this Court may again have to exercise this extraordinary power of striking an amendment from the ballot due to misleading ballot language, the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.

Since our constitution requires that amendments and revisions be filed with the secretary of state at least ninety days prior to the designated election date, I suggest that a process be established by the legislature to afford those who desire to challenge the ballot language to be able to do so within thirty days of the filing of the amendment or-revision. This Court should then create an expedited process whereby such challenges can be settled within thiiy days of the filing of the challenge In this process a means should be provided for the correction of defective ballot language so that the election on the proposal may proceed.

This Court should do everything possible to cooperate in establishing such a process so that we may eliminate the necessity for this Court to again have to deny the people a right to vote on the merits of a constitutional proposition due to faulty ballot language. The power to remove an amendment or revision from the ballot is too great to reside solely in the few members of this Court.

McDONALD and EHRLICH, JJ., concur.

EHRLICH, Justice, concurring.

I join in the opinion of the Court with these additional comments.

Appellee in his brief says "[g]ranted, there is a *tradeoff,* but in giving up the total ban to lobby before their former agency for two years, the legislature has gained something valuable in return." Appellee's Brief at 12. (Emphasis supplied.) The ballot summary accurately describes one-half of the "trade-off," namely, that former office holders would be banned from lobbying or representing someone before all state bodies and agencies unless they file full disclosures of their financial interests with the Secretary of State. But by appellee's counsel's candid admission during oral argument, the ballot summary does not disclose the other half of the "trade-off," namely, giving up the total ban to lobby before the former agency for two years. The chief purpose of the amendment is the "trade off" and the failure of the ballot summary to state the full "trade-off" is a failure to comply with the mandatory requirements of section 101.161, Florida Statutes (1981), and hence the ballot summary is fatally defective.

The same deficiency in the ballot summary causes it to be misleading. In my opinion the proposed ballot summary is deceptive, because although it contains an absolutely true statement. it omits to state a material fact necessary in order to make the statement made not misleading. If the ballot summary had mntained the words "and deletes from the Constitution the ab solute ban against such representation during such two-year period," or words to that effect, the ballot summary would have fairly complied with section 101.161, Florida Statutes (1981), and would not have been misleading.

I do not intend to imply that the framers of the joint resolution and those members of the legislature who voted for it intentionally set out to mislead or deceive the voters. That is undoubtedly not the case. All I say is that the end result of their well-intentioned efforts was not in oomphance with section 101.161, Florida Statutes (1981).

Mr. Justice Adkins ends hi dint with a rousing clarion call that the people should be allowed to vote on tbe proposal. I join with him in the belief that the people ought to be able to vote on amendments to their constitution. I differ with him in that I believe that the mandate of the legislature expressed in section 101.161, Florida Statutes (1981), was not complied with here for the reasons expressed above and in the Court's opinion, and hence the proposed amendment should not be on the ballot This by no means forecloses a future legislature from submitting to the people the proposed constitutional amendment so long as the ballot title and ballot substance comply with the statutory requirements.

ALDERMAN, C.J., and McDONALD, J., concur.

ADKINS, Justice, dissenting.

The only issue in this case is whether the language of the caption and substance of the proposed amendment meets the requirements of section 101.161, Florida Statutes. This statutory provision only requires that the "chief purpose of the measure" be set forth in the ballot summary. Although there may be multiple purposes in the constitutional amendment, it would be impractical to list all the purposes; rather, it is the chief purpose that must be stated, In the original Sunshine Amendment as passed by the people, its 'chief purpose" was financial disclosure. It is not only reasonable, but logical, to say that the "chief purpose" of the proposed amendment is "financial dii closure." This gives "fair notice" that the Sunshine Amendment is being changed.

We are required to uphold the action of the legislature if there is any reasonable theory on which it can be done.

The majority seems to ignore article II. section 3, Florida Constitution, which prohibits one branch of government from exercising any powers appertaining to another, unless expressly provided in the Constitution. The legislature has full Rower to enact measures such as section 101.161, Florida Statutes (1981), to regulate tbe form of the ballot; including the contents of sum maries of proposals for constitutional change.

Tbe majority opinion seems to impute fraud and deceit to the legislature But all the legislature is required to do, under its statute, is give "fair notice" of the contents of the amendment. The summary is not challenged for failing to provide details of the proposed amendment In *Hill v. Milander*, 72 So.2d 796 (Fla.1954), we held that the whole proposal did not have to be printed on the ballot. We also said that a proposal need not be extensively explained in the voting booth. Miami *Dolphins v.* Metm Dade *County,* 394 So.2d 981.987 (Fla.1981).

Nor is the summary challenged because it does not debate the merits of-both sides of the issue. The challenge is restricted to the theory that the ballot summary does not provide tbe public fair notioe of the repealing effect of the proposed amendment But did it repeal or did it amend?

Section 8(e) as it presently stands pmhibits, for a period of two years following their leaving office, members of the legislature and statewide elected officers from lobby-

ing or representing anyone for compensation before government bodies of which they were a member. This was a very limited ban. While a former legislator would be banned presently from lobbying before the legislature, he would not be banned from lobbying or representing someone before any other state body or agency.

If the purpose of section 8(e) was to prevent all influence peddling, it failed from the start. The individual was and still is free to peddle hi influence before any other state body.

The proposed change brings former state officials into line with the true intent of the Sunshine Amendment. Instead of being able to freely lobby in front of other state agencies immediately after their vacation of office, the former officeholders would be banned from lobbying or representing someone before any and all state bodies and agencies unless they file full dislcosure of their financial interests with the Secretary of state.

The requirement of financial disclosure by certain former elected officials is more closely attuned to the purpose of the Sunshine Amendment than is the present section 8(e).

The burden is on the appellants to show "on the record that the proposal is clearly and conclusively defective", a burden the circuit court found the appellant had failed to carry. Anyone can read the summary and clearly know what the purpose of the proposed amendment is. There are no hidden meanings or deceptive phrases.

At an election held March 11, 1936, article V, section 3 of the Florida Constitution pertaining to the jurisdiction of thii Court was substantially revised. What was submitted to the people for adoption was a statement on the ballot which read "proposing an amendment to the state constitution to modify the jurisdiction of the Supreme Court". *See Jenkins v. State,* 385 So.2d 1356. 1364 (Fla.1980). Just as here, the substance of the amendment repealed some of our jurisdiction. This proposed amendment was adequately explained to the public *See Jenkins v. State* at 1362 If this short statement was sufficient to give fair notice of the amendment which we sponsored, I believe we should also approve the statement and summary prepared by the legislature in the instant case.

Fair notice is not strictly limited to the ballot summary. Fair notice can also be shown by the amount of information disseminated to the general public. *Hill v. Milander.*

It is important to note that when the Sunshine Amendment was passed the "explanation" emphasized that it provided a constitutional mandate for *full and public disclosures of* campaign finances and the personal finances of public officials. The public was told that "the cornerstone of the amendment is the provision requiring financial disclosure."

How can it he said that it is not fair notice to state that "financial disclosure" is the main purpose of a proposed amendment?

The legislature certainly has the ability to prepare a summary that would not mislead a person of average intelligence as to the scope of the law and put that person on notioe thereby causing him to inquire into the body of the provision itself. They have done so. As a practical matter, the public generally is now more familiar with the contents and effect of this amendment than any other which will be on the ballot.

The people should be allowed to vote on the proposal.

EXHIBIT 6

ble of repetition, yet evading review.'" In *Weinstein v. Bradford*, 423 U.S. 147. 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam), the Supreme Court enlarged upon this doctrine as construed in *Sosna v. Iowa* 419 U.S. at 399–400, 95 S.Ct. at 557:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements mmbined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration. and (2) then! was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. at 149. 96 S.Ct. at 349. Both of the criteria above are satisfied in the present case. The representation election was over before the district court could reach the merits of the State's challenge to the NLRB order directing the election, and, given the breadth of the Board's assertion of jurisdiction, there is certainly a reasonable expectation that the State's alleged interest in the jai alai industry will be threatened by such orders in the future. In Super Tire *Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). the Supreme Court held that the "capable of repetition, yet evading review" exception to the mootness doctrine applied where an employer challenged state regulations according benefits to striking workers even though the particular strike that gave rise to the action had ended. Here. as in Super *Tire*, "the challenged governmental activity . is not contingent. has not ● vapomti or disappeared. and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parries." *Id. at 122, 94 S.Ct. at 1698.*

[6] The argument that this exception is inapplicable is that in the present case the NLRB's assertion of jurisdiction and ordering of elections will not *necessarily* "evade review" in the future. There would be no question of mootness if the issues were considered following a union victory in a representation election. Nevertheless. the possibility of a future union victory does not *requite* the jai alai industry and the State to undergo the expense and disruption of conceivably repeated representation elections before they are permitted to raise the preliminary question of the NLRB's jurisdiction.

Accordingly. we reverse and remand to the district court for its consideration of the issue of the reviewability of the Board's actions,' about which we intimate no opinion. If the court finds that the State's claim is presently reviewable, it should then consider the merits of the request for declaratory reiief.

REVERSED and REMANDED WITH INSTRUCTIONS.

Oscar HAUBEN, Plaintiff-Appellant,

v.

W. Clayton HARMON. Robert K. Harmon, Jr. and Cypress Gardens Realty and Insurance. Inc., Defendants-Appeliees.

No. 77–1769.

United States Court of Appeals, Fifth Circuit.

Nov. 2. 1979.

Rehearing Denied Dec. 12, 1979.

Purchaser brought action against vendors and broker seeking rescission of contract for sale of real estate, and defendants filed counterclaim The United States District Court for the Middle District of Florida. Joseph P. Willson, J., sitting by designation, entered judgment for defendants. and

1. Se *Boire v. Greyhound Corp.*, 376 U.S. 473. 84 S.Ct. 894. 11 L.Ed.2d 849 (1964); *Leedom v. Kyne*. 358 U.S. 184. 79 S.Ct. 180.3 L.Ed.2d 210 (1958): *Boire v. Miami Herald*. 343 F.2d 17 (5th Cir. 19651. *cert. denied*. 382 U.S. 624. 66 S.Ct. 56. 15 L.Ed.2d 70 (1965).

plaintiffs appealed. The Court of Appeals, Simpson, Circuit Judge, held that: (1) vendors' nondisclosure oi state's possible condemnation interest in subject property did not give purchaser the right to rescind contract, since the information was not "material" under Florida law, because of its speculative nature at time of execution of contract, and (2) where vendors filed timely motion to alter or amend judgment, and at court's direction, vendors subsequently refiled the motion more than ten days after entry of judgment, the motion to amend was timely, despite fact that more than ten days elapsed between entry of judgment and tht refiling oi the motion.

Affirmed.

Godbold, Circuit Judge, dissented and filed opinion.

1. Fraud ⇐3

Generally, in order to establish cause of action in fraud under Florida law, plaintiff must establish that defendant knowingly made false statement concerning material facts, that defendant intended that plaintiff rely on the statement, that the plaintiff relied upon the statement, and plaintiff was damaged as a result of that reliance.

2. Contracts ⇐94(3)

Under certain circumstances, an innocent misrepresentation of a material fact, relied on co another party's detriment, is grounds for rescission of contract.

3. Contracts ⇐94(8)

A nondisclosure of material facts as well as an overt misrepresentation can constitutt fraud justifying rescission of contract.

4. Fraud ⇐17, 30

Affirmative duty to disclose exists in Florida only if there is fiduciary relationship between parties or the facts are solely within knowledge of representor or some trick has been employed to prevent independent investigation by representee fraud is not presumed, but burden of proof lies on party claiming to have been defrauded.

5. Fraud ⇐18, 64(4)

d fact is "material" if, but for the alleged nondisclosure or misrepresentation, the complaining party would not have entered into the transaction; furthermore, the issue of materiality of alleged nondisclosure or misrepresentation is a question of fact under Florida law.

See publication Words and Phrases for other judicial constructions and definitions.

6. Fraud ⇐18

Under Florida law, mere statements of possibilities do not generally constitute false statements of material facts; similarly, a failure to disclose mere possibilities *cannot* be a failure to disclose material facts.

7. Contracts ⇐246

A modification to existing contract constitutes a new contract.

8. Contracts ⇐246

Although contract may be modified, general rule is that original contract stays in fom except as modified.

9. Vendor and Purchaser ⇐33

Vendors' nondisclosure of state's possible condemnation interest in subject property did not give purchaser tht right to rescind contract, since the information was not "material" under Florida law, because of its speculative nature at time of execution of contract.

10. Vendor and Purchaser ⇐54, 202

Under doctrine of equitable conversion, purchaser of realty becomes seized Of beneficial title to property upon execution of contract of sale; vendor carries burden of loss before execution contract, and purchaser carries burden of loss after execution of contract.

11. Federal Civil Procedure ⇐2658

Where vendor filed timely motion to alter or amend judgment, and at court's direction, vendor subsequently refiled the motion more than ten days aittr the entry of judgment, the motion to amend was timely, despite fact that more than ten days

elapsed between entry of judgment and the refiling of the motion. Fed.Rules Civ.Proc. rule 59(e), 28 U.S.C.A.

Thomas A. Clark, Emily W. Lawyer, C. Timothy Corcoran, III, Fla., for plaintiff-appellant.

Roy C. Summerlin, Harry E. King, Winter Haven, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

SIMPSON, Ciiuit Judge:

This diversity action was brought in the district court by appellant buyer, Oscar Hauben, against the sellers, W. Clayton Harmon and Robert K. Harmon. snd the broker, Cypress Gardens Realty & Insurance, Inc. seeking rescission of a land sale contract on the grounds of fraud. misrepresentation and concealment. Title 28, U.S.C. Section 1332. The sellers counterclaimed seeking damages for breach of contract The broker counterclaimed for its commission.

The trial court initially entered judgment for the sellers on their counterclaim in the amount of $83,400.00 and ordered that the broker's commission be paid from the judgment The parties filed various post-trial motions. All were denied except the sellers' Rule 59(e) motion that the broker's commission be paid in addition to and not out of the $83,400.00 judgment in favor of sellers. F.R.Civ.P. 59(e). The court postponed hearing on this motion until a subsequent date. Later tht parties entered into a settlement agreement in which the broker agreed to accept $10,000.00 in full payment of its claim for commission. After hearing argument of counsel on the seller's Rule 59(e) motion, the court approved the settlement of the broker's claim, dismissed the broker fmm further proceedings, and granted sellers' motion by increasing the gross judgment in favor of the sellers by $10,000.00, the amount of the agreed settlement of the broker's claim. The buyer appeals from the judgment contending (1) that the district court erred in holding the buyer was not tntitltd to rescind, and (2) that the district court lacked jurisdiction to hear the sellers' Rule 59(e) motion. We find these contentions without merit and affirm.

On May 18.1973 the buyer entered into a land sale contract with the sellers to purchase 834 acres of land in kke County, Florida, bounded on the south by the Withlacoochee River, for $717,240.00, a price of $860.00 per acre. The contract provided that the purchase price included all oil and mineral rights. The land is partially locattd within tht Southwest Florida Water Management District (the District) and the Green Swamp Flood Detention Area and is consequently subject to condemnation by the State of Florida for the flood control project The Green Swamp Flood Detention Area is part of a flood control project the purpose of which is the avoidance of flood conditions by impounding water for a period to allow rivers feeding out of the area time to complete local drainage. The central controversy in this appeal is whether the sellers' non-disclosure of the State's possible condemnation interest in the property gave the buyer the right to rescind the contract.

The sellers did not disclose that a substantial portion of the property lies within the Gmn Swamp Flood Detention Area. The district court held that this information was not material because the state had periodically and intermittently acquired land in the area for some 35 years, and it was pure speculation whether this or any other piece of property might ever be condemned. Although at trial the buyer argued that tht sellers had misrepresented that the land was high and dry and suitable for residential development, the evidence did not establish that the land was not as represented.

About two weeks before entering into the sales agreement the sellers visited the District office on May 3, 1973 and discussed the District's intentions concerning tbe proper-

ty. This visit was followed by a telephone call from one of the sellers to tbe District. The sellers did not disclose any of tbe information received as a result of the visit or telephone call to either the buyer or the broker. However. the trial court found the failure to disclose this information was not a concealment of a material fact justifying rescission because the sellers did not receive any definite information as a result of the visit or the phone call.

Before executing the contract the buyer physically inspected the property on two occasions. Neither the sellers nor the broker attempted to forestall an independent inquiry into the character and circumstances surrounding the property. In fact, the broker encouraged the buyer to do so by giving him the telephone number of the local zoning board and suggesting that he call it The buyer is a capable and ● xpcri- ● ■♏♏♎ businessman, unlikely to rely blindly on any of the sellers' representations.

In the late summer of 1973 a title search revealed an outstanding 1/16th interest in the mineral rights not owned by the sellers. Because the sellers would not be able to convey all mineral rights. the buyer threatened to rescind. The sellers attempted to return his $20,000.00 deposit, but the buyer refused to accept it On November 19. 1973, the buyer and the sellers executed an addenda to tbe May 3 contract which stated that the parties disputed whether the original contract required the sellers to deliver all the mineral rights or only those mineral rights owned by the sellers. Under the addenda, the buyer agreed to forego his possible right to rescind in return for the sellers' agreement to institute a partition action to acquire the outstanding mineral rights. The partition action was commenced, and by August of 1974 the sellers reached an agreement with the owners of the outstanding mineral rights to purchase that interest. By the terms of the addenda the original contract otherwise remained "in full force and effect, unaltered and unmodified."

Between the execution of the original contract and execution of the addenda. the sellers had several communications with the District concerning the District's plans with regard to the property. In one letter the District indicated that it might need 70–75% of the property, that after obtaining appraisals it would be in a position to negotiate for the property, and that if negotiations failed it might institute condemnation proceedings. The district court found that the failure to disclose information learned from communications with the District after execution of the original contract but before execution of the addenda was not a nondisclosure justifying rescission of the contract because the sellers did not learn that the District definitely planned to condemn the property until two months after execution of the addenda. Until then. said the court, it was pure speculation whether the property would be condemned. A condemnation suit was filed by tbe District on June 24, 1974 and was voluntarily dismissed by the District in September of 1975.

Upon learning of the prospective condemnation the buyer sued for rescission of the contract. The sellers and the broker counterclaimed. The district court found that the buyer was not entitled to rescind. Judgment was entered in favor of the sellers and the broker on their respective counterclaims. It is from this judgment that the buyer appeals.

[1, 2] Generally, in order to establish a cause of action in fraud under Florida law, a plaintiff must establish that: (a) the defendant knowingly made a false statement concerning a material fact; (b) the defendant intended that the plaintiff rely on the statement; (c) the plaintiff relied upon the statement; and (d) the plaintiff was damaged as a result of that reliance. See, for example, Ball v. Ball, 160 Fla 601, 609, 36 So.2d 172, 177 (1948); Sutton v. Gulf Life Ins. Co.. 138 Fla. 692 693. 189 So. 828. 829 (1939); *Nixon v. Temple Terrace Estates, Inc.,* 97 Fla. 392. 397. 121 So. 475, 477 (1929); 14 *Fla.Jur.* Fraud and Deceit § 9. Under certain circumstances, an innocent misrepresentation of a material fact, relied on to another party's detriment. is grounds for rescission of a contract *Robson Link &*

Co. v. *Leedy Wheeler &* Co., 154 Fla. 596, 616. 18 So.2d 523, 533 (1944); *Langley v. Irons* Land & Development *Co.*, 94 Fla. 1010, 1017, 114 So. 769, 771 (1927). This exception to the requirement that knowledge and intent to defraud be proven appears to rest on two logical grounds. First, even an innocent maker of a false statement should not be allowed to profit at the expense of an innocent party. Second, a deceived party should not be bound to a contract simply because he cannot prove the representor knew the statements were false when made. *Robson* Link *& Co., supra,* 18 So.2d at 533.

[3] The facts of the instant case differ from the typical fraud or misrepresentation cause of action because here there were no affirmative misrepresentations. Instead the buyer claims the sellers failed to disclose material facts concerning possible future condemnation. A nondisclosure of a material fact as well as an overt misrepresentation can constitute fraud justifying rescission of a contract *E. g. Robson Link & Co., supra,* 18 So.2d *at* 532; *Hirschman v.* Hodges. *O'Hara & Russell* Co., 59 Fla 517, 527, 51 So. 550, 554 (1910); 14 *Fla.Jur.* Fraud and Deceit § 27. However the Supreme Court of Florida has stated that although nondisclosure of a material fact *map* be grounds for relief.

> where the *facts* lie *equally* open to the vendor and vendee with equal opportunity of examination. and the vendee undertakes to examine for himself, without relying upon the vendor's statement, it is no evidence of fraud that the vendor knew facts not known to the vendee and does not make them known to him.

Stephens v. Orman, 10 Fla. 9. 86–87 (1862); *see also Hirschman v. Hodges, O'Hara & Russell Co.. supra,* 51 *So. at 554; Robson Link &* Co., *supra,* 18 So.2d at 531. The record in this case indicates that the buyer, and sellers apparently had equivalent access to the iniormarion concerning the property. that the buyer did not rely on the sellers' representations, and that the buyer did conduct an investigation of his own.

[4] Additionally, an affirmative duty to disclose exists in Florida only if there is a fiduciary relationship between the parties or the facts ate solely within the knowledge of the representor or some tick has been employed to prevent an independent investigation by the representee. *Ramel v. Chasebrook Construction Co., Inc.,* 135 So.2d 876, 882 (Fla.App.1962). Fraud is not presumed; the burden of proof lies on the party claiming to have been defrauded. *Barrett v. Quesnel, 90* So.2d *706* (Fla.1956). With these basic principles of Florida law in mind, we proceed to the buyer's assignments of error.

[5] The sellers did not disclose that a substantial portion of the property sold lies within the Green Swamp Flood Detention Area. While that name may sound foreboding, the evidence *at* trial did not show that the property within this area is flooded or otherwise unsuitable for residential, commercial or other normal uses. Property within the *area* is *possibly* subject to condemnation by the state. However. the Green Swamp Flood Detention Area covers more than fifty square miles. The state's condemnation activities in the area have been continuing off and on for more than three decades. It is thus a matter oi speculation whether any one piece of property within this area may ever be condemned. A fact is material if but for the alleged non&closure or misrepresentation the complaining party would not have entered into the transaction. *E.* g., *Morris v. Ingraffia,* 154 Fla. 432, 437, 18 So.2d 1, 3 (1944); *Gnat American Insurance Co. v. Suarez,* 92 Fla. 24, 29–30, 109 So. 299, 301 (1926). Furthermore the issue of materiality of an alleged nondisclosure or misrepresentation appears to be a question of *fact* under Florida law.[1] Considering the tenu-

1. *Biscayne Blvd. Properties. Inc v. Graham,* 6.5 So.2d 656. 859 (Fla.1953); 14 *Fla.Jur.* Fraud and Deceit § 86. *Biscayne Blvd. Properties. Inc..* the only Florida case which approached this question. does not clearly state that materiality is a question of fact. but it is cited by *Florida Jurisprudence* as supporting such a proposition. The Florida test for materiality in this type case is whether. but for the non-disclosure or misrepresentation. the complaining party

ous and speculative effect of part of the land sold being partially within the Green Swamp Flood Detention Area, we agree with the district court's determination that this information was not material under Florida law.

[6] The buyer also claims that the information received by the sellers as a result of the *May* 3, 1973 meeting and the May 18, 1973 telephone conversation with the District was more specific information which was material and should have been dis closed. The district court found that the sellers received no definitive information as a result of the meeting and the telephone conversation and that therefore the information was not material. tinder Florida law, *men statements* of possibilities do not generally constitute false statements of mot&al facts. Sutton, *supra*, 189 So. at 829; *Greenberg v. Berger*, *46* So.2d *609*. 610: (Fla.1950), *Farnham v. Blount*, 152 Fla. 208, 218, 11 So.2d 785, 790 (1942), 14 *Fla.Jur.* Fraud and Deceit § 13. Similarly, a failure to disclose mere possibilities cannot be a failure to disclose material facts.

[7, 8] The bupr argues that even if the sellers had no definitive information prior to the execution of the *original* contract, they had such information, which should have been disclosed, prior to entering the November 18, 1973 addenda to the contract.[2] However the district court found that it was not until two months after execution of the addenda that the sellers learned the Diitrlct actually planned to acquire the property thmugh condemnation and that before that time the possibility of condemnation was speculative. In view *Of* this factual determination, the district court was amply justified in holding that this information was not material because of its speculative nature.

[9] In his efforts to establish the nondisclosed information as material, the buyer cites several Florida opinions which hold that the pendency of condemnation proceedings at the time of execution of a contract constitutes a defect in title and is grounds *for* rescission *of* the contract. *Walton Land & Timber Co. v. Long,* 135 Fla. 843, 185 So. 839 (1939); *Westerlind v. Dehon,* 326 So.2d 24 (frApp.1976). As the district judge explained in his opinion, these cases do not apply to the facts of the instant case because in each of them tbe condemnation action was filed before the execution of the contract.

[10] After finding that there had been no misrepresentation or non-disclosure of material facts, the district court correctly applied the doctrine of equitable conversion as taught by the case of *Arko Enterprises, Inc. v. Wood*, 185 So.2d 734 (Fla.App.1966). Under the doctrine of equitable conversion a purchaser of realty becomes seized of beneficial title to the property upon execution of the contract of sale. *Id.* at 736. The vendor carries the burden of loss before execution oi the contract and the vendee carries the burden *of* loss after execution of the contract *Arko* applied the doctrine of equitable conversion and held that *condemnation of* real property after execution of the contract and before conveyance of legal title was not a ground for rescission and

would not have entered into the transaction. *Moms v. Ingraffia, supra*, 18 So.2d at 3. *Great American Insurance* Co. v. *Suarez, supra*, 109 so. at 301. Considering the Florida test of materiality, it is evident that it is the function of the trier of fact to weigh the evidence and determine whether the party *would* have entered the transaction even if the information *had* been disclosed.

2. Appellant buyer summarily concludes, without supporting authority, that the addenda to the contract constituted a new contract which required full disclosure of all material fact concerning the original contract, even those facts having little, if anything, to do with the addenda transaction. Certainly a modification to an existing contract constitutes a new contract. 7 *Fla.Jur.* Contracts § 169. Although • contract may be modified, the general rule is that the original contract stays in force except as modified. 17 *Am.Jur.2d* Contracts § *459. No* Florida case has addressed the issue of whether a party is required to disclose events occurring after execution of an original contract which have little if anything to da with subsequent modification to the contract. Since we have determined that the information sellers gained after • ⊠♏♍♦♦□▪ of ♦♒♏ original contract was not material, we need nor decide this issue.

that the buyer was entitled to the condemnation award in place of the land. Id. at 740. Although *events* short of actual condemnation may, in *the* proper circumstances, be grounds for rescission, the instant record don not establish such events.

The buyer also asserts that the district court improperly considered the subsequent dismissal of the condemnation suit This assertion is without merit It is clear from the district court opinion that the district judge mentioned the dismissal in passing without considering it in his decision.

[11] Finally. the buyer argues the district court lacked jurisdiction to grant the sellers' Rule 59(e) motion to assess the broker's commission against the buyer rather than requiring it to be paid from the judgment in favor of the sellers. Originally the district court entered judgment for the sellers for $63,400.00 and directed that the $50,040.00 bmker's commission be paid from that amount All parties thereafter filed various timely post-trial motions. All motions were denied except the sellers' Rule 59(e) motion. The district judge directed:

> However, with respect to the allegations in Paragraph 1 of the Harmon motion filed October 6, 1976, counsel will be heard at Tamps on a motion to alter or amend that portion of the Opinion and Judgment under Rule 59(e), providing such a motion is filed within 10 days of the notice of this Order by the Clerk. as I will be sitting again *at* Tampa from February 14, 1977, through March 4. 1977.

App. at 189.

On the court's direction, the sellers refiled the motion which was subsequently *granted*. The buyer argues the diitict court lacked jurisdiction to hear the motion be--use more than ten days had elapsed from the time of entry of the judgment until &he sellers filed the motion for the second time. The Federal Rules of Civil Procedure require a motion to *alter* or amend a judgment to be served not later than ten days after entry of judgment. F.R.Civ.P. 59(e). The ten day limit cannot be enlarged by the court. F.R.Civ.P. 6(b). The district court did not offend these rules as the sellers initially filed the motion within the ten day period. The district court merely delayed *ruling on the timely motion until it* could hear argument of counsel.

The judgment appealed fmm was correct. It is

AFFIRMED.

GODBOLD, Circuit Judge, dissenting:

I would reverse.

The majority read the district court opinion as holding; (1) Prior to execution of the *original* contract and execution of the "addenda." the possibility of condemnation of the land was so speculative and uncertain that failure by the sellers to disclose this possibility was not concealment of a ma&-al fact; (2) It was *not until* two months after execution of the addenda. when the sellers learned that the flood control district "definitely planned to condemn the property," that the possibility of condemnation was anything more than "pure speculation."

As the majority opinion notes, in Florida matter is material when. if the representee had &en told of it. he would not have entered into the contract *Morris v. Ingraffia*, 18 So.2d 1, 3 (Fla.1944).

In considering materiality. the majority opinion looks first at generalized information about the district and its history of condemnation, and second at particular information obtained by the sellers between May 3 and May 17. Each prong. they conclude. does not rise to the level of materiality. The original contract was signed May 18, 1973. The district court found:

> From the evidence presented, the Harmon brothers knew prior to executing the May 18, 3973. contract that a substantial portion of their property was within the Green Swamp Detention Area and subject to possible future condemnation.

Obviously a seller is not required to call the buyer's attention to the existence of a general governmental power of eminent domain. I agree with the majority that the location of land in a water district that has power to condemn did not alone move this case high enough up the scale to reach the

level of materiality. nor did the history of condemnation activities in the area over the past three decades. But somewhere up the scale the possibility of condemnation becomes sufficiently high that, if know to the seller. he must reveal it. because it is a fact that, in all good sense, would cause the putative buyer to decline to enter into the transaction. There is no magic in the fact that the unrevealed subject matter relates to the governmental power to condemn. No court would hesitate over a case where, for example, before a contract for the sale of land is signed today, the seller knows that suit papers to condemn the land have been prepared *and* signed and will be filed tomorrow. The ordinary buyer does not intend to buy a condemnation suit which brings with it frustrations, delays, expense, attorney fees. the risk of not receiving a fair award, and the possibility that plans for use or development must be changed because of alterations in size, contour or accessibility of the land.[1]

What moves this case up the scale and satisfies materiality is not the generalized kind of information that the district court and the majority describe but the activities of the sellers during May 1973. which demonstrate that they considered the possibility of condemnation highly material. The district court was inexplicably gentle. and this court inexplicably silent. about what occurred. The district court found that the sellers, the Harmons, visited the office of the flood district on May 3. They did not go to talk about football or because they were interested in condemnation as an abstract subject of intellectual interest They were not in pursuit of information about land in general, or overall condemnation policies. or of my other irrelevant information. They went to got information about the extent to which the particular land here involved was below the *mean* annual flood *elevation* and was therefore subject to *condemnation* by the district Let us look at the record.

Clayton Harmon testified that *before* May 18 he had *no* knowledge that the land was subject to possible condemnation suit,[2] had *no* contact with the flood control district[3] and in fact had never heard of the district[4] He testified that he "disclaim[ed] *any* knowledge [prior to May 18] about the District and about the fact that the District might be interested in acquiring this property." (A.43). He placed his first and only trip to the district office as occurring after the contract with plaintiff was signed (A.85). The nature of the conversation that occurred was "To see exactly where they planned on putting this flood control area." (A.87). The person with whom they [the Harmons] talked showed them a map *that* included some of the property involved in this litigation and showed them a curve on it (A.87).

1. Persons with inside information or expertise may buy in anticipation of profiting from condemnation. but there is no evidence that the plaintiff was such a buyer.

2. A.42:

Q. All right sir. At the time that you and your brother executed that contract. did you have any knowledge that the land was subject to a possible condemnation suit?

A. None whatsoever.

* * * * * * *

A.84–85:

Q. Forgive me if it's repetitive. but on the date of May 18. 1973. when you entered into the contract with Mr. Hauben. you didn't have any notice that this property would possibly be condemned by SFWMD?

A. No.

Q. You didn't have any notice or knowledge that SFWMD might be in any way interested in the property?

A. No.

To the same effect, see A.90–91.

3. A.43:

Q. Had you had my contact with the Southwest Florida Water Management District 0" or prior to May 18th. 1973?

A. No. none to my knowledge.

* * * * * *

A.83:

Q In other words. at no time before May 18. 1973, had you had any discussions with anybody connected with the SFWMD that this land might possibly be condemned?

A. No.

4. A.43:

Q All right. Had you heard of that entity—we'll call it the District or SFWMD. if we might—on May 18th. 1973?

A. No.

36

Q. And showing you that curve on the map meant that they were contemplating condemning it?

A. Right

A.87. Clayton Harmon asked why the land was being condemned, and the person with whom they talked explained (A.87–88).

Robert Harmon testified that, before May 18, he had no knowledge of possible condemnation,[5] knew nothing about possible flood control [6] and made no trip to the district office.' He testified that his only visit to the district office was after May 18 (A.93).

Plaintiff introduced the following memo from the files of the district:

May 7, 1973

MEMORANDUM

TO: ROBERT WATSON, DIRECTOR, REAL ESTATE DIVISION

THROUGH: DONALD R FEASTER, ACTING EXECUTIVE DIRECTOR

FROM: JAMES A. MANN, ACTING DIRECTOR, WATER RESOURCES DIVISION

SUBJECT: THE HARMON BROTHERS/ GREEN SWAMP FDA

Robert and Clayton Harmon were in the office Thursday, May 3rd to discuss their acreage (see attached map) which is partially within the Green Swamp FDA. Would you kindly get-in-touch with them to discuss our land acquisition intentions for their property within the FDA. They wish to develop (residential) their property or sell to development interests.

They have asked for a determination of the mean annual flood on their holdings. Malcolm Johnson will be determining this and it will be forwarded by letter about two weeks hence.

JAM:lr

Attachment

Attached to the memo was a sketch map of the Harmons' property including that in question in this case.

In oral testimony, James A. Mann. the director of the district, explained that the mean annual flood elevation is the physical limit to the jurisdiction of the district's development authority. With his recollection refreshed by the May 7 memorandum, Mann testified (A.51):

Q. And does the memorandum refresh your memory as to the subject matter of the conversation that you and the Harmons had on that occasion?

A. Yes. The memorandum talks about property which they discussed with me at that time which was partially in the Green Swamp Flood Detention Area, pan of the Four River Basins Florida Flood Control Project which the District is active in construction along with the Corps of Engineers.

And I'm requesting of Mr. Watson that he get in touch with the Harmon brothers to discuss our land acquisition intentions of their property, which I indicated was partially within the Flood Detention Area. And also I indicated that they wished to develop paren residential close-paren their properties to sell or to sell to development interests: and that they had asked my office and the men who had been working for me to make a determination of the mean annual flood elevation on their properties.

And I indicated that we would be forwarding that information on the

5. A.46'

Q. At the time of the sale of this land to Mr. Hauben, you did not tell him about any possible condemnation of this property, did you?

A. I didn't know anything about it.

6. A.46–47:

Q. And did you tell him [plaintiff] anything about possible flood control?

A. No sir. I didn't know anything about it.

7. A.47:

Q. It's your testimony that you did not make this trip to Brooksville before this contract was signed on May 18, 1973?

A. No sir.

Q. That's your testimony?

A. Yes sir.

flood elevations to them within about two weeks' time.

. . . .

And later he testified further (AS):

Q. And in discussing what was land acquisition intentions, was the possibility of the District acquiring the land discussed with tht two *Mr.* Harmons?

A. Yes, I believe that there was in connection with our flood detention area land acquisition for water storage purposes.

A letter from Mann to Clayton Harmon dated May 22 sheds additional light on events that occurred before the signing *of* the contract. it said:

> An analysis of the date of the U.S. Geological Survey Gaging Sbtion on the Withlacoochee River near Eva shows *that* the mean annual flood state at State Road 33 is approximately 110 feet mean sea level. The mean annual flood occurs on the average of every.233 years. Records have been collected at this station since 1958. From this analysis it appears that about 90% of the property as outlined on the attached map would be under water during the mean annual flood. *As* indicated to you by phone, Mr. Robert Watson of the Southwest Florida Water Management District, Real Estate Division, will be in contact with you in the near future.

Telephone company records disclosed that there had &en a long-distance call fmm the Harmons' office in Winter Haven. Florida, to the district's office in Brooksville, Florida, on May 17, one day before the contract was signed.' Mann testified that, in such a telephone call on May 17, Harmon would have understood that Watson would be in touch with him (Harmon) "to discus the possibility of the District acquiring all or parts *of* the land holdings which he originally discussed with me in the office on May 3rd."

In view of the documentary evidence and the oral testimony I have described, the district court could hardly accept as credible the Harmons' testimony. And it did not. It rejected their testimony and found that they did visit the district office on May 3. But it found that what they learned thtn, and learned later *before* the addenda was signed, was *not* sufficiently "definitive" to cause the information to be material. This focus upon the uncertain nature of what the Harmons *learned* before May 18 ignores the probative force *of what* they *did* before *May* 18. It is obvious that they considered the risk of condemnation to be significant. The matter can be pointed up this way. Assume that on May 18 the Harmons had said to plaintiff: "This land is partially within a flood control district that has the power to condemn land up to the mean flood *elevation.* The location of the mean flood *elevation* and thus the scope of possible condemnation is *of* sufficient concern to us that since we *began* negotiating with you we have visited the district office to inquire about both the possibility of condemnation and the possible scope of condemnation and were in telephone contact yesterday to learn when the information will be forthcoming. *We havt* been shown a map of our land describing the parts contemplated for condemnation. We should hear *from* the district in a few days with more precise description of it." [9] I think the buyer would have said: "If it's that important to the sellers, I think that I will wait and see what the district says." If there is any doubt of the *significance* of what the Harmons learned before May 18, it is dispelled by the *fact* that at trial they denied learning anything and denied the events that gave rise to knowledge on their part. Concealment of the possibility of condemnation, the pursuit of more firm information concerning that possibility, and the concealment of that pursuit, all illuminated by the incredible and non-credible efforts to

8. Robert Harmon denied making the call shown by *the records* and attempted to explain it on the basis there were "a lot of people" in his office who could have made it and other people that come in his office and make phone calls. (A.46).

9. Or. assume a third person had conveyed the same information to plaintiff.

conceal it at trial, add up to materiality before May 18.

Events after May 22 are further evidence of the significance of the possibility of the condemnation and of the Harmons' activities and of what they learned before May 18. On September 12, 1973, after the contract was signed and before the addenda was signed (November 18). a broker purporting to represent the Harmons called the district and protested that he was losing a deal to sell property of the Harmons (to persons other than plaintiff) because a rep resentative of the district (Watson or another person) had told his clients that the district intended to acquire the property. He threatened to sue the district for loss of a $50.000 commission. The district checked and found that preliminary drawing had been completed showing that approximately 65% of the Harmons' land would be taken. The broker was informed of this and told that the acquisition depended upon legislative appropriations in the next year. The broker became angry and threatened to get *an* injunction against interference with his sale. The attorney for the Harmons called the district and was told that 70% to 75% of the Harmons' property would be needed. that the district would negotiate for purchase and faiiing that might file condemnation proceedings around March 1974. The district suggested that the Harmons might be willing to state a purchase price.

On October 5 the attorney *for* the Harmons wrote the district asking exactly what part of the Harmons' land the district was planning on acquiring, and when. None of these events were revealed to plaintiff, although obviously the facts had moved even further up the scale of materiality. On November 18 plaintiff signed the addenda, In December the district replied to the attorney's letter. sending legal descriptions and stating that it hoped to have the appraisals received and completed shortiy. In January 1974 the district wrote the Harmons that it was approving the property for condemnation. None of this was revealed to the plaintiff. Formal motion of condemnation was given to the Harmons in July 1974, and a few days later plaintiff notified the Harmons that he rescinded. For reasons not stated in the record the condemnation suit was dismissed in September 1974.

I find no Florida case on failure to reveal the known possibility of condemnation. In *Hermes v. Anton.* 300 So.2d *46* (3d D.C.A. Fla., 1976), the owner negotiated with plaintiffs to lease property to them. telling them that the state planned to condemn it in a year or a year and a half. Actually a condemnation suit already had teen filed. Plaintiffs leased for a year at $400 per month, moved in and made repairs, and after two months had to move out when notified the property now belonged to the state. Plaintiffs sued for fraud in the inducement. The trial judge granted summary judgment for the owner on the ground plaintiffs had actual notice of the state's intent *to condemn.* The Court of Civil Appeals reversed because there was a genuine issue of material fact whether the owner, at the time the lease was signed, had notice of the date of taking. *Id. at* 47.[10] Thus, the critical issue was not whether suit had been instituted but whether the owner misrepresented *a fact* known to her that was material to the leasee's reasonable expectancy of enjoying the use and occupancy of the prop erty. Here there was concealment of similar, though different, information material to the plaintiffs reasonable expectancy concerning this property.

In *Musgrave* v. *Lucas.* 238 P.2d 780 (Or. 1951). the *seller* of a sand and gravel operation on land next to a river received a warning from the War Department to discontinue removing sand and gravel because it might alter the course of the river. The seller sold without revealing the warning. The Oregon Supreme Court held the *non*-disclosure a sufficient basis for relief based upon fraud. saying:

10. On remand a jury awarded $20.000 punitive damages for fraud and the trial judge remitted down to $1.800. On appeal the court reinstated the award. 346 So.2d 1205 (3d D.C.A. Fla.. 1977).

12 L.Ed.2d 977 (1964). Escobedo was expanded by Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). But neither decision is required, under ordinary circumstances, to be applied retrospectively. Johnson v. State of New Jersey, 354 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

The other assignments of error have all been argued and it is our conclusion that they are either without substance or fail to show harmful error.

Affirmed.

SHANNON, Acting C. J., and HOBSON, J., concur.

William F. HUNTER and Adna A. Hunter, his wife et al., Appellants,

v.

FAIRMOUNT HOUSE, INC., a non-profit Florida corporation, Appellee.

No. 66-31.

District Court of Appeal of Florida. Third District.

Oct. 25, 1966.

Plaintiffs complaint for injunctive and other equitable relief was dismissed with prejudice by the Circuit Court, Dade County, George E. Schulz, J., and plaintiff appealed The District Court of Appeal, Swann, J., held that where compiaint did not obviously appear either to fail to state cause of action or to be so lacking as to be unsusceptible to such amendment as would state a cause of action and where defendant did not file brief on appeal, case would be remanded to permit filing of amended complaint.

Reversed and remanded.

Appeal and Error ⇐773(5)

Where complaint which was dismiss with prejudice did not obviously appel either to fail to state cause of action or be so lacking as to be unsusceptible to su amendment as would state a cause action and where defendant did not fi brief on appeal, case would be remanded to permit filing of amended complaint.

Norman F. Solomon, Miami Beach, for appellants.

David Levine, Miami, for appellee.

Before HENDRY, C. J., and BARKDULL and SWANN, JJ.

SWANN, Judge.

Plaintiffs-appellants filed a seven amended complaint in chancery, with a page exhibit attached, praying for injunctive and other equitable relief. The defendant, Fairmount House, Inc., moved to have the action dismissed for failure to state a cause of action, and the court granted the motion, dismissing the cause with prejudice at cost to the plaintiffs. The plaintiffs now appeal from that order.

Neither the order nor the record on appeal indicates the grounds upon which the dismissal with prejudice was entered, and the appellee has failed to file a brief.

The plight of our court, with its heavy caseload, brings to mind the famous lines of the English poet, Andrew Marvell (uttered under somewhat different circumstances):

"Had we but world enough, and time, This coyness, Lady, were no crime."

Appellate courts in Florida have on many occasions, commented on the failure

EXHIBIT 7

GRAPELAND HEIGHTS CIVIC ASSOCIATION, and Florida East Coast Railway Company, a Taxpayer and Property Owner within the City of Miami, Florida, Appellants,

v.

The CITY OF MIAMI, a municipal corporation, Appellee.

FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Appellant,

v.

The CITY OF MIAMI, a municipal corporation, Appellee.

Nos. 42,517, 42,586.

Supreme Court of Florida.
Oct. 11, 1972.

Rehearing Denied Oct. 31, 1972.
Sept. 19, 1972.

The Circuit Court, Dade County, George E. Schulz, J., validated a bond issue for public park and recreational facilities, and appeals were taken. The appeals were consolidated. The Supreme Court held that even though majority of voters entering voting booths did not approve bonds, where majority of persons voting on bond issue voted for bonds, bonds were approved by voters.

Affirmed.

Roberts, C. J., filed a specially concurring opinion.

1. Continuance ⟹7
Discovery ⟹70

Trial court did not abuse discretion in denying motion for continuance and motion for default relating to failure to answer interrogatories.

2. Trial ⟹106

Trial judge's statement to counsel that particular statute precluded consideration of irrelevant issues did not restrict counsel in asserting any relevant matter under

any other applicable statute. F.S.A. §§ 75.01 et sq, 100.341.

3. Municipal Corporations ⟹918(2)

Where bond ballot stated that it was for the purpose of providing funds for the cost of acquiring and constructing public park and recreation facilities in city, failure to list specifically each capital project on the ballot did not invalidate the bond issue.

4. Municipal Corporations ⟹918(2)

Under the "single purpose rule," two or more unrelated purposes must be separated on a bond ballot, but interrelated purposes in same financing plan may be considered as a single purpose and combined in one bond issue.

5. Municipal Corporations ⟹918(2)

Two objectives of parks and recreational facilities in downtown area and parks and recreational facilities in outlying neighborhood constituted a single purpose and ballot authorizing one vote for or against the objectives was not unlawful.

6. Municipal Corporations ⟹918(4)

Even though majority of voters entering voting booths did not approve bonds, where majority of persons voting on bond issue voted for bonds, bonds were approved by voters. F.S.A. § 100.281.

7. Municipal Corporations ⟹918(2)

Where records before the city commission set forth actual projects, resolution stating purpose of bonds but not stating the projects did not violate constitutional provision limiting municipalities to bonds for capital projects authorized by law and was valid. F.S.A.Const. art. 3, § 6; art 7, § 12.

8. Municipal Corporations ⟹918(2)

Where bond proposal before commission was a public record and spelled out in detail each project, its location and estimated costs and bond issue was highly publicized by public media which fully advised voters on all different aspects of

bond issue, including specific projects, electors were given adequate information on projects for an intelligent exercise of franchise. F.S.A. § 286.011.

David F. Cerf, Jr., Miami, for appellant Grapeland Heights Civic Assn.

William P. Simmons, Jr. of Shutts & Bowen, Miami, for appellant Florida East Coast Railway Co.

Alan H. Rothstein, City Atty., and John S. Lloyd, Asst. City Atty., for appellee.

PER CURIAM:

This cause is before us on direct appeal from a decision by the Circuit Court, Dade County, validating a $39,890,000 bond issue for public park and recreational facilities in the City of Miami. Our jurisdiction in bond validation proceedings attaches under Fla.Const. Art. V, § 4(2), F.S.A. We affirm.

At the outset we note the unusual nature of the appeal of this validation proceeding in that the able state attorney for the Eleventh Judicial Circuit does not contest the validation below as he usually does. The appellants, here on separate appeals are Grapeland Heights Civic Association (hereafter sometimes called "Grapeland") and Florida East Coast Railway ("Railway"). In the trial proceeding Grapeland intervened and participated. Even though Railway did not appear at the trial level, Appellee City of Miami ("City") has not challenged Railway's standing to appeal.

By court order we consolidated these appeals from the same final judgment confirming the bonds. Grapeland and Railway present some different points and arguments, but we shall generally review them together in this opinion.

[1] Initially, Grapeland challenges two procedural orders by the trial judge denying a motion for continuance and a motion for default relating to the City's failure to answer interrogatories. Suffice to say we have carefully examined the record in this regard and find no abuse of discretion.

[2] The next point alleges that the trial court limited the legal issues to matters within Chapter 75, Florida Statutes, F.S.A. This contention centers around the trial judge's statement to Grapeland's counsel that Chapter 75 precludes consideration of irrelevant issues. A close review of the judge's remarks discloses his intent to limit the trial to relevant issues, not to Chapter 75. These comments in no way restricted counsel in asserting any relevant matter under any other applicable statute, e. g., Fla.Stat. § 100.341, F.S.A., mentioned by that counsel.

[3] Grapeland and Railway jointly contest the legality of the ballot format. It is argued that the failure to list specifically each capital project on the ballot invalidates the bond issue. The case of State v. Dade County, 144 Fla. 448. 198 So. 102 (1940), negates this claim.[1] There the bond ballot expressed Dade County's intent to acquire land for park purposes. We held this general objective appearing on the ballot to be sufficient. It adequately informed the voters on the proposition and did not mislead them. The ballot in our case contains similar language. It provides in pertinent part:

> . . . for the purpose of providing funds, together with any other available funds, to pay the cost of acquiring, con-

1. During oral argument counsel for Railway tried to distinguish State v. Dade County, supra, by saying the County passed a detailed resolution in that ... This fact has no bearing on this issue concerning the contents of a ballot.

structing, developing, extending, enlarging, filling and improving public park and recreational facilities in the City of Miami. . . "

Relying on State v. Dade County, *supra*, we see no reason for requiring greater specificity in the ballot under review.

[4, 5] The next argument on ballot format refers to the single purpose rule in bond elections. Appellants attack the ballot on the ground that it combines two unrelated purposes or objectives in a single bond proposition. The "two objectives" arc parks and recreational facilities in the downtown area and parks and recreational facilities in the outlying neighborhoods. According to appellants the voters should be given the opportunity to vote on each objective separately. We disagree. Under the single purpose rule two or more *Ire-&cd purposes must be separated on the ballot.[2] However, *interrelated* purposes in the same financing plan may be considered as a single purpose and can be combined in one bond issue.[3] Applying the latter principle these two objectives for parka and recreational facilities constitute a single purpose. Therefore, the ballot authorizing one vote for or against the two closely related objectives is not unlawful.

[6] We now turn to the question of whether the bonds were actually approved by the voters. The results of the election were a3 follows:

59,385	Entered the voting booths
20,453	Voted for the bonds
15,238	Voted against the bonds

An analysis of these figures indicates that a majority of the electors voting on the bond issue approved the bonds. However, a majority of the voters entering the voting booths did not approve them. The question becomes : Does the term "participating" in Fla.Stat. § 100.281[4] mean voting on the bond issue or entering the voting booth? In State v. City of Miami Beach, 257 So.2d 25, 28 (Fla.1971), Mr. Justice Carlton answered this question by saying: "Participating" means "the actual casting of ballots" on the issue presented. Accordingly, these bonds were approved by the prescribed majority of voters, namely, a majority of those voting on the bond issue.

[7] We shall next consider a constitutional argument strongly urged by Grapeland and Railway as a major contention They jointly challenge the validation on the theory that the City's Resolution 72-15 stating the *purposes*, for the bonds, instead of the *projects*, violates the new constitutional provision (Art. VII, § 12) limiting municipalities to bonds for "capital projects authorized by law." This controversy turns in part upon an interpretation of the constitutional words "authorized by law." Grapeland and Railway believe "authorized by law" alludes to the immediate, enacting city ordinance (law) for the bond issuance and that accordingly the constitutional expression, "capital projects authorized by law," mandates the City to pass an ordinance (law) listing each capital project as *thereby* being *"authorized"*

We *cannot* agree with this analysis for very basic reasons. It is the City's *author-*

2. Antuono v. City of Tampa, 87 Fla. 92.99 So. 324 (1924).

3. State v. City of St. Augustine, 235 So.2d 1 (Fla.1970): State v. Dade County, 39 So.2d 807 (Fla.1949) ; and Stats v. City of Daytona Beach, 160 Fla. 13. 33 So.2d 218 (1948).

4. Fla.Stat. § 100.281: "Approval to issue bonds.—Should a majority of the votes cast in a bond election be in favor of approving the issuance of bonds, then the issuance of said bonds is deemed authorized in accordance with Section 12, Article VII of the State Constitution. In the event a majority of those *participating* did not vote in favor of approval of the issuance of the proposed bonds, then the issuance of those specified bonds is deemed to have failed of approval and it is unlawful to issue or attempt to issue the said bonds." (emphasis ours)

ity ("authorized") TO act which is referred to. as by virtue of the "law" which is its charter (enacted by a law passed by the Legislature) giving it the power to pursue the issuance of the bonds, for lawful ("authorized") purposes ("projects"). The constitutional language does not refer to the wording of the City's enacting resolution. If that were the "law" referred to, it would be a grant to municipalities of a "self-starter" approach to whatever they chose to pursue even though it were not within the cities' authority ("authorized by law"). We think our analysis demonstrates the logic of the interpretation of "projects authorized by law" as being those that the City is empowered to pursue.

Moreover, our constitution supports this reasoning. The import of "authorized by law" must of course be based on the definition of the word "law". Although the term "law" has additional meanings, e. g. the case law, WE are only concerned here with one particular definition. What does the word "law" in our constitution mean? We derive the constitutional meaning from Art. III, § 6. According to this constitutional provision, every law must include the words: "Be it enacted by the Legislature of the State of Florida" From this premise, it necessarily follows that "law" in our constitution means an enactment by the State Legislature (as the enactment into law of the city charter)-not by a City Commission or any other political body.

In this light the City has the authority to adopt any ordinance or resolution within its charter powers and not in conflict with any other legislative requirement or a constitutional prohibition.

We find no requirement, as urged by appellants, that the City must expressly include each capital project in its resolution. The City's resolution articulating the purposes for the bonds as distinguished from the specific projects, buttressed by the record before the City Commission which sets forth the actual projects, is valid. Lengthy, adversary public consideration given to the 39 park designations as the "projects" upon which the bond moneys will be expended, supplements and supports the resolution and specifies these particular park areas as the projects involved, thus meeting objections that these bond moneys "may be spent for airports, astrodomes or other projects."

[8] It is also contended that the electors were not given adequate information on the projects. This argument is equally without merit. The 14-page proposal before the Commission was a public record, spelling out in detail each project (park) by listing its location and estimated cost (thus the precise total of $39,890,000). The public media, utilizing various means of communication and fulfilling its public trust to inform and to report events and community concerns, fully advised the voters on all different aspects of the bond issue, including the specific projects in an illustrated color map diagram and description of the locations of the exact and only projects encompassed in the bond issue.

The presentations in the proposal for the bonds were approved "in the sunshine"[5] by the City Commission, and having been widely publicized by an informed and civic-minded media, as mentioned above, we can only conclude that there was ample public knowledge of the projects involved, sufficient for an intelligent exercise by the public of its very important franchise.

We have completely and thoroughly considered the remaining issues presented by appellants. These arguments are not convincing and do not warrant discussion.

Accordingly, the comprehensive judgment by the prominent Chancellor validating and confirming the bonds is

Affirmed.

5. Fla.Stat. § 286.011 (1971), F.S.A.

ERVIN, CARLTON, BOYD and DEKLE, JJ., concur.

ROBERTS, C. J., concurs specially with opinion.

ROBERTS, Chief Justice (concurring specially):

The City prior to the vote on the bond issue in question widely circulated to the voters the 39 separate park and recreation facilities that they were voting for. Brochures were published which mapped the facilities by name and location over the City. It is logical that the voters who favored the bond issue relied upon this representation by their City.

The bond resolution by the City, however, makes no mention of these 39 facilities and only provides generally that the bonds are:

> "For the purpose of providing funds, together with any other available funds, to pay the cost of acquiring, constructing, developing, extending, enlarging, filling and improving public park and recreational facilities in the City of Miami, there shall be issued the negotiable coupon bonds of The City of Miami, Florida, in the aggregate principal amount Of Thirty-nine Million Eight Hundred Ninety Thousand Dollars ($39,890,000), to be designated 'Public Park and Recreational Facilities Bonds' and to consist of 7,798 bonds of the denomination of $5,000 each."

On this state of the record, I am reluctant to approve the validation because of the very real possibility that a City could proceed in a different fashion than that which was represented and apply the moneys in a way different than that which was advertised. However, public officials are presumed to abide by the law and to carry out their duties and responsibilities. Upon this presumption that the City will, as intended, apply the bond moneys to the projects represented, even though not described in the City's resolution authorizing the bonds, I concur upon this special ground and secure in the knowledge that should they not do so, then appropriate avenues for relief in the courts for such noncompliance would be open.

Joseph D. FARISH, Jr, Petitioner,
v.
LUM'S, INC., a Florida corporation, a/k/a Lum's, Respondent.

No. 41544.

Supreme Court of Florida.

Sept. 27, 1972.

Rehearing Denied Nov. 3, 1972.

Plaintiff brought suit to recover money paid to defendant pursuant to a contract. The Circuit Court, Dade County, Thomas E. Lee, Jr., J., granted summary judgment for plaintiff on ground that defendant's answers were not properly filed. The District Court of Appeal, 251 So.2d 338, rcvtrsed and mnandtd to permit filing of properly executed answers, and plaintiff filed petition for writ of certiorari. The Supreme Court held that in absence of facts showing an abuse of discretion, trial court's decision refusing to excuse defendant's noncompliance with rule requiring answers to a Request for Admissions be filed within 20 days, sworn to and signed by defendant must be affirmed.

Cause remanded with directions.

Ervin, J., and Rawls, District Court Judge, dissented.

For order after remand see 269 So.2d 428.

1. Appeal and Error ⟹961

Trial court, not the appellate court, has duty of determining whether inadvertence is sufficient to excuse failure to Comply with procedural rules.

EXHIBIT 7A

NESBITT, J. (dissenting):

I respectfully dissent.

The substance of the referendum ballot at issue specifically provides "that the Board of Dade County Commissioners shall be the governing body of the Metro-Dade Fire Rescue Service District." These words unambiguously set out the chief purpose of the proposal as required by section 101.161(1), Florida Statutes (1987). A second ballot authorizes the electorate to select representatives by districts to the Fire Rescue Service hoard. The separate positioning of these ballots in addition to the clear and unambiguous wording of each should not mislead an informed voter of average intelligence as to the consequences of his vote. *See Hill v. Milander,* 72 So.2d 796, 798 (Fla.1954). I would affirm the order permitting tabulation of the referendum ballot

METROPOLITAN DADE COUNTY. Appellant,

v.

Dexter LEHTINEN, Appellee.

No. 88-449.

District Court of Appeal of Florida, Third District

March 3, 1988.

Form of proposed ballot question was held to be improper by the Circuit Court for Dade County, John A. Tanksley, J., and county appealed. The District Court of Appeal held that ballot question was both affirmatively misleading and in violation of statute and charter provision requiring clarity of language.

Affirmed.

Elections ⇐175

Proposed ballot question seeking approval of numerous home charter revisions was affirmatively misleading and did not satisfy either statute or charter provision requiring clarity of language where, for example, it referred to revisions of "procedures" for initiative, referendum and recall, while actual proposal involved extensive substantive changes in recall process. West's F.S.A. § 101.161(1).

Robert A. Ginsburg, County Atty., for appellant.

Dexter Lehtinen, Mitchell Katz, Miami. for appellee.

Before SCHWARTZ. C.J., and HENDRY and NESBITT, JJ.

PER CURIAE.

We agree with the trial court that the proposed ballot question in issue here[1] is both affirmatively misleading in critical respects,[2] see *Askew v. Firestone,* 421 So.2d 151 (Fla.1982), and, even more clearly, does not satisfy the requirement of section 101.161(1), Florida Statutes (1987), that the "substance of . . . [the] measure . . . be printed in clear and unambiguous language," nor that of Article 7, Section 7.01(4)(b) of the Metropolitan Dade County Home Rule Charter that a proposition be

1. The question provides:

HOME RULE CHARTER REVISIONS

SHALL THE DADE COUNTY CHARTER BE AMENDED TO PROVIDE FOR AMONG OTHER THINGS, REVISIONS TO: THE CITIZENS BILL OF RIGHTS; THE COUNTY COMMISSION'S POWERS, PROCEDURES AND ELECTIONS; THE ORGANIZATION OF THE COUNTY'S ADMINISTRATION; THE TRANSFER OF MUNICIPAL EMPLOYEES; THE PROCEDURES FOR CREATION AND ABOLITION OF MUNICIPALITIES; THE PROCEDURES FOR INITIATIVE, REFERENDUM AND RECALL; THE PROCEDURES FOR THE AMENDMENT OF THE CHARTER; AND VARIOUS TECHNICAL AND PROCEDURAL MATTERS?

YES

NO --

2. For example, the question refers to revisions of "the *procedures* for initiative, referendum and recall" [e.s.], *while the actual proposal* involves extensive substantive changes in the grounds and availability of the recall process.

submitted "in such manner as provides a clear understanding of the proposal."

We fmd no *merit* in the *county's* argu*ment* that the action is barred by laches.

Affirmed.[3]

1

David P. LEONARD, **Appellant,**

v.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION, and General Sports Venturer, Inc., Appellees.

No. 862433.

District Court of Appeal of Florida. Third District

March 22, 1988.

An Appeal from Florida Unemployment Appeals Commission.

David P. Leonard, iu pro. per.

John D. Maher, Tallahassee, for Florida Unemployment Appeals Com'n.

Kreeger & Kreeger and Julian H. Kreeger, Miami, for Gen. Sports Ventures, Inc.

Before SCHWARTZ C.J., and BARKDULL and FERGUSON. JJ.

PER CURIAM.

Affirmed. *Applegate v. Barnett Bank of Tallahassee,* 87'7 So.2d 1156 (Fla.1979); *Steinhauer v. Steinhauer,* 336 So.2d 665 (Fla. 4th DCA 1976).

3. Rehearing is dispensed with.

2

Raymond JEAN, **Appellant,**

v.

Samuel E. LINDSAY, Jr.. **Appellee.**

No. 87-2249.

District Court of Appeal of Florida, Third District.

March 29, 1988.

An Appeal from the Ciit Court for Dade County; Leonard Rivkind, Judge.

Ronald D. Poltorack, Fort Lauderdale, for appellant

Mark J. Feldman. Miami, for appellee.

Before SCHWARTZ, C.J., and HENDRY and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed. Set *Magazine* v. *Bedoya* 475 So.2d 1035 (Fla. 3d DCA 1985); *Bayview Tower* Condominium Association, *Inc. v. Schweizer,* 475 So.2d 982 (Fla. 3d DCA 1985); *Slomowitz v. Walker,* 429 So.2d 797 (Fla. 4th DCA 1983); *Sternberg v. Barnett Bank of Fort Lauderdale,* 400 So.2d 200 (Fla 4th DCA 1981); *John Crescent, Inc. v. Schwartz,* 382 So.2d 383 (Fla. 4th DCA 1980); *In re Trust of Aston,* 245 So.2d 674 (Fla. 4th DCA 1971).

3

GENERAL DEVELOPMENT CORPORATION, Petitioner.

v.

Frank A. LOVE and Christina Love, Respondents.

No. 88-27.

District Court of Appeal of Florida, Third District.

April 12, 1983.

On Petition for Writ of Certiorari to the Circuit Court of Dade County; Frederick N. Barad, Judge.

EXHIBIT 8

STATE of Florida and the Taxpayers, Property Owners and Citizens of Said Special Tax School District No. 1 of Dade County, Florida, Including Nonresidents Owning Property or Subject to Taxation Therein, Appellants,

v.

SPECIAL TAX SCHOOL DISTRICT NO. 1 OF DADE COUNTY, Florida, Appellee.

Supreme Court of Florida.
Division A.

March 26, 1956.

Special tax school district filed petition to validate school bonds. The Circuit Court, Dade County, Marshall C. Wiseheart, J., entered decree validating proposed bonds and all proceedings incident to validation and the state appealed. The Supreme Court, Terrell, J., held that re-registration of freeholders provided for by Special Act, duly passed, was lawful means to determine whether majority of freeholders in special tax school district participated in election to approve bonds.

Affirmed.

1. Schools and School Districts ⚷97(4)

Although ballots used for school bond election did not conform to requirements of statute relating to paper ballots that ballots contain words "For Bonds" and "Against Bonds", where election was held by voting machine and ballots used complied with requirements of statute relating to machines, election was in compliance with law. F.S.A. §§ 10127, 236.40.

2. Elections ⚷180(1)

The test as to legality of ballot is whether or not voters were afforded opportunity to express themselves fairly and did in fact exercise the privilege.

3. Schools and School Districts ⚷97(4)

Re-registration of freeholders provided for by special act, duly passed, was lawful means to determine whether majority of freeholders in special tax school district participated in election to approve bonds. Sp.Acts 1955, c. 30682; F.S.A. Const. art. 9, § 6.

4. Schools and School Districts ⚷97(1)

Special tax school district was authorized to issue bonds for school purposes without providing for compliance with constitution requiring segregation and impartial provision for both white and colored children. F.S.A. 236.01 et seq.; F.S.A. Const. art. 12, § 12; art. 12, § 17.

George A. Brautigam, Miami, and John S. Lloyd, Tallahassee, for appellants.

Edward Boardman of Boardman & Bolles, Miami, for appellee.

TERRELL, Justice.

This appeal is from a final decree of the Circuit Court, Eleventh Judicial Circuit of Florida, validating school bonds of Special Tax School District No. 1, Dade County, in the sum of $34,500,000. Special Tax School District No. 1 comprises all of Dade County. At the request of the Board of Public Instruction, dated August 16, 1955, the Board of County Commissioners, pursuant to Chapter 30682, Special Acts of 1955, called for re-registration of the freeholders in the district. The registration books were opened from September 7, 1955, through October 11, 1955, at the place designated, notice thereof having been published in the Miami Herald and the Miami Daily News September 1, 8, 15, 22, 29 and October 6, 1955.

September 7, 1955, following receipt of a resolution and petition from the Board of Trustees of the District, the Board of Public Instruction of Dade County, in compliance with Sec. 236.37, Florida Statutes 1955, F.S.A., adopted a resolution listing projects determined by it to be essential to the school program in the district. The Board of Public Instruction also determined that the said bond issue was essential to provide and complete said projects and meet the school needs of the district. The resolution of the Board of Public Instruc-

tion and the bond issue were approved by the State Superintendent of Public Instruction September 12, 1955, and on September 14 the Board of Public Instruction adopted a resolution confirming its resolution of September 7, 1955, providing for holding of the frecholdcrs election to approve issuance of said bonds. It appears that 77,254 frceholdcrs registered and qualified to vote in said election which was held October 25, 1955. It further appears that 66,082 frceholders voted in said election; that 60,854 voted to issue said bonds and 5,228 voted against the bond issue.

The resolution of. September 7, 1955, shows that the indebtedness of the district, including the bonds so authorized, will aggregate $51,946,000, which is less than 20 percent of the assessed valuation of the taxable property within the district. The petition to validate was duly filed, notice and order to show cause were duly entered, served and published. Answer was seasonably filed by the state attorney and at final hearing, January 10, 1956, an order was entered vaiidating the proposed bonds and all proceedings incident to validation. This appeal is from the validating decree.

[1, 2] It is first contended that the bond election was not held in compliance with law because the ballot used did not conform to the requirements of Sec. 236.40, Florida Statutes, F.S.A.

The portion of Sec. 236.40, Florida Statutes, F.S.A., relied on to support this contention is, " . . . the form of ballots for such election shall be: 'For Bonds' or 'Against Bonds.' " It appears that Sec. 236.40 has reference to paper ballots to be voted by hand whili the election in question was held by voting machine and the ballots used were defined and prepared as required by Sec. 101.27, Florida Statutes, F.S.A. The resolution calling the bond clection provided :

> "Section 6. That the ballot used at said election shall be that portion of the cardboard or paper or other material within the ballot frames of the voting machines which shall contain a statement of the question submitted, and said voting machines shall provide facilities for qualified electors who are frccholdets to vote for or against the issuance of said bonds as they may choose. Said ballot as it appears within the ballot frames of the voting machines shall be in substantially the following form:
>
> "Official Ballot
> Bond Election October 25, 1955
> Special Tax School District No. 1
> of Dade County, Florida
>
> Yes No
>
> Shall bonds of Special Tax School District Ko. 1 of Dade County, Florida. be issued at one time or from time to time in the aggregate principal amount of $34,500,000 for the purposes and to mature as stated in the resolution adopted on September 7, 1955, by The Board of Public Instruction of Dade County, Florida?
>
> "Section 7. Those desiring to vote for the issuance of said bonds are instructed to turn down the pointer or lever over the word 'Yes' within the ballot frame containing the statement of the question relating to said bonds, and those desiring to vote against the issuance of said bonds arc instructed to mm down the pointer or lever over the word 'No' within the ballot frame containing the statement of the questions relating to said bonds."

A similar question was before the court in State v. City of Tallahassee, 142 Fla. 476, 195 So. 402, and was decided contrary to the contention-of appellants. In fact we think this case coaciudes the point. The test as to legality of the ballot is whether or not the voters were afforded an opportunity to express themselves fairly and did in fact exercise the privilege. A reading of the returns from the bond clection quoted in this opinion can leave no doubt that this was done.

[3] The second point with which we arc confronted is whether or not re-registration of freeholders required by Chapter

30682, Special Acts of 1955, was a lawful means to determine that a majority of freeholders in Special Tax School District No. 1, Dade County, participated in the election to approve said bonds as required by Section 6, Article XX, Constitution of Florida, F.S.A.

The record discloses that Chapter 30682, providing for re-registration, was duly passed, that registration for the bond election was regularly conducted and that the proper notice and advertisement were given. The decree validating the bonds found that these things were done, that the freeholder electors were repeatedly urged to register to vote, and that no freeholder was denied the right to vote in said election, that no one complained to the State Attorney or any one else that he was denied the right to vote in said election and that no one ever heard a rumor of any freeholder being denied the opportunity to vote. The County Superintendent of Public Instruction and the Supervisor of Registration verified the fact of intensively advertising the election and the number of qualified freeholders who were registered and took part in the election. A very similar question was presented and considered in State v. County of Sarasota Fla., 62 So.2d 708, and we think the opinion in that case concludes the question here.

[4] The third and last point presented is whether or not Special Tax School District No. 1, Dade County, is authorized by Chapter 236, Florida Statutes, and Section 17, Article XII, Florida Constitution, F.S.A., to issue the proposed bonds for the school purposes indicated without providing for compliance with *Section* 12, Article XII, Constitution of Florida, F.S.A.

Chapter 236, Florida Statutes 1955, F.S.A., defines the procedure for issuing special tax school district bonds. It is shown that the required procedure was followed in this case with reference to segregated schools. In voting for the bonds the freeholders had in mind the extreme necessity for the contemplated improvements as disclosed by the record. In our view the segregation question has no place in this discussion or bond issue. The question before the voters was one of urgent school necessity and the qualified electors voted for the bonds to provide better school facilities for that reason and no other. The pressing necessity for better school facilities was revealed by the record and the bond issue was overwhelmingly approved on that basis. Any reasonable pattern for desegregation that may be approved in the future will still require more and better school facilities which can be taken care of when that contingency arises. To drag it into the picture at this time is beside the question. Board of Public Instruction v. State, Fla., 75 So.2d 832; Matlock v. Board of County Commissioners, Okl., 281 P.2d 169.

The decree appealed from is therefore affirmed.

Affirmed.

DREW, C. J., THORNAL, J., and PRUNTY, Associate Justice, concur.

Louis M. HUNTER and Florence M. Hunter, his wife, Appellants,

v.

UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation, Appellee.

Supreme Court of Florida.
Special Division A.
March 28, 1956.

Action on fire policy. The Circuit Court for St. Johns County, George William Jackson, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Drew, C. J., held that violation of policy agreement to take out no ad-

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with a dangerous weapon, to allege the ownership of the property therein described as the object of the robbery, or in lieu thereof that the owner thereof was unknown. as required under that decision. Such ownership, when alleged, may consist of a general or special property in the subject-matter, but a complete omission of all allegation of ownership cannot be upheld as against a motion to quash duly and timely interposed in a case of this kind.

Reversed.

WHITFIELD, P. J., and BROWN and DAVIS, JJ., concur.

ELLIS, C. J., and TERRELL and BUFORD, JJ., concur in the opinion and judgment.

BROWN, Justice (concurring).

While I dissented in the Pippin Case, that case settled the question involved here, unless and until there is additional legislation on the subject I therefore concur.

STATE v. CITY OF WEST PALM BEACH.

Supreme Court of Florida, Division B.

Jan. 11, 1937.

1. Municipal corporations ⇐913

General Refunding Act and special law *held* to authorize city to issue and exchange refunding and funding bonds to *refund* and fund bonds. judgments on bonds. and city's floating debt (Acts 1931. Ex.Sess., c. 15772; Sp.Acts 1933, c. 16758, §§ 70–98).

2. Municipal corporations ⇐931

Refunding bonds and interest certificates proposed to be issued by city to be exchanged for principal and interest claims of bonded debt held not invalid under homestead exemption provisions, enacted subsequent to issuance of 'original bonds. because of provisions obligating city to levy taxes upon homesteads for payment, since instruments constituted extension of original contract, and bondholders were entitled to have tax levy made upon property as authorized under original bonds (Acts 1935. c 17060; Const. art 10, § 7, as added in 1934).

3. Municipal corporations ⇐931

Funding bonds proposed to be issued by city to fund floating debt held invalid under homestead exemption provisions because of provisions in instruments and ordinances authorizing their issuance obligating city to levy taxes upon homesteads for payment, where there was no contract prior to enactment of exemption provisions or levies to pay debt (Acts 1935. c 17060; Const. art. 10, § 7, as added in 1934).

4. Municipal corporations ⇐919

City, acting under General Refunding Act. *held* authorized *to* obligate itself by terms of refunding ordinances to levy tax in one fiscal year sufficient to provide payment of interest due on refunding bonds in next fiscal year and on old bonds which were to be refunded, even though terms of refunding bonds and ordinances authorizing their issuance violated provisions or statute providing for payment of interest and sinking fund on bonds or other past-due obligations of city by means of past-due obligations (Acts 1931, Ex.Sess., c. 15772; Acts 1935, cc. 16838, 16965, 17401).

5. Municipal corporations ⇐918(2)

Refunding bonds proposed to be issued by city *held not* invalid because of inconsistency in maturity dates stated in proposition submitted at election called to approve bonds and in ordinance authorizing their issuance, where proposition met essential statutory requirements, and statute does not require proposition to state maturity dates since information in proposition as to maturity dates was surplusage, and inconsistency was immaterial (Acts 1931, c. 1471[illegible] 11).

6. Municipal corporations ⇐966(4)

Territory annexed to and consolidated with city under statute *held* not entitled to claim immunity from taxation to refund and fund city's bonded and floating debt, [illegible] tions of which were incurred prior to annexation, since Legislature has plenary power, under Constitution, to abolish existing corporations and to create new corporations and, under statute, to make all former corporation's outstanding obligations new corporation's obligations and to authorize levy of tax on all taxable property within corporate limits available for payment

obligations (Sp.Acts 1933, cc. 16758, 16759; Acts 1935. c. 16851; Const. art 8, § 8).

Appeal from Circuit Court. Palm Beach County; C. E. Chillingworth, Judge.

Petition by the City of West Palm Beach against the State to validate certain refunding bonds. From a final decree of validation, the State appeals.

Decree reformed and, as reformed, affirmed.

J. W. Salisbury, State Atty., of West Palm Beach, foi the State.

Paul W. Potter, City Atty., of W&t Palm Beach, for appellee.

BUFORD, Justice.

The appeal is from a final decree validating certain refunding bonds proposed to be issued by the City of West Palm Beach in Palm Beach county, Fla

The City of West Palm Beach was established by chapter 6411, Acts 1911. From time to time various charter acts were passed by the Legislature of Florida until finally chapter 16351 was enacted by the Legislature of 1935. That act consolidated the governmental functions which had been theretofore delegated to the City of West Palm Beach and the District of West Palm Beach by chapters 16758 and 16759, Sp. Acts 1933, respectively. Undtr chapter 16551, Acts 1935. the present municipality acquired all the rights, powers, and privileges of the district theretofore existing, and all the rights, powers, privileges, and duties of the city theretofore existing. and all the debts and liabilities of the district became and are now the debts and liabilities of the city. All of the valid judgments rendered against the district or against the Town or City of West Palm Beach as theretofore existing became judgments against the city so created by the latter att and the city may levy taxes against such properties within the city as either the district or the former city could have levied.

From and after January 1, 1912, the City's predecessors issued some forty-six separate series of bonds of which there is now outstanding for principal the amount of $15,456,500, of which the sum of $4,493,500 has been reduced to judgment and $10,693,500 is represented by bonds either matured or unmatured which have not been reduced to judgment. Interest upon this bonded debt which accrued in the fiscal year ending September 30, 1933, and prior fiscal years in the sum of $800,000 is outstanding and unpaid

The predecessors of the present city incurred a floating debt in the sum of $657,578.86. Of this amount $347,355.16 has been reduced to judgment and $310,223.70 is represented by a mortgage, certificates of indebtedness and paving lien certificates. There is also due on the last above-mentioned items for interest which accrued in the fiscal year ending September 30, 1933, and prior fiscal years, the sum of $25,000.

Negotiations to refund and fund the indebtedness of the City of West Palm Beach culminated in the enactment of two ordinances by the City of West Palm Beach on the 26th day of August, 1936, authorizing a readjustment of the entire indebtedness of said city. The substantial difference between the two ordinances is that one ordinance provides for the issuance and exchange of refunding bonds for an amount equal to 75 per cent. of the principal amount of the outstanding bonded debt of said city and the refunding of interest which accrued during the fiscal year ending September 30, 1933. and prior fiscal years, by the issuance and exchange of nonnegotiable. noninterest-bearing certificates of indebtedness to an amount equal to the amount of interest to be thereby refunded; while the other ordinance provides for the issuance and exchange of refunding bonds for an amount equal to 75 per cent. of the principal amount of the floating debt of said city and the funding of interest which accrued during the fiscal year ending September 30. 1933. and prior fiscal years, by the issuance and exchange of nonnegotiable. noninterest-bearing certificates of indebtedness of said city for an amount equal to the interest claims to be thereby funded and extended

The interest rate upon the refunding and funding bonds commences at 2 per cent. for the period beginning August 1, 1941. and gradually increases until it reaches 5 per cent. at August 1, 1956. to August 1. 1961, the dares of maturity of said refunding and funding bonds. The interest contemplated is at the average rate of 3.5 per cent. as compared to 6 per cent. obtaining as to the indebtedness to be refunded and funded.

It is also observed that the ordinances disclose that 25 per cent. of the face amount of the certificates of indebtedness to be issued and exchanged to each holder of an interest claimed thereby refunded or funded

and extended shall be due and payable on or before September 1st in each of the years 1937. 1938. 1939, and 1940 at 10 per cent. of the face amount thereof.

It is shown that, by the carrying out of the refunding and funding set-up, large amounts of money will be saved to the taxpayers of the municipality. The figures of are not material.

For the payment of the refunding and funding bonds and interest thereon and the above-mentioned 'certificates of indebtedness, the full faith and credit of the taxing power of the city is irrevocably pledged.

The bonds contain the following provisions:

"This bond is issued by said City under authority of and in full compliance with the Chapter 15772, General Laws of Florida, Acts of 1931 [Ex.Sess.], and with Sections 70 to 98, both inclusive of chapter 16738, Laws of Florida. Acts of 1933 [Special], and pursuant to an ordinance duly passed and adopted by the City Commission of said City on the —— day of —— A. D. 1936, and is issued 'for the purpose of funding a like amount of valid subsisting debt of said City for the payment of which the City was obligated to levy taxes upon all property within its present territorial limits which was subject to taxation under the constitution and laws of Florida, as they existed immediately prior to November 6, 1934.'"

By the terms of the ordinances they became effective only when approved by a majority of the votes cast in an election, in which a majority of the freeholders who were qualified electors residing in said city participated, to be held in the manner prescribed by law. By proper resolution the city commission called and caused to be held the election. The election was held on October 6, 1936. The record shows that at that time there were 3,076 freeholders who were qualified electors residing in the city who were entitled to participate in said election. A total vote of 2,046 votes were cast upon each of the propositions submitted to the electors in said city and who were qualified to participate in said election. 1,973 votes were cast in favor of the issuance and exchange of the refunding bonds. 1,946 votes were cast in favor of the issuing of certificates of indebtedness with which to refund interest on refunding bonds which accrued on bonds on or before September 30, 1933. 1,934 votes were cast in favor of the issuance and exchange of funding bonds and 1,926 votes were cast in fav of the issuance of certificates of indebte ness with which to fund the interest wh had accrued on or before September 1933, on the principal outstanding floati indebtedness of the city.

It, therefore. appears that the issuan the refunding bonds, the funding bond and interest certificates to cover intere on each class of indebtedness was approv and authorized by the vote of the freehol ers. The result of the election was dul declared and on October 22, 1936, appelle filed its verified petition seeking validatio of the securities involved. On the same d the circuit judge entered an order agains the State of Florida requiring it to appea on the 17th day of November, 1936, and o same date the clerk of the circuit cou issued a citation to the citizens and taxpay ers requiring them to appear on November 17, 1936, to show cause why the refunding and funding bonds and certificates of indebtedness should not be validated and confirmed On October 26, 1936, the State's attorney accepted service of copy of the petition and order of the court On November 17th the State's attorney filed answer on behalf of the State of Florida to the petition for the validation of the securities involved therein.

The petition and answer raised questions which were presented to the court on November 17. 1936, and on the 18th day of November, 1936, the circuit judge entered a final decree nunc pro tunc as of November 17th overruling the objections raised by the answer and validating and confirming the refunding and funding bonds and certificates of indebtedness, and from that order this appeal is taken.

The appellant in the brief filed here states 18 questions for our determination. We find, however, that the appellee has more concisely stated the matters which we must determine in 5 questions.

The questions thus presented are as follows:

"First Question. Does the City of West Palm Beach in Palm Beach county, Florida, have the power and authority under chapter 15772, Laws of Florida, Acts of 1931, and under section 70 to 98 both inclusive, of chapter 16738, Special Laws of Florida, Acts of 1933 to issue and exchange refunding and funding bonds of said city for the purpose of refunding and funding bonds, judgments upon bonds and the floating indebtedness of said city?

"Second Question. Are the refunding and funding bonds and certificates of indebtedness proposed to be issued by the City of West Palm Beach and to be exchanged for principal and interest claims respectively of the bonded and floating debt of said city, invalid. because by the terms and provisions contained therein and in the ordinances authorizing their issuance,, the City of West Palm Beach is obligated to levy taxes for the payment thereof upon all homesteads located within its territorial limits, notwithstanding the provisions of section 7, article 10 of the Constitution of Florida and chapter 17060, Laws of Florida, Acts of 1935, specifically exempting from taxation homesteads up to the valuation of five, thousand dollars ?

"Third Question. Is the City of West Palm Beach authorized to obligate itself in and by the terms of refunding and funding ordinances to levy a tax in one fiscal year sufficient to provide for the payment of interest due on the refunding and funding bonds in the next fiscal year and where the terms and provisions contained therein and in the ordinances authorizing their issuance violate the provisions of chapters 16838, 17401 and 16965, Laws of Florida, Acts of 1935'

"Fourth Question. Arc the certificates of indebtedness proposed to be issued and exchanged for interest claims upon the bonded and floating debts of the City of West Palm Beach, invalid, because the ordinances authorizing the issuance of said certificates Provide that twenty five per cent of the face amount thereof issued to each holder of an interest claim to be thereby refunded and extended shall be due and payable on or before the first day of September in each of the years 1937, 1938, 1939 and 1940 at ten per cent of the fact amount thereof, while the propositions submitted to the qualified freeholders of said city in an election called for the purpose of approving or disapproving said certificates, stated that said certificates should be redeemable at ten per cent of the face amount thereof on or before four years after date thereof?

"Fifth Question. Can the territory annexed to the City of West Palm Beach by chapter 7254, Laws of Florida, Acts of 1915 [Special] ; chapter 7722, Laws of Florida. Acts of *1917* [Special] ; chapter 9112. Laws of Florida, Acts of 1921 [Special] ; chapter 9945. Laws of Florida, Acts of 1923 [Special]; chapter 11797, Laws of Florida, Acts of 1925, Extraordinary Session ; chapters 16758, and 16759, Laws of Florida, Acts of 1933 [Special], which were consolidated and merged pursuant to chapter 16851, Laws of Florida, Acts of 1935, now claim immunity from taxation to refund and fund respectively the bonded and floating debts of said city, portions of which were incurred prior to such annexation ?"

[1] The first question was answered in the affirmative by the circuit court and such ruling is supported by the opinions and judgments of this court in the case of State v. Board of Public Instruction, 170 So. 602, and also in the case of State of Florida and G. I. Ridgeway v. City of Daytona Beach, 171 So. 814, filed at this term of the court and not yet reported [in State report]. It is not needful for us to say more than has been said in those two opinions.

[2, 3] The second question was answered by the lower court in the negative and, in so far as it applies to the refunding bonds and certificates for accrued interest thereon, that was holding in line with the decisions of this court in the case of State v. City of Clearwater, 169 So. 602, not yet reported in Florida Reports, and in Folks v. Marion County, 121 Fla. 17, 163 So. 298, 102 A.L.R. 659; Fleming v. Turner, 122 Fla. 200, 165 So. 353. The opinions and judgments in those cases were grounded upon the postulate that tbc rtfunding bonds constituted a continuation and extension of the original contract and that, therefore, the bondholders were entitled under the contract to have the tax levy made upon property as was autboriztd when the original bonds were issued. This condition, however, does not apply to the funding bonds issued *to* fund a floating debt as to which there was no prior contract for tax levies, These bonds and interest certificates constituted a new and independent contract for the payment of which the levy of a tax upon homcsttads is prohibited under section 7, article 10, of the Constitution (as added in 1934). Certainly, the municipality would not be authoriztd to issue these funding bonds and interest certificates to provide for the payment *of* accrued interest on the floating debt for which such funding bonds are to be issued without having been thereunto authorized by an election such as was held in the instant case; but, even the authority which accrued and became complete by the result of such an election would not authorize the municipality to tax homesteads. which arc made exempt by the provisions of section 7. article 10, of the Constitution, to raise funds with which to pay such obligations.

[4] The third question was answered by the lower court in the affirmative and that holding, in so far as it applied to the obligation conraincd in the refunding bonds and the payment of interest due on refunding bonds and interest which had become due and remained unpaid on the old bonds which arc to be refunded, was in line with the opinions and judgments of this court in the cases of State v. City of Pensacola, 123 Fla. 331. 166 So. 851, and State v. City of Clearwater, 169 So. 602. It is not necessary for us to here say more on this subject than was said in the case of State v. City of Clearwater, supta.

[5] The fourth question was answered by the court below in the negative. With the limitations heretofore stated that question was properly answered. While it is true that the provision of the ordinance3 authorizing the issuance of certificates of indebtedness for the purpose of refunding interest and authorizing the issuance of certificates of indebtedness for the purpose of funding interest was not followed verbatim in submitting those two questions at the election, the differences appearing are immaterial. Section 11 of chapter 14715, Laws of Florida, Acts of 1931, is as follows:

"Section 11. At said election, the ballots used shall be a plain white piece of paper with such description of the issuance of bonds to be voted on, printed thereon as the authority calling the election may prescribe. A separate statement of each issue of bonds sought to be approved, giving the amount thereof and the interest rate thereon, together with such other details as may be deemed necessary to properly inform the electors, shall be printed thereon in connection with the question 'For Bonds' and 'Against Bonds.' Direction to the voter to express his choice by making an 'X' mark in the space to the right or to the left of said question shall be stated on such ballot"

It will be observed that this provision of the statute does not require the proposition submitted to the voters to designate the maturity date of the obligations therein referred to. The act requires that the proposition to be submitted to the voters should specify the amount of the issue of said certificates and the interest rate thereon. It affirmatively appears that the voters were apprised of the fact that two issues of certificates. one in the aggregate amount of $800,000 and the other in the aggregate amount of $25,000 were to be voted upon, and that such certificates of indebtedness would not beat interest. These were the only two essential requirements to bc met and the additional information as to maturity dates was mere surplusage. Therefore, inasmuch as it affirmatively appears that the obligation of the taxpayer will not be increased by reason of any inconsistency in the stated maturity dates, and as no fraud is shown, we hold that this inconsistency does not affect the validity of the obligations. In McQuillin on Municipal Corporations, vol. 5, pp. 1021-1023, the author says:

"In the absence of fraud, or attempt to mislead the voters, or express declaration in the law to the contrary. mere irregularities which do not ptcvcnt a full and free expression of opinion of the will of the electors, and change the result will not invalidate the election. But a disregard of mandatory requirements, or matters of substance will vitiate the election and preclude valid contemplated action thereunder. * * *

"All presumptions arc in favor of the validity of the election, and as said above, it will not be vitiated by mere irregularities. Thus, mete irregularities in the ordinance calling the election do not invalidate the bonds, especially where the statute so provides. Furthermore, a bond election will not be held invalid on account of a disregard of merely directory provisions of election laws, where such a disregard would not render an election for municipal officers invalid. Likewise, the fact that the manner of making municipal election returns has not been prescribed by ordinance, as required by statute, does not invalidate the election, where there was a fair canvass and declaration of the result of the election and no fraud is claimed. So the mere fact that the ballots do not state the purpose of the expenditure is not fatal where there is no possibility or claim that any voter was misled or prejudiced by the mistake. * * *"

The cases of State v. Andresen, 75 Or. 509, 147 P. 526; City of Perry v. Davis, 97 Kan. 369,154 P. 1127; City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174. P. 217, 5 A.L.R. 519, and State ex rcl. Utah Savings & Trust Co. v. Salt Lake City et al., 35 Urah, 25, 99 P. 255, 18 Ann.Cas. 1130 support this text.

[6] The fifth question was answered in the negative by the court below and properly so.

The City of West Palm Beach acquires its authority under the provisions of chapter 16851, Acts 1935, when read in pari materia

with chapters 16758, and 16759, Sp.Acts 1935, the result of which in this regard has been heretofore stated. Regardless of any former legislative enactments, the Legislature possesses plenary power under section 8, article 8, of the Constitution to abolish existing corporations and create a new corporation and by the act make all outstanding obligations of the former corporation the obligations of the new corporation and to authorize the levy of tax on all taxable property within the territorial limits of the new corporation available for the payment of such obligations. See State v. City of Miami, 101 Fla. 292, 134 So. 608; State v. City of St Petersburg, 106 Fla. 742, 144 So. 313, 671, 145 So. 175; State v. City of Clearwater, supra.

We may say here that the-record shows that all of the territory now included in the City of West Palm Beach was by legislative act brought within the corporate limits Prior to the adoption of the homestead amendment on November 6, 1934, now section 7, article 10, of the Constitution So, we hold that the decree appealed from should be affirmed, except in so far as it validates the provisions of the funding bonds hereinbefore referred to and the certificates of indebtedness to procure funds with which to pay the interest which had accrued prior to September 30, 1933, on the floating debt, whereby the same appear to pledge tax to be levied on homesteads as described in section 7, article 10, of the Cons&ion, and we direct that the decree should be reformed so as to eliminate this provision. When so reformed, the decree will stand affirmed.

So ordered.

ELLIS, P. J., and TERRELL, J., concur.

WHITFIELD, C. J., and BROWN and DAVIS, JJ., concur in the opinion and judgment.

STATE v. CITY of SANFORD.

Supreme Court of Florida, Division A.

May 3, 1937.

Municipal corporations ⟹918(1)

Electors' approval was not necessary to issuance of refunding bonds where pledging of special assessments which had been made but were not collected did not impose an additional burden on taxpayers generally and was no pledge of taxing power other than that taxing power which attached to original bonds, and refunding bonds created no additional or increased liability (Acts 1931, Ex.Sess., c. 15772).

2. Municipal corporations ⟹918(1)

City *held* entitled, without voters' approval, to issue refunding bonds in lieu of special assessment bonds and certificates of indebtedness and public utility bonds which refunding bonds pledged full faith and credit of city, notwithstanding original bonds pledged also special assessments and net revenue from city water plant (Acts 1931, Ex.Sess., c. 15772).

3. Municipal corporations ⟹967(1)

Homesteads in city *held* assessable for taxes for payment of refunding bonds notwithstanding constitutional provision exempting homesteads from taxation and statute specifically exempting homesteads up to valuation of $5,000 from taxation (Acts 1931, Ex.Sess., c. 15772; Acts 1935, c. 17060; Const. art. 10, § 7, amended in 1934).

4. Municipal corporations ⟹968(½)

Refunding bonds issued by city under general refunding act *held* not affected by statute providing for budget (Acts 1931, Ex. Sess., c. 15772; Acts 1935, c. 16838).

5. Municipal corporations ⟹919

Prohibition in resolution authorizing issuance of refunding bonds by city of acceptance of anything but lawful money of United States in payment or satisfaction of taxes or special assessments levied for such refunding bonds hold not invalid because of statute permitting use of past-due obligations of municipality for payment of taxes levied for payment of interest and for sinking fund (Acts 1931, Ex.Sess. c. 15772; Acts 1935, c. 17401).

6. Municipal corporations ⟹951

City issuing refunding bonds *held* authorized to provide that any amount collected under levy to raise money to pay interest which would be in excess of amount necessary to pay interest was to go into sinking fund for payment, redemption, or purchase of bonds (Acts 1931, Ex.Sess., c. 15772).

7. Municipal corporations ⟹919

City *held* authorized to issue refunding bonds under general refunding act without

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flict of Decisions, Third District-Case No. 81-1964.

Case below: 433 So.2d 1323.

Bennett H. Brummer, Public Defender and Elliot H. Scherker, Asst. Public Defender, Eleventh Judicial Circuit, Miami, for petitioner.

Jim Smith, Atty. Gen. and Diane E. Leeds, Asst. Atty. Gen., Miami, for respondent

PER CURIAM.

Approved. *State* v. ***Fuller,*** 455 So.2d 357 (Fla.1984).

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS. J., dissents.

Adrian WINTERFIELD, Appellant,

v.

TOWN OF PALM BEACH and the State of Florida, Appellees.

No. 64284.

Supreme Court of Florida.

July 19, 1984.

Rehearing Denied Oct. 5, 1984.

Appeal was taken from a judgment of the Circuit Court, Palm Beach County, John D. Wessel, J., validating municipal bonds. The Supreme Court held that: (1) violation of single-purpose rule did not mandate invalidation, and (2) failure of proposed text for referendum ballot to mention that some of the revenue would be used to reimburse city for prior expenditure for land did *not* mandate invalidation.

Affirmed.

1. Municipal Corporations ⇐918(4)

Municipal bond referendum election would not be invalidated despite violation of single-purpose rule, resulting from single election on proposed bond issue to pay for new police facility, fire station, and sewer compressor station, where there was no assertion that violation of the rule *con*stituted fraud, corruption or coercion or affected the result of the election and where multiple purposes of proposed bond issue were clear *on* the face of the notice of election and the ballot and thus anyone wishing to challenge on the point could have made the attack before the election.

2. Municipal Corporations ⇐918(4)

Where discrepancies on bond referendum ballot **mislead the voters or fail** to adequately inform them of the project, ballot is subject to invalidation.

3. Municipal Corporations ⇐918(4)

Failure of proposed text for bond referendum ballot to mention that some of the revenue would be used to reimburse city for prior expenditure for land did not mandate invalidation for the bond referendum election where title of original resolution included reference to acquiring land as did all subsequent notices and resolutions and ballot itself and where prior purchase of land was matter of public record.

Adrian Winterfield, pro. per.

John C. Randolph of Johnston, Sasser, Randolph & Weaver, West Palm Beach, for appellee Town of Palm Beach.

David H. Bludworth, State Atty. and Marta M. Suarez-Murias, Asst. State Atty., West Palm Beach, for State.

PER CURIAM.

This is an appeal from a circuit court judgment validating municipal bonds pursuant to chapter 75, Florida Statutes

(1983). We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.

Electors of the Town of Palm Beach voted on a bond referendum on March 22, 1983. The proposed bond issue would raise $7 million to pay for a new police facility, a fire station, and a sewer compressor station. The ballot provided for a single vote to be cast on the entire bond issue, rather than allowing a separate vote to be cast for each project. Approximately three-quarters of those voting approved the bond issue.

Winterfield appeared as an intervenor at the circuit court validiation hearing held August 1, 1983, pursuant to chapter 75, and was permitted to intervene. He unsuccessfully challenged the validity of the bonds on two grounds, violation of the "single-purpose" rule and technical irregularities in the bonding process. The circuit court validated the bonds and Winterfield appealed to this Court We affirm the judgment of validation.

I. THE SINGLE-PURPOSE RULE

[1] The single-purpose rule was adopted by this Court in *Antuono v. City of Tampa*, 87 Fla. 82, 99 So. 324 (1924). The rule was stated as follows:

> ***If there are two or more separate and distinct propositions to be*** voted on, each proposition should be stated separately and distinctly so that a voter may declare his opinion as to each matter separately, since several propositions cannot be united in one submission to the voters so as to call for one assenting or dissenting vote upon all the propositions; and elections are invalid where held under 'such restrictions as to prevent the voter from casting his individual and intelligent vote upon the object or objects sought to be obtained. ***The object of the*** rule preventing the submission of several and distinct propositions to the people united as *one* in such a *manner as* to compel the voter to reject or accept all is to prevent the joining of one local subject to others in such a way that each shall gather votes for all, and thus one measure, by its popularity or its apparent necessity, carries other measures not so popular or necessary and which the people, if granted the opportunity of separate ballots, might defeat. However, unless otherwise provided, it is proper to submit a number of propositions or questions at one time, providing the ordinance specifies each separate question or proposition as such, and provision is made by which the voters are given opportunity to vote upon each specific proposition or question independent of the other questions submitted at the same time. This may be done upon a single ballot, but the ballot must state each proposition separately, so that the voter may be able to express his will with reference to each *question*,

87 Fla. at 90-91, 99 So. at 326 (emphasis in original) (quoting 5 E. McQuillin, ***The Law of Municipal Corporation*** **§ 2198 (1921)**, identical language in current edition at 15 J. Latta & E. McQuillin, ***The Law of Municipal Corporation*** **§ 40.09** (3d ed. 1970).

The rule has been construed so that "if bonds are proposed and issued for two or more purposes that are so related as to amount to a single purpose, they may be combined and voted on as a *single* issue." ***State*** v. ***City*** *of* Daytona ***Beach*, 160** Fla. 13, 14, 33 So.2d 218, 219 (1948). This is especially so when a single plan of financing is involved. *State* ***v. City of St. Augus***tine, 235 So.2d 1 (Fla.1970). In every case considered by this Court since ***Antuono*** raising the single-purpose rule, the Court has found sufficient interrelationship between various projects to amount to a *single purpose*.[1]

1. *Grapeland Heights Civic Association v. City of Miami*, 267 So.2d 321 (Fla.1972) (recreational facilities in two areas of the city); *State v. City of St. Augustine*, 235 So.2d 1 (Fla.1970) (conversion of building to city hall and fire station with related expenses); *State v. County of Dade*, 125 So.2d 833 (Fla.1960) (highway projects); *State v. Dade County*, 39 So.2d 807 (Fla.1949) (five bridges); *State v. City of Daytona Beach*, 160 Fla. 13, 33 So.2d 218 (1948) (city recreation facilities); *State ex rel. Wilkes v. Brandon*, 92 Fla. 793, 110 So. 127 (1926) (waterworks and

In the case before us, the town suggests that the three projects constitute a single purpose-to provide essential services. If we *were* to accept this rationale, the single-purpose rule would be effectively eviscerated. Instead, we find that, based on the facts of this case, more than one purpose will be served in issuing these bonds. At the very least, the public safety purpose of the police and fire projects is separate and distinct from the public health purpose of the sewer projects. We do not need to decide whether the police and fire projects are also separate and distinct purposes.

The ***Antuono*** single-purpose rule appears to require invalidation whenever voters have been asked to approve mbre than one purpose with a single vote, However, this Court has not lost sight of the underlying rationale for the rule, which is to prevent the electoral equivalent of logrolling, whereby "one measure, by its popularity or its apparent necessity, carries other measures not so popular or necessary and which the people, if granted the opportunity of separate ballots, might defeat" ***Antuono,*** 87 Fla. at 90, 99 So. at 326. While electoral logrolling is an evil to be avoided, per se invalidation may very well result in a greater evil. Thus, this Court has on one occasion recognized that a violation of the single-purpose rule does not render bonds invalid ***per se, In State ex rel. Wilkes v. Brandon, 92*** Fla. 793, 110 So. 127 (1926), the mayor *of* Perry refused to sign bonds after the election and circuit court validation. The mayor raised the single-purpose rule in response to a petition for an alternative writ of mandamus to require the mayor to sign the bonds. This Court held:

> It is not made to appear that such a purpose [to extend municipal waterworks and sewer systems] embraces "two or *more* separate and distinct propositions" as was contemplated by the rule announced in the Antuono case, and if it did so appear, we think that those desiring to avail themselves of the benefits of the rule, must do so in seasonable time. When power to issue the bonds is admitted, and they have in fact been issued and validated by decree of the Circuit *Court* as provided under the law of this State, and no fraud is charged, an attempt to invoke the rule in the Antuono case comes too late.

State ex rel. Wilkes v. Brandon, 92 Fla. at 795-96, 110 So. at 128. This Court also recognized the desirability of a "seasonable" challenge based on the single-purpose rule in ***Slate v.*** City ***of St. Augustine, 235*** So.2d 1, 3 (Fla.1970), where it noted in dicta that "the better procedure [rather than raising the issue in the validation proceeding] would be for the *elector* to question the sufficiency of the ballot in appropriate proceedings before-not after-the election has been held and the results proclaimed." (Footnote omitted.)

The ***Brandon*** and ***City of St. Augustine*** decisions found no violation of the single purpose rule, and so there was no need to address the issue now before us, which is whether a challenge in the validation proceeding based on the single-purpose rule can be sustained. However, this Court has on repeated occasions found that pre-election irregularities do not necessarily require invalidating an election. An early indication of the Court's reluctance to invalidate elections came in State ***ex rel. Smith v. Burbridge, 24*** Fla. 112, 130, 3 So. 869, 877 (1888), where the Court held that the "disposition and duty of courts are to sustain popular elections whenever they have been free and fair, and it is clear that the voters have not been deprived of their right to vote, and the result has not been changed by irregularity." A more definitive standard was stated in ***Carn*** v. Moore, 74 Fla. 77, 88-89, 76 So. 337, 340 (1917): "Republics regard the elective franchise as sacred, and the courts should not set aside an election because some official has not complied with the law governing elections, where the voter has done all in his power to cast his ballot honestly and intelligently, ***unless fraud has been perpetrated or corruption or coercion practiced to a degree to have affected the result."*** (Emphasis

sewers); *Lewis v. Leon County,* 91 Fla. 118, 107 So, 146 (1926) (county-wide road projects).

added.) See also *Marler v. Board of Public Instruction of Okaloosa County,* 197 So.2d 506, 508 (Fla.1967) (challenge to sufficiency of notice of bond referendum not grounds to invalidate election because "the violation of [statutory provisions for notice of election] cannot affect the validity of an election nor the result thereof where such election has been fairly held and there is no charge of fraud, corruption or coercion that is alleged to have affected the result thereof." (footnote omitted)).

In preserving elections in the face of post-election challenges to pre-election irregularities, this Court has found that a party is estopped from voiding an election where he was on notice of the irregularity before the election. "The aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." *Pearson v. Taylor,* 159 Fla. 775, 776, 32 So.2d 826, 827 (1947) (post-election challenge to sufficiency of petition which lead to election). See also *State ex rel. Robinson v. North Broward Hospital District,* 95 So.2d 434 (Fla.1957) (failure to advertise bond referendum for full thirty days before election not grounds to invalidate election where no attack was made before election, no one claimed denial of right to vote, and no fraud was charged); *McDonald v. Miller,* 90 So.2d 124, 129 (Fla.1956) (losing candidate, fully aware of blatant pre-election irregularities, barred from raising those irregularities as grounds to invalidate election: "One cannot stand by with full knowledge and acquiesce in this type of conduct prior to an election and then, after. being disappointed by the results, successfully overturn the election."); *Nelson v. Robinson,* 301 So.2d 508 (Fla. 2d DCA), cert. denied, 303 So.2d 21 (Fla.1974) (losing candidate's challenge to name placement on the ballot may have been enforceable before election, but not after); *Speigel v. Knight,* 224 So.2d 703, 706 (Fla. 3d DCA 1969) ("A different rule applies to technical or procedural irregularities which occur and are challenged prior to a general election than to those which are discovered and challenged after the general election, in the absence of corruption or fraud or a statutory penalty requiring an ouster of the elected official or a vacancy in the office.").

In the case before us, Winterfield's challenge is based on a bare assertion that the bond referendum violated the single-purpose rule. No substantial assertion is made that violation of the rule constituted fraud, corruption or coercion, or that the violation affected the result of the election. In fact, a strong majority of the voters favored the bond issue, and the record fails to show any substantial controversy which would indicate that any one of the projects was more or less popular or necessary than the others. The multiple purposes of the proposed bond issue were clear on the face of the notice of election and the ballot, and any one wishing to challenge on the point now raised could have made the attack before the election. No constitutional or statutory provision requires invalidating an election under these circumstances.

We therefore hold that violation of the single-purpose rule under the circumstances presented in this case does not require invalidation of the election.*

II. PROCEDURAL IRREGULARITY

Winterfield's second challenge in the validation proceeding centered on discrepancies in the description of the police facility project in documents related to the bonding process. The city had purchased the land for the police facility some time before the bond referendum. The proposed text for the referendum ballot embodied in the original town council resolution initiating the bonding process failed to mention that some of the bond revenue would be used to

2. We also note that even a pre-election challenge must be filed in a timely manner to allow adequate judicial review before the election. Cf. *State ex rel. Pooser v. Wester,* 126 Fla. 49, 170 So. 736 (1936), where a contest of a primary election was barred after the contestant waited more than four months, until less than one month before the general election, to make the challenge.

reimburse the city for the prior expenditure for land. Later official notices and the ballot itself referred to "acquisition of land for and construction of a police facility."

[2, 3] Where discrepancies on a bond referendum ballot mislead the voters, or fail to adequately inform them of the project, the ballot is subject to invalidation. *See Grapeland Heights Civic Association v.* City of Miami, 267 So.2d 321 (Fla.1972). We find no basis for applying this principle in this case. The title of the original resolution included reference to acquiring land for the police facility, as did all subsequent notices and resolutions and the ballot itself. The prior purchase of the land was a matter of public record, and information leaflets prepared by the town explaining the referendum outlined the situation.

III. THE VALIDATION HEARING

Besides the two issues raised before the circuit court, appellant also urges on appeal that the circuit court denied him due process and showed bias in the way he was treated during the hearing. The record shows that appellant first filed a pleading in the validation proceedings on the morning of the hearing, styled "Answer of Intervenor."

Winterfield complains that seveml irregularities occurred before and during the hearing because he was not granted intervenor status until the end of the hearing, and that at one point the judge demonstrated bias by speaking to him condescendingly. Our review of the record convinces us that the trial judge acted reasonably in light of the last-minute nature of appellant's appearance.

Accordingly, we affirm the judgment of validation of the circuit court.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

P.L.R.. a child, Petitioner,

v.

STATE of Florida, Respondent.

No. 64264.

Supreme Court of Florida.

July 19, 1984.

Rehearing Denied Oct. 4, 1984.

Juvenile was adjudicated delinquent by the Circuit Court, Broward County, John A. Miller, J., based on possession of marijuana, and he appealed. The District Court of Appeal, Fourth District, 435 So.2d 850, affirmed, and certified a direct conflict. The Supreme Court, Overton, J., held that officer's observation of a manila envelope, of a type usually used for marijuana transactions, in the pocket of a juvenile at a known drug-tansaction site provided sufficient probable cause to arrest the juvenile and conduct a search incident to that arrest.

Decision approved.

Adkins, J., filed dissenting opinion.

Arrest ⚩71.1(3)

Officer's observation of a manila envelope, of a type usually used for marijuana transactions, in the pocket of a juvenile at a known drug-transaction site provided sufficient probable cause to arrest the juvenile and conduct a search incident to that arrest.

Richard L. Jorandby, Public Defender, and Anthony Calvello, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for petitioner.

Jim Smith, Atty. Gen., and Richard G. Bartmon, Asst. Atty. Gen., West Palm Beach, for respondent.

EXHIBIT 11

ORDINANCE NO. 2137

AN ORDINANCE OF THE CITY OF WINTER PARK, FLORIDA CALLING A BOND REFERENDUM TO BE HELD ON THE QUESTION OP THE ISSUANCE OF NOT EXCEEDING $5,125,000.00 GENERAL OBLIGATION BONDS, SERIES 1996, OF THE CITY OF WINTER PARK, FLORIDA, TO FINANCE THE COST OF THE ACQUISITION OF THE GREEN SPACE KNOWN AS THE WINTER PARK GOLF COURSE; AUTHORIZING THE ISSUANCE OF SUCH BONDS IF APPROVED BY REFERENDUM; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED by the people of the City of Winter Park, Florida (the "Issuer" or sometimes herein referred to as the "City") as follows:

Section 1. Authority for this Ordinance. This ordinance is enacted pursuant to Chapters 100 and 166, Florida Statutes, and other applicable provisions of law.

Section 2. Authorization of Bonds. Subject and pursuant to the proviaions hereof, General Obligation Bonds, Series 1996 (the "Bonds"), of the Issuer are authorized to be issued in the aggregate principal amount of not exceeding $5,125,000.00 to finance the acquisition of the Green Space known as the Winter Park Golf Course property located within the City, and all purposes incidental thereto (collectively, the *Project"). The money received from the issuance of the Bonds will be used for such purpose and for the benefit of the Issuer. The Bonds shall be payable from ad valorem taxes levied without limitation as to rate or amount on all taxable property in the area of the Issuer. None of the Bonds shall be issued for a longer term than 20 years from their date of issuance, and such Bonds shall bear interest at such rate or rates not exceeding the maximum rate permitted by law on the date of sale of the Bonds.

Section 3. Bond Referendum. A bond referendum of the qualified electors residing in the area of the Issuer is hereby called to be held on June 4, 1996, to determine whether or not the issuance of the Bonds, in an aggregate principal amount of not exceeding $5,125,000.00, shall be approved by such qualified electors to finance the cost of the acquisition of the Project. All qualified electors residing in the area of the Issuer shall be entitled and permitted co vote in such bond referendum. The polls will be open at the voting places from 7 o'clock A.M. until 7 o'clock P.M. on the same day.

Section 4. Notice of Bond Referendum. As required by law, at least 30 days' notice of the bond referendum shall be provided. This ordinance shall be published in full as part of the notice of

such bond referendum, together with an appropriate notice in substantially the form attached hereto as Exhibit "A" in the Orlando Sentinel or any other newspaper published and of general circulation in the area of the Issuer, at least twice, once in the fifth week and once in the third week prior to the week in which the bond referendum is to be held.

Section 5. Places of Voting, Inspectors, Clerks. The places of voting shall be the same as in general elections held in the area of the Issuer, and the inspectors and clerks for the polling places for the bond referendum shall be as required by law.

Section 6. Official Ballot. The form of ballot to be used shall be in substantially the following form with such minor changes a6 may be made by the City Clerk with the advice of the City Attorney:

OFFICIAL BALLOT
CITY OF WINTER PARR, FLORIDA
GREEN SPACE (GOLF COURSE) ACQUISITION
BOND REFERENDUM - JUNE 4, 1996

Shall the City of Winter Park issue not exceeding $5,125,000.00 general obligation bonds, bearing interest at not exceeding the maximum legal rate, maturing within 20 years from date of issuance, payable from ad valorem taxes levied on all taxable property in the City area, without limitation as to rate or amount, for financing the acquisition of the Green Space known as the Winter Park Golf Course, as provided in Ordinance No.. 2137 ?

Instructions to Voters:

If you are in favor of the issuance of the bonds, complete the arrow pointing to the words "FOR BONDS."

If you are not in favor of the issuance of the bonds, complete the arrow pointing to the word6 "AGAINST BONDS."

Section 7. Absentee Voting. Paper ballots shall be used at such election for absentee voting. The form of ballot to be used in the referendum for absentee voters shall be in substantially the form specified in Section 6 above.

Section 8. Printing of Ballots. The Supervisor of Elections is authorized and directed to have printed a sufficient number of such ballots for use of absentee electors qualified to cast ballots in the bond referendum, and shall also have printed sample ballots and deliver them to the inspectors and clerks on or before the date and time for the opening of the polls for such bond referendum, for

use at the voting places; and further is authorized and directed to have printed on plain white cardboard or paper and delivered in accordance with law, the official ballots for use in such bond referendum.

Section 9. Referendum Procedure. The bond referendum shall be held and conducted in the manner prescribed by law fox holding general elections in the area of the Issuer, except as may be provided by Sections 100.201 through 100.351, Florida Statutes. The inspectors and clerks at each polling place shall prepare and file returns of such bond referendum and shall deliver the same to the City. such returns shall show the number of qualified electors who voted at such bond referendum on the proposition, and the number of votes cast respectively for and against approval of the proposition. The returns shall, as soon as practicable, be canvassed by the City Commission of the City (the "Commission".)

Section 10. **Referendum Results.** If a majority of the votes cast at such bond referendum in respect to the proposition shall be "For Bonds", such proposition shall be approved; and then the Bonds, the issuance of which shall be thereby approved, may be issued as hereafter provided by subsequent resolution of the Commission,

Section 11. **Severability.** In the event that any word, phrase, clause, sentence or paragraph hereof shall be held invalid by any court of competent jurisdiction, such holding shall not affect any other word, clause, phrase, sentence or paragraph hereof.

Section 12. **Repealing Clause.** All ordinances, resolutions or parts thereof in conflict or inconsistent with this ordinance are hereby repealed insofar as there is conflict or inconsistency.

Section 13. Effective Date. This ordinance shall take effect immediately upon its final passage and adoption.

ADOPTED at a regular meeting of the City Commission of the City of winter Park, Florida, held at City Hall, Winter Park, Florida, on the 12th day of March, 1996.

Mayor

Attest: City Clerk

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(rev. 02 27 96)

RESOLUTION NO. 1635

RESOLUTION CANVASSING THE RESULTS OF A BOND REFERENDUM HELD ON JUNE 4, 1996 IN THE CITY OF WINTER PARK, FLORIDA, ON THE QUESTION OF THE PROPOSED ISSUANCE BY THE CITY OF NOT EXCEEDING $5,125,000.00 GENERAL OBLIGATION BONDS, SERIES 1996.

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF WINTER PARR, FLORIDA (the "Commission" and "Issuer" respectively):

Section 1. **Authoritv for this Resolution- This** resolution is adopted **pursuant** to Chapters 100 and 166, Florida Statutes, and other applicable provisions of law.

Section 2. **Findinss.** It is hereby ascertained, determined and **declared that:**

A. **On June 4, 1996, a** bond referendum (the 'Referendum") was held within the **area of the Issuer pursuant to an ordinance duly** enacted by the Commission on March 12, 1996, and notice of the same duly published prior thereto, as required by law; to submit to the qualified electors of the Issuer the following proposition (the "Proposition") :

GREEN SPACE (GOLF COURSE) ACQUISITION

> Shall the City of Winter Park issue not exceeding $5,125,000.00 general obligation bonds, bearing interest at not exceeding the maximum legal rate, maturing within 20 **years** from date of issuance, payable from ad **valorem** taxes levied on all taxable property in the City area, without limitation as to rate or amount, for financing the acquisition of the Green Space known as the Winter Park Golf Course, as provided in Ordinance No. 2137?

B. The total number of votes cast in the Referendum for the Proposition was 4,573, out of which 3,497 were in favor of the issuance of the proposed bonds, and of which 1,076 were opposed thereto.

C. It'appears that the Referendum has been duly and properly held in accordance with law, and that the returns of the Referendum have been delivered to the Commission for the purpose of canvassing the same and determining and certifying the results thereof.

Section 3. Results of Referendum. The proposed issuance of bonds described in the Proposition heretofore described, in the aggregate principal amount of not exceeding $5,125,000.00, were approved by a majority of the qualified electors voting in the Referendum for such Proposition.

Section 4. **Declaration of Result.** A certificate of declaration of results of the Referendum **shall** be recorded in the minutes of the Commission **as** soon **as** possible.

Section 5. Effective bate. This resolution shall take effect immediately upon its adoption.

ADOPTED after reading by title at a regular meeting of the City Commission of the City of Winter Park, Florida, held at City Hall, Winter Park, Florida, on the 11th day of June, 1996.

Gary A. Brewer, Mayor

Attest: Joyce M. Swain, City Clerk

aw\city\bondval.res\06.06.96

Execution Copy

RESOLUTION NO. 1636

A RESOLUTION PROVIDING FOR THE ISSUANCE OF NOT EXCEEDING $5,125,000 GENERAL OBLIGATION BONDS, SERIES 1996, OF THE CITY OF WINTER PARK, FLORIDA, FOR THE PURPOSE OF FINANCING THE COST OF THE ACQUISITION OF THE GREEN SPACE KNOWN AS THE WINTER PARK GOLF COURSE; AND PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF WINTER PARK, FLORIDA:

SECTION 1. AUTHORITY FOR THIS RESOLUTION. This resolution is adopted pursuant to Chapter 166, Florida Statutes, and other applicable provisions of law.

SECTION 2. DEFINITIONS. Unless the context otherwise requires, the terms defined in this section shall have the meanings specified in this section. Words importing the singular number shall include the plural number in each case, and vice versa, and words importing persons shall include firms and corporations.

A. "Amortization Installment" shall mean, with respect to (1) any Current Interest Paying Term Bonds, the amount of money designated for such Current Interest Paying Term Bonds and required to be deposited into the Bond Amortization Account to pay the principal amount of Current Interest Paying Term Bonds to be redeemed on each annual interest or principal maturity date; provided, that the aggregate of such installments for each maturity of Current Interest Paying Term Bonds shall equal the aggregate principal amount of each maturity of Term Bonds delivered on original issuance; and (2) any Capital Appreciation Term Bonds, the Compounded Amounts so designated by subsequent resolution of the Commission. Such installments shall be deemed to be due on such dates as shall be fixed by subsequent resolution of the Commission adopted on or prior to the sale of Term Bonds.

B. "Authorized Investments" shall mean any of the following if and to the extent the same are at the time legal for investment of municipal funds:

(1) Government Obligations which are held in a custody or trust account by a bank or savings and loan association which is either (a) a "qualified public depository" under the laws of the State of Florida or (b) has capital, surplus and undivided profits of not less than $50,000,000, and which is a member of the Federal Deposit Insurance Corporation ("FDIC");

(2) bonds, debentures, notes, participation certificates or other evidences of indebtedness payable in cash issued, or the principal of and interest on which are unconditionally guaranteed, by the following federal agencies whose obligations represent the full faith and credit of the United States of America: Federal Home Loan Bank System, the Export-Import Bank of the United States, the Federal Financing Bank, the Government National Mortgage Association, the Farmers Home Administration, the Federal Housing Administration or the Maritime Administration;

(3) time and demand deposits in any commercial bank. *or* savings and loan association which is a member of FDIC and is a "qualified public depository" under the laws of the State of Florida;

(4) repurchase agreements fully and continuously secured by Government Obligations, with any bank, trust company, national banking association or savings and loan association which is a member of FDIC and is a "qualified public depository" under the laws of the State of Florida; or with any registered government bond broker/dealer which is subject to the jurisdiction of the Securities Investors' Protection Corporation; provided, (a) such Government Obligations are held by the Issuer or a third party which is (i) a Federal Reserve Bank, or (ii) a bank or savings and loan association which is a member of FDIC and is a "qualified public depository" under the laws of the State of Florida, or (iii) a bank or savings and loan association approved in writing for such purpose by the municipal bond insurer, if applicable; and the Issuer shall have received written confirmation from the third party that it holds such Government Obligations; and (b) a perfected first security interest in or title to such Government Obligations is created or obtained for the benefit of the Issuer;

(5) shares in a money market fund, the investments of which are exclusively in Government Obligations;

(6) any other agreements for the investment of money between the Issuer and a bank, trust company, national banking association or corporation subject to registration with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 or the Federal National Mortgage Association, or any corporation, including insurance companies, (a) whose unsecured obligations or uncollateralized long term debt obligations have been assigned ratings by Standard & Poor's Ratings Services, New York, New York ("S&P"), and Moody's Investors Service, New York, New York ("Moody's), which are equal to or higher than the ratings initially assigned by S&P and Moody's to the Bonds, or (b) which has issued a letter of credit contract, agreement or surety bond in support of debt obligations which have been so rated; or

(7) any other investments authorized or permitted from time to time by Section 166.261, Florida Statutes, or any other law of the State of Florida controlling the investment of surplus public funds of a municipality.

C. **"Bond Registrar"** shall mean such bank or trust company, located within or without the State of Florida, which shall maintain the registration books of the City and be responsible for the transfer and exchange of the Bonds, and which also may be the paying agent for the Bonds and interest thereon; and if no bank or trust company is appointed, shall mean the City Clerk of the Issuer.

D. **"Bonds"** shall mean the General Obligation Bonds, Series 1996, authorized to be issued by this resolution.

E. "Capital Appreciation Bonds" shall mean Bonds, the interest on which (1) shall be compounded periodically, (2) shall be payable at maturity or redemption prior to maturity and (3) shall be determined by reference to the Compounded Amounts.

F. **"Code"** shall mean the Internal Revenue Code of 1986, as amended, and all applicable regulations promulgated thereunder and any predecessor provisions.

G. **"Commission"** shall mean the City Commission of the Issuer.

H. "Compounded Amounts" with respect to any Capital Appreciation Bonds, shall mean the amounts so designated in a subsequent resolution of the Issuer, representing principal and interest accrued on such Capital Appreciation Bonds.

I. "Current Interest Paying Bonds" shall mean the Bonds, the interest on which shall be payable on a semiannual basis.

J. **"Issuer"** shall mean the City of Winter Park, Florida.

K. **"Project"** shall mean the acquisition of the Green Space known as the Winter Park Golf Course property owned by Elizabeth Morse Genius Foundation, Inc. (the **"Foundation"**); all in accordance with the Option Contract for Purchase and Sale between the Issuer and the Foundation regarding such property (the **"Option Contract"**), as amended and supplemented from time to time.

L. **"Record Date"** shall mean the 15th day of the month (whether or not a business day) immediately preceding an interest payment date for the Bonds.

M. "Registered Owner" shall mean any person who shall be the owner of any outstanding Bond or Bonds as shown on the books of the Issuer maintained by the Bond Registrar.

N. "Serial Bonds" shall mean the Bonds which shall be stated to mature in annual installments.

O. **"Term Bonds"** shall mean the Bonds of a series, all of which shall be stated to mature on one date and which shall be subject to retirement by operation of the Bond Amortization Account.

SECTION 3. FINDINGS. It is hereby found, ascertained and determined that:

A. The Commission, by Ordinance No. 2137 of the Issuer, has heretofore determined that it is necessary and desirable to issue the bonds in the aggregate principal amount of not exceeding **$5,125,000** for the purpose of financing part of the cost of the Project. The total **cost** of the Project is **$8,000,000,** and the balance thereof shall be paid from other legally available funds of the Issuer. The Project is a public purpose and a capital project for which the Issuer may issue bonds in accordance with .the provisions of Chapter 166, Part II, Florida Statutes,

B. The issuance of the Bonds was approved by a majority of votes cast in a bond referendum held on June 4, 1996, by the qualified electors of the Issuer; all in the manner required by the Constitution and Statutes of the State of Florida.

SECTION 4. RESOLUTION TO CONSTITUTE **CONTRACT.** In consideration of the acceptance of the Bonds authorized to be issued hereunder by those who shall hold the same. from time to time, this resolution shall be deemed to be and shall constitute a contract between the Issuer and such Registered Owners. The covenants and agreements set forth in this resolution to be performed by the Issuer shall be for the equal benefit, protection and security of the Registered Owners of any and all of such Bonds, all of which shall **be** of equal rank and without preference, therein and herein.

SECTION 5. AUTHORIZATION OF BONDS AND PROJECT. In accordance with Ordinance No. 2137 of the Issuer, and pursuant to the provisions of this resolution, obligations of the Issuer to be known as General Obligation Bonds, Series 1996, herein sometimes referred to as **"Bonds,"** are hereby authorized to be issued in the aggregate principal amount **of** not exceeding **$5,125,000** for the purpose of financing part of the cost of the Project. The cost of the Project, in addition to the items set forth in the Option Contract, may include, but need not be limited to, the acquisition of any lands or interest therein or any other properties deemed necessary or convenient therefor; legal and financing expenses; expenses **for** estimates of costs and of revenues; expenses for surveys; fees of consultants; administrative expenses relating solely to the acquisition of the Project; the capitalization of interest for a reasonable period after the issuance **of** the Bonds; premiums for municipal bond insurance policies; the discount on the sale of the Bonds; and such other costs and expenses as may be necessary or incidental to the financing herein authorized and the acquisition of the Project.

SECTION 6. DESCRIPTION OF BONDS. The Bonds may be issued in one or more installments, each installment to be dated as of a date or dates to be fixed by subsequent resolution of the Commission, but not later than the date of issuance and, if more than one installment, to have (a) a number or letter suffix after the initial series designation contained in this resolution or (b) such other distinguishing features in the series designation as may be deemed appropriate. The Bonds of each installment may be numbered consecutively from one upward or in such other manner as agreed between the Commission and the Bond Registrar; shall be in the denomination of $5,000 each or integral multiples thereof; shall bear interest at not exceeding the maximum rate authorized by applicable law, payable semiannually; shall mature on such dates and in such years (but not exceeding 20 years from the date of delivery of the applicable installment) and amounts; and shall-be issued as Serial Bonds or Term Bonds, or any combination thereof; all as shall be fixed by subsequent resolution of the Commission adopted on or prior to the sale of the Bonds.

The Bonds shall be issued in fully registered form without coupons; shall be issued as Current Interest Paying Bonds or as 'Capital Appreciation Bonds; shall be payable with respect to principal at the office of the Bond Registrar as paying agent, or such other paying agent as may be hereafter duly appointed; shall be payable in lawful money of the United States of America; and shall bear interest from their date or dates, payable by mail to the Registered Owners at their addresses as they appear on the registration books. If Capital Appreciation Bonds are issued, Compounded Amounts therefor shall also be fixed in the subsequent resolution described above.

Notwithstanding any other provisions of this section, the Issuer may, at its option, prior to the date of issuance of any Bonds, elect to use an immobilization system or pure book-entry system with respect to issuance of the Bonds, provided adequate records will be kept with respect to the ownership of Bonds issued in book-entry form or the beneficial ownership of Bonds 'issued in the name of a nominee. Under such circumstances the Issuer is authorized to execute and deliver any letters of representation or completed eligibility questionnaires necessary to qualify the book-entry program with The Depository Trust Company, New York, New York, or other recognized securities depositories. As long as any Bonds are outstanding in book-entry form, the provisions of Sections 7, 9, 10, 11 and 13 of this resolution may not be fully applicable to such book-entry Bonds; and the provisions of this Section 6 may be modified as set forth in the following-described resolution. The details of any alternative system of Bonds issuance, as described in this paragraph, shall be set forth in a resolution of the Commission duly adopted on or prior to the issuance of any of such Bonds utilizing the alternative system of issuance.

SECTION 7. EXECUTION AND AUTHENTICATION OF BONDS. The Bonds shall be executed in the name of the Issuer by its Mayor, and the corporate seal of the Issuer or a facsimile thereof shall be affixed thereto or reproduced thereon and attested by its City Clerk. The authorized signatures for the Mayor and City Clerk shall be either manual or in facsimile. The Certificate of Authentication of the Bond Registrar shall appear on the Bonds, and no Bonds shall be valid or obligatory for any purpose or be entitled to any security or benefit under this resolution unless such certificate shall have been duly executed on such Bonds. The authorized signature for the Bond Registrar shall be either manual or in facsimile; provided, however, that at least one of the signatures, including that of the authorized signature for the Bond Registrar, appearing **on** the Bonds, shall at all times be a manual signature. In case any one or more of the officers of who shall have signed or sealed any of the Bonds shall cease **to** be such officer of the Issuer before the bonds so signed and sealed shall have been actually sold and delivered, such bonds may nevertheless be sold and delivered as if the person who signed or sealed such bonds had not ceased to hold such office. any bonds may be signed and sealed on behalf of the Issuer by such person as at the actual time of the **execution** of such bonds shall hold the proper office, although at the date of such bonds such person may not have held such office or may not have been so authorized.

A certification as to Circuit Court validation, in the form below, shall be executed with the facsimile signature of any present or future Mayor of the Commission.

SECTION 8. NEGOTIABILITY. The Bonds shall be and shall have all of the qualities and incidents of negotiable instruments under the laws of the State of Florida, and each successive Registered Owner, in accepting any of the Bonds, shall be conclusively deemed to have agreed that such Bonds shall be and have all of the qualities and incidents of negotiable instruments under the laws of the State of Florida.

SECTION 9. REGISTRATION. The Bond Registrar shall be responsible for maintaining the books for the registration of the transfer **and** exchange of the Bonds, and if the Bond Registrar is a bank or trust company, in compliance with an agreement between the Issuer and the Bond Registrar executed on or prior to the date of delivery of the Bonds. Such agreement shall set forth in detail the duties, rights and responsibilities of the parties thereto.

All Bonds presented for transfer, exchange, redemption or payment (if so required by the Issuer or the Bond Registrar) shall be accompanied by a written instrument or instruments of transfer or authorization for exchange, in form and with guaranty of signature satisfactory to the Issuer or the Bond Registrar, duly executed by the Registered Owner or by his duly authorized attorney.

Upon surrender to the Bond Registrar for transfer or exchange of any Bond accompanied by an assignment or written authorization for exchange, whichever is applicable, duly executed by the Registered Owner or his attorney duly authorized in writing, the Bond Registrar shall deliver in the name of the Registered Owner **or** the transferee or transferees, as the case may be, a new fully registered Bond or Bonds of authorized denominations and of the **same** series, maturity and interest rate for the aggregate principal amount which the Registered **Owner** is entitled to receive.

The Issuer and the Bond Registrar may charge the Registered Owner a sum sufficient to reimburse them for any expenses incurred in making any exchange or transfer after the first such exchange or transfer following the delivery of the Bonds. The Bond Registrar or the Issuer may also require payment from the Registered Owner or his transferee, as the case may be, of a sum sufficient to cover any **tax,** fee or other governmental charge that **may be** imposed in relation thereto. Such charges and expenses shall be paid before any such new Bond shall be delivered.

Interest on the Bonds shall be paid to the Registered Owners whose names appear on the books of the Bond Registrar on the Record **Date.**

New Bonds delivered upon any transfer **or** exchange shall be valid obligations of the Issuer, evidencing the **same** debt **as** the Bonds surrendered, shall be secured **by** this resolution, and shall be entitled to all of the security and benefits hereof to the **same** extent as the Bonds surrendered.

The Issuer and the Bond **Registrar may** treat the Registered Owner of any Bond as the absolute owner thereof for all purposes, whether or not such Bond shall be overdue, and shall not be bound **by** any notice to the contrary.

Notwithstanding the foregoing provisions of this section, the Issuer reserves the right, on or prior to the delivery of the Bonds, to amend or modify the foregoing provisions relating to registration of the Bonds in order to comply with all applicable laws, rules, and regulations of the United States or the State of Florida relating thereto, including, particularly, any provision of such laws, rules and regulations **as** shall permit the use of unregistered instruments and coupons. The provisions of such instruments and coupons, if applicable, shall be set forth in a subsequent resolution of the Commission.

SECTION 10. DISPOSITION OF BONDS PAID OR REPLACED. Whenever any Bond shall be delivered to the Bond Registrar for cancellation, upon payment of the principal **amount** thereof, or for replacement, transfer or exchange, such Bond shall be cancelled and destroyed by the Bond Registrar as authorized by law, and counterparts of a certificate of destruction evidencing such destruction shall be furnished to the Issuer.

SECTION **11.** BONDS MUTILATED, DESTROYED, STOLEN OR LOST. In case any Bond shall become mutilated, or be destroyed, stolen or lost, the Issuer may, in its discretion, issue and deliver a new Bond of like tenor **as** the Bond so mutilated, destroyed, stolen or lost, in exchange and cancellation of such mutilated Bond or in lieu of and substitution for the Bond destroyed, stolen or lost, and upon the Registered Owner furnishing the Issuer and the Bond Registrar proof of his ownership and the loss thereof (if lost, stolen or destroyed) and satisfactory indemnity and complying with such other reasonable regulations and conditions **as** the Issuer may prescribe and paying (in advance if so required by the Issuer, or the Bond Registrar) such taxes, governmental charges, attorneys fees, printing costs and other expenses **as the** Issuerand the Bond Registrar may charge and/or incur. All Bonds so surrendered shall be cancelled by the Bond Registrar. If **any** such Bonds shall have matured or be about to mature, instead of issuing a substitute Bond, the Issuer **may** pay the same, upon being indemnified as aforesaid, -and if such Bond be lost, stolen or destroyed, without surrender thereof.

Any such duplicate Bonds issued pursuant to this section shall constitute original additional, contractual obligations on the part of the Issuer whether or not the lost, stolen or destroyed Bonds be at any time found by anyone, and such duplicate Bonds **shall be** entitled to equal and proportionate benefits and rights as to lien on and source **and** security for **payment** from the funds, as pledged below, to the **same** extent as all other Bonds issued hereunder.

SECTION **12.** PROVISIONS FOR REDEMPTION. The Bonds or any portions thereof shall be subject to mandatory and/or optional redemption prior to their respective stated dates of maturity, at such times and in such manner **as** shall be determined by subsequent resolution of the Commission adopted on or prior to the sale thereof.

Notice of such redemption (the **"Notice** of Redemption") shall, at least 30 **days,** but not more than 60 days, prior to the redemption date, be filed with the Bond Registrar and paying agent and be mailed, postage prepaid, by the Bond Registrar to all Registered Owners of Bonds to be redeemed at their addresses as they appear of record on the books of the Bond Registrar; provided, however, that failure to mail such notice to **a** Registered Owner shall not render ineffective any proceedings for redemption with respect to Bonds held by Registered Owners to whom notice was properly mailed. Interest shall cease to accrue on **any** Bond duly called for prior redemption on the redemption date, if payment thereof has been duly provided. The privilege of transfer or exchange of any of the Bonds selected for redemption shall be suspended.

Furthermore, at least 2 business **days** in advance of mailing the Notice of Redemption **as** specified above, the Bond Registrar shall send such Notice of Redemption by certified mail, overnight mail/delivery service or telecopy to the securities depositories then in the business of holding substantial amounts of obligations

of the type comprising the Bonds (such depositories currently The Depository Trust Company, New York, New York; Midwest Securities Trust Company, Chicago, Illinois; Pacific Securities Depository Trust Company, San Francisco, California; and Philadelphia Depository Trust Company, Philadelphia, Pennsylvania); and at least 30 days prior to the redemption date, mail such Notice of Redemption to one or more national information services which disseminate notices of redemption of obligations such as the Bonds; provided, however, that failure to distribute such Notice of Redemption to such depositories and national information services shall not render ineffective any calling of Bonds for prior redemption.

Each Notice of Redemption shall state the date of dissemination of such notice; the date of issue of the Bonds; the redemption date; the redemption price; the place or places of redemption (including the name and appropriate address or addresses of the paying agent); the dates of maturity and interest rates borne by the Bonds to be redeemed; the CUSIP number (if any) of the maturity or maturities to be redeemed; and, if less than all of any such maturity, the distinctive certificate numbers of the Bonds of such maturity to be redeemed, and, in the case of Bonds to be redeemed in part only, the respective portions of the principal amount thereof to be redeemed. Each such notice shall also state that on such date there will become due and payable on each of such Bonds, the redemption price thereof, or of such specified portion of the principal amount thereof in the case of a Bond to be redeemed in part only, together with interest accrued thereon to the redemption date; and that from and after such redemption date, interest thereon shall cease to accrue, and shall require that such Bonds be then surrendered at the address or addresses of the paying agent specified in the notice, Failure to include in such notice all of the information specified in this paragraph, shall not render ineffective any proceedings for the redemption of Bonds.

SECTION 13. FORM OF BONDS. The text of the Bonds, the certificate of validation and the certificate of authentication shall be in substantially the following form, with such omissions, insertions and variations as may be necessary and desirable and authorized or permitted by this resolution or any subsequent resolution adopted prior to the issuance thereof; or as may be necessary if the Bonds or a portion thereof are issued as Capital Appreciation Bonds or bear a variable rate of interest; **or** as may be necessary to comply with applicable laws, rules and regulations of the United States and the State of Florida in effect upon the issuance thereof:

SEE REVERSE SIDE FOR ADDITIONAL PROVISIONS AND DEFINITIONS

CUSIP: _______

No. _____________

$______________

UNITED STATES OF AMERICA
STATE OF FLORIDA
COUNTY OF ORANGE
CITY OF WINTER PARK
GENERAL OBLIGATION BOND, SERIES 1996

RATE OF INTEREST MATURITY DATE DATE OF ORIGINAL ISSUE

REGISTERED OWNER:

PRINCIPAL SUM:

KNOW ALL MEN BY THESE PRESENTS, that the City of Winter Park, Florida (the **"Issuer"),** for value received hereby promises to pay to the Registered Owner designated **above,** or registered assigns, solely from the special funds hereinafter mentioned, on the Maturity Date specified above, the principal sum shown **above,** upon the presentation and surrender hereof at the **corporate** trust office of ________________________________ as paying agent and bond registrar (collectively, the "Bond Registrar"), and to pay solely from such **special** funds, interest hereon from the date of this bond or from the most recent interest payment date to which interest has been paid, whichever is applicable, until payment of such sum, at the rate per annum set forth above, payable on _________ **1,** 1997, and semiannually **thereafter** on ________ 1 and _________ **1** in each year (or if any such date is not a business day, then on the next business day thereafter), by check or draft mailed to the Registered Owner at his address as it appears at 5:00 p.m. (eastern time) on the fifteenth day of the month (whether or not a business day) immediately preceding the applicable interest payment date, on the registration books of the Issuer kept by the Bond Registrar. The principal of, premium, if **any,** and interest on this bond are payable in lawful money of the United States of America.

This bond is one of **an** authorized issue of bonds issued to finance the cost of acquisition of certain property within the **area** of the Issuer, under the authority of and in full compliance with the Constitution and Statutes of the State of Florida, including particularly Chapter 166, Florida Statutes, and other applicable provisions of law, Ordinance No. 2137 of the Issuer, and a resolution duly adopted by the City Commission on ______________,

1996, as [amended and] supplemented (collectively, the "Resolution"), and is subject to all the terms and conditions of such Resolution.

It is hereby certified and recited that all acts, conditions and things required to happen, to exist and to be performed, precedent to and in the issuance of this bond, have happened, exist, and have been performed in due time, form and manner as required by the Constitution and laws of the State of Florida applicable thereto; that the issue of bonds of which this bond is a part has been approved at a bond referendum held in accordance with the Constitution and Statutes of the State of Florida on June 4, 1996; and that provision has been made for the levy and collection of a direct annual tax upon all taxable property within the area of the Issuer, without limitation as to rate or amount, sufficient to pay the principal of and interest on the-bonds of this issue of which this bond is a part, as the same shall become due, which tax shall be levied and collected at the same time and in the same manner as other ad valorem taxes are assessed, levied and collected.

(Insert Redemption Provisions)

Notice of such redemption shall be given in the manner and to the extent required by the Resolution.

(To be inserted where appropriate on face of bond:

"REFERENCE IS HEREBY MADE TO THE FURTHER PROVISIONS OF THIS BOND SET FORTH ON THE REVERSE SIDE HEREOF, AND SUCH FURTHER PROVISIONS SHALL FOR ALL PURPOSES HAVE THE SAME EFFECT AS IF SET FORTH ON THIS SIDE.")

This bond may be transferred only upon the books of the Issuer kept by the Bond Registrar upon surrender hereof at the principal office of the Bond Registrar with an assignment duly executed by the Registered Owner or his duly authorized attorney, but only in the manner, subject to the limitations and upon payment of the charges, if any, provided in the Resolution, and upon surrender and cancellation of this bond. Upon any such transfer, there shall be executed in the name of the transferee, and the Bond Registrar shall deliver, a new fully registered bond or bonds in authorized denominations and in the same aggregate principal amount, series, maturity and interest rate as this bond.

In like manner, subject to such conditions and upon the payment of such charges, if any, the Registered Owner of this bond may surrender the same (together with a written authorization for exchange satisfactory to the Bond Registrar duly executed by the Registered Owner or his duly authorized attorney) in exchange for an equal aggregate principal amount of fully registered bonds in authorized denominations of the same series, maturity and interest rate as this bond.

This bond is and has all the qualities and incidents of a negotiable instrument under the laws of the State of Florida.

This bond shall not be valid or become obligatory for any purpose or be entitled to any security or benefit under the Resolution until the certificate of authentication hereon shall have been executed by the Bond Registrar.

IN WITNESS WHEREOF, the City of Winter Park, Florida, has issued this bond and has caused the same to be executed by its Mayor, and its corporate seal to be impressed, imprinted, or otherwise reproduced hereon and attested by its City Clerk, all as of __________ 1, 1996.

CITY OF WINTER PARK, FLORIDA

(SEAL)

____
Mayor

ATTESTED:

____
City Clerk

CERTIFICATE OF AUTHENTICATION OF BOND REGISTRAR

This bond is one of the bonds of the issue described in the Resolution.

____
As Bond Registrar

By ______________________________
Authorized Signature

Date of Authentication:

VALIDATION CERTIFICATE

This bond is one of a series of bonds which were validated and confirmed by judgment of the Circuit Court for Orange County, Florida, rendered on ____________________, 1996.

____
Mayor, City of Winter Park, Florida

The following abbreviations, when used in the inscription on the face of the within bond, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM - as tenants in common

TEN ENT - as tenants by the entireties

JT TEN - as joint tenants with right of survivorship and not as tenants in common

UNIF GIF/TRANS MIN ACT - ____________
(Cust.)

Custodian for ________________
(Minor)

under Uniform Gifts/Transfers to Minor Minors Act of ________________
(State)

Additional abbreviations may also be used though not in list above.

ASSIGNMENT

FOR VALUE RECEIVED, the undersigned sells, assigns and transfers to ______________________________
(PLEASE INSERT NAME, ADDRESS AND SOCIAL SECURITY OR OTHER IDENTIFYING NUMBER OF ASSIGNEE)
the within bond and does hereby irrevocably constitute and appoint ______________________________ as his agent to transfer the bond on the books kept for registration thereof, with full power of substitution in the premises.

Dated: ____________________

Signature guaranteed:

____

Signature guarantee by guarantor institution participating in Securities Transfer Agents Medallion Program, or in other guarantee program acceptable to Bond Registrar

____

NOTICE: The signature to this assignment must correspond with the name of the **Registered Owner** as it **appears upon the face of** the within bond in **every particular,** without alteration or enlargement or change whatever.

SECTION 14. SECURITY. For the prompt payment of the principal (including any Amortization Installments), redemption premiums, if applicable, and interest on the Bonds, the full faith, credit and unlimited ad valorem taxing power of the Issuer is irrevocably pledged.

SECTION 15. SINKING FUND; LEW OF AD VALOREM TAX. There is hereby created a Sinking Fund (including a Bond Amortization Account therein) to be held by a depository for and administered by the Issuer. Money on deposit in the Sinking Fund (excluding the Bond Amortization Account) shall be used solely for the purpose of paying the principal, redemption premiums, if applicable, and interest on the Bonds as they become due. Money on deposit in the Bond Amortization Account shall be used for the payment of Amortization Installments on Term Bonds, and if more than one stated maturity of Term Bonds of a series is outstanding, allocation of such money shall be made in a separate special subaccount for each stated maturity of Term Bonds of a series. Pending its use money on deposit in the Sinking Fund may be invested in Authorized Investments, and the income therefrom shall be retained in the Sinking Fund. At least one business day prior to an interest or Amortization Installment payment date, or principal maturity date for the Bonds, the Issuer shall pay or cause to be paid to the paying agent for the Bonds, an amount sufficient to pay the interest, Amortization Installment, principal and redemption premium, as applicable, due on the Bonds on such date.

Money held in the Bond Amortization Account shall be applied to the redemption or open market purchase (at not exceeding the price of par and accrued interest) of Term Bonds in accordance with the mandatory redemption provisions and/or the schedule of Amortization Installments for such Term Bonds. Amortization Installments for any Term Bonds shall be reduced on a reasonably proportionate basis to the extent that such Term Bonds are purchased in the open market, or shall be adjusted as otherwise approved by the City Manager of the Issuer. The Issuer shall pay from the Sinking Fund all expenses in connection with such purchase or redemption.

In each year while any of such Bonds are outstanding, there shall be levied and collected by the Issuer, a tax without limitation as to rate or amount on all taxable property within the area of the Issuer, sufficient in amount to pay the principal, Amortization Installments, redemption premiums, if applicable, and interest on such Bonds, as the same shall become due, after deducting therefrom any other funds which may be available for such principal, Amortization Installments, applicable redemption premiums and interest payments and which shall actually be so applied. The proceeds of such tax shall be deposited, as received, into the Sinking Fund and Bond Amortization Account, as applicable, for such purposes, and the Registered Owners of the Bonds shall have a lien upon the proceeds of such tax until so applied for payment of the principal (including any Amortization Installments),

redemption premiums, if applicable, and interest on the Bonds,

SECTION 16. APPLICATION OF PROCEEDS OF BONDS. All money received from the sale of the Bonds shall be applied by the Issuer as follows:

A. All accrued interest, and in the discretion of the City Manager of the Issuer, capitalized interest for a period of not exceeding 12 months from the date of delivery of the applicable series of bonds, shall be deposited into the Sinking Fund.

B. The Issuer shall next use the money to pay all costs incurred in connection with the issuance of the Bonds.

C. A special fund is hereby created, established and designated as the "General Obligation Bonds, Series 1996, Acquisition Fund" (the "Acquisition Fund"), and shall be held by a depository for and administered by the Issuer. There shall be paid into the Acquisition Fund the balance of the money remaining after making all the deposits and payments specified in paragraphs A and B above.

Such Fund shall be kept separate and apart from all other accounts of the Issuer, and the money on deposit therein shall be withdrawn, used and applied by the Issuer solely to the payment of, the cost of the Project. In lieu of capitalizing interest as permitted by paragraph A above, the Issuer may advance from the Acquisition Fund, an amount which, together with other funds on deposit in the Sinking Fund, will be sufficient to pay the first interest payment due on the Bonds, and repay such advance from the proceeds of legally available funds collected by the Issuer during the current or succeeding fiscal year of the Issuer.

Pending its use money in the Acquisition Fund may be invested in Authorized Investments, maturing not later than the date or dates on which such funds will be needed for the purposes of this resolution. Any income received upon such investments shall be retained in the Acquisition Fund and, to the extent not required to be rebated to the United States Treasury, used to pay costs of the Project. Upon completion of the Project, any money remaining in the Acquisition Fund shall be deposited into the Sinking Fund and, to the extent not required to be rebated to the United States Treasury, used solely for the purposes thereof.

Registered Owners shall have no responsibility for the use of the proceeds of the Bonds, and the use of such Bond proceeds by the Issuer shall in no way affect the rights of such Registered Owners. The Issuer shall be irrevocably obligated to continue to levy and collect the ad valorem taxes as provided herein and to pay the principal of and interest on the Bonds, notwithstanding any failure of the Issuer to use and apply such Bond proceeds in the manner provided in this resolution.

SECTION 17. TAX EXEMPTION. The Issuer at all times while the Bonds and the interest thereon are outstanding will comply with the requirements of the Code to the extent necessary to preserve the exemption from federal income taxation of the interest on the Bonds. The City Manager of the Issuer, or his designee, is authorized to make or effect any election, selection, choice, consent, approval or waiver on behalf of the Issuer with respect to the Bonds as the Issuer is required to make or give under the federal income tax laws, for the purpose of assuring, enhancing or protecting favorable tax treatment or characterization of the Bonds or interest thereon or assisting compliance with requirements for that purpose, reducing the burden or expense of such compliance, reducing the rebate amount or payments of penalties thereon, or making payments in lieu thereof, or obviating such amounts or payments, as determined by such officer, or his designee. Any action of such officer, or his designee, in that regard shall be in writing and signed by the officer, or his designee.

SECTION 18. **DEFEASANCE.** If, at any time, the Issuer shall have paid, or shall have made provisions for payment of, the principal, interest and redemption premiums, if any, with respect to any portions of the Bonds, then, and in that event, the pledge of and lien on the tax, described above, in favor of the applicable Registered Owners shall be no longer in effect. For purposes of the preceding sentence, deposit of sufficient cash and/or principal and interest on Federal Securities (being direct obligations of, or obligations unconditionally guaranteed by, the United States of America, none of which permit redemption prior to maturity at the option of the obligor) in irrevocable trust with a banking institution or trust company, for the sole benefit of the applicable Registered Owners to make timely payment of the principal, interest, and redemption premiums, if any, on the applicable Bonds, shall be considered "provision for payment."

SECTION 19. VALIDATION AUTHORIZED. The Attorney for the Issuer shall prepare and file pleadings to validate the Bonds in the manner provided by law.

SECTION 20. SALE OF BONDS. The Bonds shall be sold and delivered all at one time, or in installments from time to time, at public or private sale and at such price or prices as shall be determined by the Commission, all as authorized or permitted by Section 218.385, Florida Statutes, and any other applicable provision of law.

SECTION 21. UNCLAIMED MONEY. Notwithstanding any provisions of this Resolution, any money held by the paying agent for the payment of the principal or redemption price of, or interest on, any Bonds and remaining unclaimed for one year (or such shorter period as shall prevent the escheat of such money to the State of Florida) after the applicable date or dates when such principal, redemption price or interest has become due and payable (whether at

maturity, call for redemption or otherwise), if such money were so held at such date or dates, or one year (or such shorter period as shall prevent the escheat of such money to the State of Florida) after the date or dates of deposit of such money if deposited after such date or dates, shall be repaid to the Issuer free from the provisions of this Resolution, and all liability of the paying agent with respect to such money shall thereupon cease; provided, however, that before the repayment of such money to the Issuer as aforesaid, the paying agent first mail a notice, in such form as may be deemed appropriate by the paying agent with respect to the Bonds so payable and not presented, or unclaimed interest thereon, and with respect to the provisions relating-to the repayment to the Issuer of the money held for the payment thereof.

SECTION 22. MODIFICATION OR AMENDMENT. No adverse material modification or amendment of this resolution or of any ordinance or resolution amendatory hereof or supplemental hereto may be made without the consent in writing of the Registered Owners of 51% or more in aggregate principal amount of the Bonds to be affected by such modification or amendment; provided, however, that no modification or amendment shall permit a change in the maturity of the Bonds or a reduction in the rate of interest thereon, or in the amount of principal obligation thereof, or affect the 'promise of the Issuer to pay the principal of and interest on the Bonds as the same shall become due from the proceeds of the ad **valorem** tax, or authorize less than 30 days' notice of mandatory tender for purchase and/or redemption, by mail to Registered Owners of any Bonds to be called for prior redemption or tendered for purchase, or reduce the percentage of the Registered Owners of the Bonds required to consent to any adverse material modification or amendment hereof without the consent of the Registered Owners of all Bonds; provided further, however, that the Issuer may at any time amend this resolution to provide for the issuance or exchange of Bonds in coupon form, if and to the extent that doing so will not affect the tax exempt status of the interest on the Bonds. If the Bonds or any series of Bonds then outstanding are insured by a bond insurance policy, the consent of the municipal bond insurer shall be required in lieu of the consent of the Registered Owners of the Bonds so insured. For the purpose of computing the amount of Bonds held by the Holder of Capital Appreciation Bonds, the principal amount of a Capital Appreciation Bond shall be deemed to be its Compounded Amount.

SECTION 23. SEVERABILITY OF INVALID PROVISIONS. If any one or more of the covenants, agreements or provisions herein contained shall be held contrary to any express provision of law or contrary to the policy of express law, though not expressly prohibited, or against public policy, or shall for any reason whatsoever be held invalid, then such covenants, agreements or provisions shall be null and void and shall be deemed separable from the remaining covenants, agreements or provisions hereof or of the Bonds.

SECTION 24. OFFICIAL STATEMENT. Bond counsel and/or the financial advisor to the Issuer, as appropriate, are hereby authorized and directed to prepare and disseminate in connection

with the marketing of the Bonds, the preliminary and final official statements for the Bonds. Any preliminary official statement distributed by the Issuer to prospective purchasers for the Bonds shall be sufficient to be, and shall be, "deemed final" (except for permitted omissions) in accordance with SEC Rule 15c2-12. The City Manager or his designee is hereby authorized to determine and to certify or otherwise represent when such official statement shall be "deemed final" by the Issuer as of its date, in accordance with such Rule.

SECTION 25. REPEAL OF INCONSISTENT PROVISIONS. All resolutions or parts thereof in conflict with this resolution are hereby repealed to the extent of such conflict.

SECTION 26. EFFECTIVE DATE. This resolution shall take effect immediately upon its adoption.

ADOPTED after reading by title at a regular meeting of the City Commission of the City of Winter Park, Florida, held in City Hall, Winter Park, Florida, on this 25th day of June, 1996.

Mayor

ATTEST:

City Clerk

EXHIBIT 14

OPTION CONTRACT FOR PURCHASE AND SALE

THIS OPTION CONTRACT FOR PURCHASE AND SALE (the "Contract") is made and entered into by and between the CITY OF WINTER PARK, a municipal corporation organized and existing under the laws of the State of Florida, whose address is Winter Park City Hall, 401 Park Avenue South, Winter Park, Florida 32789 ("Buyer"), and the ELIZABETH MORSE GENIUS FOUNDATION, INC., a Florida not-for-profit corporation, whose mailing address is Post Office Box 40, Winter Park, Florida 32790 ("Seller").

WITNESSETH:

1. Grant of Option. Subject to the terms and conditions contained in this Contract, Seller hereby grants to Buyer and Buyer hereby accepts from Seller an evocable option (the "Option") to purchase from Seller, that certain parcel of land in which a portion of the Winter Park Golf Course is located in the City of Winter Park in Orange County, in the State of Florida, which real property is more particularly described on Exhibit "A" attached hereto (the "Property"), together with all improvements thereon and all of Seller's right, title and interest in, on, and to all easements, rights-of-way, licenses, privileges, tenements, reversions and appurtenances belonging or appertaining to the Property, if any.

1. Term of Option The term of the Option (the "Term") shall commence upon the date of execution of this Contract and shall expire on October 31, 1996, unless extended in writing by Buyer and Seller.

2. Exercise of Option. Buyer may exercise the Option at any time during the Term by delivery of written notice of same to Seller in accordance with the requirements of this

Contract. The date of delivery of such notice shall be referred to herein as the "Exercise Date". In the event Buyer fails to exercise the Option during the Term, then the Earnest Money Deposit, as described in Paragraph 4(A) hereinbelow, and all accrued interest thereon shall be returned to Buyer and this Contract and all rights and obligations of Buyer and Seller hereunder shall terminate.

3. Purchase Price. The Purchase Price shall be EIGHT MILLION AND NO/100 DOLLARS ($8,000,000.00). The Purchase Price shall be paid as follows:

A. Buyer shall, within five (5) day following execution of this Contract by both parties, deliver to Lowndes, Drosdick, Doster, Kantor & Reed, Professional Association ("Escrow Agent") as an initial earnest money deposit hereunder, a check in the amount of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) (the "Earnest Money Deposit").

The Earnest Money Deposit shall be deposited by Escrow Agent in an interest bearing money market account at a federally insured bank, subject to disbursement in accordance with the terms and provisions of this Contract. The interest earned on the Earnest Money Deposit shall be reported under Buyer's Federal Taxpayer I.D. Number (59-6000 454) and shall be delivered to the party who receives the Earnest Money Deposit pursuant to the terms of this Contract. If the transaction contemplated hereby shall close, the interest on the Earnest Money Deposit shall belong to the Seller. The Escrow Agent shall hold the Earnest Money Deposit until either the closing hereunder or the termination of this Contract.

B. The balance of the Purchase Price, SEVEN MILLION NINE HUNDRED NINETY THOUSAND AND NO/100 DOLLARS ($7,990,000.00) or such greater or lesser amount as may be necessary to complete the payment of the Purchase Price after credits,

adjustments and prorations, shall be paid to Seller by Buyer at closing hereunder by wire transfer to Escrow Agent's trust account.

4. Evidence of Title. Within thirty (30) days of the Exercise Date, Seller shall deliver to Buyer at Seller's expense, a commitment for an owner's title insurance policy (the "Commitment") issued by Winderweedle, Haines, Ward & Woodman, as issuing agent for Attorneys' Title Insurance Fund, Iuc. (the "Title Company") evidencing that Seller is vested with fee simple title to the Property and agreeing to issue to Buyer, upon recording of the general warranty deed to Buyer, an owner's title insurance policy in the amount of the Purchase Price, subject only to the foliowiug (the "Permitted Exceptions"):

a. zoning, restrictions, prohibitions, regulations, ordinances and other requirements of any applicable governmental authority;

b. the lien of taxes and assessments for the calendar year of the Closing and all subsequent years;

c. restrictions and matters appearing on the plat of the Property or otherwise common to the subdivisions of which the Property is a part;

d. Public utility easements;

e. any lien, encumbrance or other matter as to which the Title Company shall commit to affirmatively "insure over" at the minimum risk rate;

f. platted streets, parks and rights of way upon which portions of the existing golf course are located;

g. those matters set forth as exceptions in the Commitment and to which Purchaser does not object within the ten (10) day time period provided below for notifying Seller of any defects in the title to the Property.

The effective date of such policy shall be the date the general warranty deed conveying the Property is recorded in the Public Records of Orange County, Florida.

Buyer shall have ten (10) days from the date the Commitment is obtained to review and examine the Commitment. In the event any title defects or exceptions that are unacceptable to Buyer appear in the Commitment, Buyer shall, within said ten (10) day period, notify Seller in writing of such fact. Any defects, encumbrances, instruments, documents, exceptions or qualifications to title to the Property as reflected in the Commitment (except Permitted Exceptions) so objected to by Buyer in writing shall be deemed title defects ("Title Defects"). Upon receipt of notice of Title Defects from Buyer,' Seller shall have a period of one hundred twenty (120) days within which to take all necessary actions, including the prosecution of a quiet title or declaratory judgment action or actions, as may be required to cure or remove the Title Defects to the reasonable satisfaction of Buyer and Title Company. Seller hereby agrees that any liens or judgments encumbering the Property of an ascertainable amount shall be paid and satisfied at or prior to closing.

In the event after diligent effort Seller fails to cure or remove the Title Defects during the one hundred twenty (120) day curative period, Buyer may grant to Seller an additional one hundred twenty (120) day curative period, and upon expiration of the additional cure period or the original cure period if Buyer does not choose to grant an extension thereof, Buyer may (i) terminate this Contract by written notice to Seller, whereupon Buyer shall be entitled to an

immediate refund of the Earnest Money, Deposit, together with interest earned thereon or (ii) accept such title as Seller can then deliver with no further liability of Seller under this Contract.

5. Survey. No later than sixty (60) days after the date of the Referendum (see paragraph 9), Buyer shah obtain at Buyer's sole expense, a survey of the Property prepared by a registered land surveyor licensed in the State of Florida and acceptable to Buyer (the "Survey"). The Survey shall have affixed thereto a certification in the form attached hereto as Exhibit "B", and shall be sufficient to allow Title Company to remove the standard survey exception from the title insurance policy issued pursuant to the Commitment without any further exception with respect to survey. matters. Buyer shall have a period of ten (10) days to review the Survey and notify the Seller of any encroachments, overlaps, gaps or other matters not acceptable to Buyer, all of which shall be deemed Title Defects and cured by Seller in accordance with the requirements applicable to Title Defects as set forth above.

6. Closing. The closing hereunder shall occur on or before the earlier of (a) December 31, 1996 or (b) one hundred twenty (120) days after the Exercise Date, unless said date is extended pursuant to Paragraphs 5 or 6 hereinabove. The closing shah be held at the offices of Winderweedle, Haines, Ward & Woodman (the "Closing Agent") 250 Park Avenue, South,. Winter Park, Florida 32789 at a time mutually convenient to Buyer and Seller.

7. Representations and Warranties.

Seller hereby represents and warrants to Buyer the following:

A. Possession. That Seller shall deliver to Buyer free, exclusive and unobstructed possession of the Property at closing;

B. Ownership. That Seller is the fee simple owner of the Property, possesses full power and authority to deal therewith in all respects and no other party has any right or option thereto or in connection therewith, except for the existing City lease;

C. Condemnation. To the best of Seller's knowledge, without investigation or inquiry, there are no pending or threatened condemnation proceedings or actions affecting the Property;

D. Litigation. To the best of Seller's knowledge, without investigation or inquiry, there are no pending or threatened actions, legal proceedings or administrative proceedings or contractual commitments with any person, entity, governmental body or agency which may materially and adversely affect the Property.

Each of the warranties and representations set for&h above shall be deemed to have been made and shall be effective as of the date of this Contract and the date of closing. During the pendency of this Contract, Seller shall promptly deliver written notification to Buyer if events occur which render these representations or warranties untrue or incorrect. The foregoing warranties and representations shall survive the closing hereunder.

8. Condition Precedent. Notwithstanding anything in this Contract to the contrary, Buyer's obligation to close the purchase transaction contemplated in this Contract is subject to passage and approval of a duly held referendum of the voters of the City of Winter Park approving the issuance of bonds to finance the purchase of the Property '(the "Referendum"). The actual amount of the bond issuance, the source of repayment, and all other matters included in the Referendum shall be subject to the sole and absolute discretion of Buyer. Buyer anticipates that the Referendum shall be held during the first half of 1996. In the event, for any

reason, Buyer determines that the Referendum cannot be duly held, or if the bond issuance is not approved in the Referendum or if the interest rates at the time of the bond issuance are deemed by Buyer to be excessive, Buyer shall have the right to terminate this Contract upon delivery of written notice to Seller, whereupon Buyer shall be returned its Earnest Money Deposit and all interest earned therein.

9. <u>Obligations at Closing</u>.

A. Seller shall prepare and deliver to Buyer at closing:

(i) A duly executed general warranty deed in recordable form conveying fee simple title to the Property subject only to the Permitted Exceptions and those title exceptions previously accepted in writing by Buyer. The deed shall contain the following provision:

> Grantor hereby conveys the Property to the City of Winter Park with the understanding that use of the Property is hereby restricted to public recreational purposes only which include, but are not limited to, golfing, biking, croquet, badminton, volleyball, walking, jogging, wastewater reclamation, or any related activity which is consistent with the use of the Property as a golf course and/or recreational property. The Property is not to be used for business, commercial, residential, or any other purpose inconsistent with the nature of a recreational area. In addition, Parcel E, a portion of the Property as described on Exhibit A, may also be used for cemetery purposes. These restrictions are for the benefit of the Grantor, as well as the City of Winter Park and may be enforced in every lawful manner. It is understood that the use of any of the Property for any purpose prohibited hereby will cause the property to revert to Grantor and Grantor's successors and assigns. These restrictions may be amended, modified or released, in whole or in part, by instrument duly executed by Grantor (or

Grantor's successor or assigns) and, so long as the Property is owned by the City of Winter Park or by an entity claiming by, through, or under the City of Winter Park, by the City of Winter Park after approval of such amendment, modification, or release by a referendum of the qualified voters of the City of Winter Park.

(ii) A duly executed owner's affidavit, in a form satisfactory to Title Company and sufficient to delete the standard mechanics lien exception and the standard possessory rights exception from the title policy to be issued pursuant to the Commitment.

(iii) A duly executed closing statement.

(iv) Such other duly executed documents in recordable form, as are contemplated herein or reasonably required by Buyer to consummate the purchase and sale contemplated herein.

B. Buyer shall prepare and/or deliver to Seller at closing:

(i) Cash in the form of a wire transfer to Closing Agent's trust account for the purchase price, after adjustments, prorations and similar matters.

(ii) A duly executed closing statement.

(iii) Such other documents duly executed in recordable form as are contemplated herein or reasonably required by Seller to consummate the purchase and sale contemplated herein.

10. Real Estate Commission. Buyer and Seller hereby represent and warrant to each other that neither party has employed a real estate broker or agent in connection with the transaction contemplated hereby. Each party hereby agrees to indemnify, save and hold the other party harmless from any damages, claims, or actions, including, but not limited to,

attorneys fees and court costs, incurred or arising as a result of any brokerage commission claims brought by real estate brokers, which claims resulted from any agreement with or action by the indemnifying party. The warranties of Buyer and Seller set forth in this Paragraph shall survive the closing hereunder.

11. Lease Extension. The parties understand and agree that Buyer is currently leasing the Property from Seller under the terms of that certain Lease Agreement dated December 28, 1989, as amended (the "Lease"), which Lease shall expire on December 31, 1996. After expiration of the Lease, so long as this Contract remains in effect and for a period of ninety (90) days after termination of this Contract, Buyer shall have the right to use and occupy the Property pursuant to the terms of the Lease at a monthly rental equal to one-twelfth (1/12th) of the rental due under the Lease for the year 1996. Rents due under such lease shah be prorated as of the Closing date.

12. McKean Arboretum Memorial. Buyer and Seller hereby agree to work together in connection with the construction and maintenance of a landscaped walkway (the "McKean Walkway") on a portion of the Property and on a portion of the Winter Park Golf Course presently owned by the Buyer pursuant to the following terms and conditions:

A. The McKean Walkway will be located in the areas depicted on Exhibit "C" attached hereto (the "Walkway Parcels").

B. Buyer and Seller shall agree upon a plan prior to Closing (the "Approved Walkway Plan") for construction of the walkway, irrigation and landscaping improvements within the Walkway Parcels. The Approved Walkway Plan shall include appropriate signage designating the area as the McKean Arboretum Memorial and the creation of same in honor of

the contributions of Hugh Ferguson McKean and Jeannette Genius McKean to the City of Winter Park.

C. Buyer shall be responsible for installation of all hardscape and irrigation improvements within the Walkway Parcels in accordance with the Approved Walkway Plan at Buyer's sole cost and expense.

D. Seller shall be responsible for installing all landscaping and plantings within the Walkway Parcels in accordance with the Approved Walkway Plan at Seller's sole cost and expense.

E. Buyer, at its sole cost and expense, shall maintain the improvements located within the Walkway Parcel, and shall maintain and replace all landscaping and plantings with items of reasonably similar quality to those installed by Seller pursuant to the Approved Walkway Plan.

F. Notwithstanding anytbing set forth in this Contract to the contrary, Buyer shall not be obligated to participate in the cost of construction or maintenance of the McKean Walkway until Buyer acquires the Property pursuant to this Contract. The improvements provided by the Approved Walkway Plan shall be completed within one year from the Closing date.

G. The covenants contained in this Paragraph 13 shall survive the closing hereunder.

13. Prorations - Closing Expenses. Ad valorem taxes and any other liens, assessments or fees requiring adjustment shall be prorated to the date of closing as provided in Paragraph 6 above. Seller shall pay for (a) the cost of all documentary stamp taxes or other

transfer taxes required to be paid with respect to the general warranty deed, (b) the fee for the Commitment and the premium for the title insurance policy to be issued pursuant thereto, and (c) all recording fees for all title, corrective instruments or documents. Buyer shall pay for (a) recording fees for the general warranty deed and (b) all costs associated with Buyer financing the purchase of the Property, if any, and (c) the Survey. Each party hereto shall bear the costs of its own attorney's fees.

14. Default. The following provisions shah govern the rights of the parties hereto in the event that this Contract fails to close:

A. If Seller fails to consummate this Contract in accordance with its terms for any reason, except for Buyer's default or its termination as herein provided, Buyer may elect to either (i) terminate this Contract and receive a refund of the entire Earnest Money Deposit, together with interest earned thereon, or (ii) seek specific performance hereunder. Buyer expressly waives any right to bring an action for damages hereunder.

B. In the event Buyer shah fail to consummate this Contract in accordance with its terms for any reason, except for termination as herein provided, Seller shall as its sole remedy hereunder retain the entire Earnest Money Deposit, together with interest earned thereon, as liquidated damages.

Both Seller and Buyer expressly acknowledge that the above provisions are reasonable in light of the intent of the parties hereto and the circumstances surrounding the execution of this Contract, and that their respective rights and remedies shall be limited as set forth above.

15. Notices. All notices required or referenced by this Contract shall be sent by either U.S. certified mail, return receipt requested, or by Federal Express, to the following addresses:

To Seller:	Elizabeth Morse Genius Foundation Attn: Harold A. Ward, III, President
To Buyer:	City of Winter Park Winter Park City Hall 401 Park Avenue South Winter Park, Florida 32789
With copy to:	Hal H. Kantor, Esquire Lowndes, Drosdick, Doster, Kantor & Reed, P.A. 215 North Eola Drive Orlando, Florida 32801

All notices shall be deemed delivered upon the earlier of the date the receiving party signs an acknowledgment of receipt or five days after the notice is postmarked. A party may change its address for notices under tbis Contract by written notice delivered in accordance with the requirements of tbis Paragraph.

16. Successors and Assigns. This Contract shall not be assigned by Buyer without the prior written consent of Seller.

17. Escrow Agent. Escrow Agent shall be Lowndes, Drosdick, Doster, Kantor & Reed, Professional Association. The parties hereto agree that Escrow Agent shall have no obligation to negotiate the check delivered to it as the Earnest Money Deposit unless Escrow Agent shall receive a fully executed duplicate original of this Contract. The parties hereto agree to indemnify and hold Escrow Agent harmless against any loss or damage occasioned as a result

of it acting as Escrow Agent hereunder, except that occasioned by Escrow Agent's gross negligence or intentional fraud, including court costs and attorneys' fees incurred by Escrow Agent in the good faith exercise of its duties. In the event of a dispute between the parties, Escrow Agent shall be entitled to interplead the Earnest Money Deposit, or to keep it in an interest-bearing account pending resolution of the dispute, without prejudice to Escrow Agent's right to represent Buyer.

18. Attornevs' Fees. In the event that it shall be necessary for either party to this Contract to seek to enforce this Contract or to bring any legal action to enforce any provisions hereof or for damages on account of any breach of this Contract, the prevailing party in any such legal action, including, suits and appeals therefrom, shall be entitled to recover from the other party, in addition to any damages or other relief granted as a result of such legal action, all costs and expenses of such action, including reasonable attorneys' fees and paralegals' fees, whether such expenses were incurred before or after suit was brought.

19. Governing Law and Binding Effect. This Contract and the interpretation and enforcement of the same shall be governed by and construed in accordance with the laws of the State of Florida and shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto as well as their respective successors and assigns. The normal rules of construction on requiring that an agreement be construed most strictly against the drafter are hereby waived by the parties, as each party has been represented by counsel and the parties and their respective counsel have each participated in the negotiation and drafting of this Contract. In the event of any disagreement, conflict or litigation under this Contract, exclusive venue for the suit brought to resolve such dispute shall lie in Orange County, Florida.

20. Time is of the Essence. It is expressly agreed by the parties hereto that time is of the essence of this Contract and in the performance of all conditions, covenants, requirements, obligations and warranties to be performed or satisfied by either party hereto. Whenever a date specified herein shall fall on a Saturday, Sunday or legal holiday, the date shall be extended to the next succeeding business day.

21. Waiver. Waiver of performance or satisfaction of timely performance or satisfaction of any condition, covenant, requirement, obligation or warranty by one party shall not be deemed to be a waiver of the performance or satisfaction of any other condition, covenant, requirement, obligation or warranty unless specifically consented to in writing by both parties.

22. Possession and Risk of Loss. Possession of the Property shall be delivered by Seller to Buyer at the time of closing hereunder. Prior to the delivery of possession as aforesaid and subject to the terms of the Lease, for purposes of this Contract, Seller shall bear all risk of loss of whatever nature; and subsequent to the delivery of Possession Buyer shall bear all risk of loss of whatever nature.

23. Entire Agreement. This Contract embodies the complete and entire understanding and agreement between the parties hereto with respect to all matters contemplated in this transaction and supersedes any and all prior or contemporaneous agreements, whether written or oral. No agreements or other provisions, unless incorporated herein, shall be binding on either party hereto. This Contract may not be modified or amended nor may any covenant, agreement, condition, requirement, provision, warranty or obligation contained herein be released unless specifically consented to in writing by both parties hereto.

24. Effective Date of Contract. For purposes of 'computing time periods under this Contract, the effective date of this Contract (the "Effective Date") shall be the date when the last one of Buyer and Seller has properly executed this Contract, and provided, however, that anything to the contrary set forth herein notwithstanding, Seller's obligations hereunder shall be conditioned upon the enaction by the City of Winter Park of an ordinance or ordinances which rezone the Genius Drive Property, as defined in that certain Foundation Development Agreement of even date herewith between Seller and Buyer (the "Development Agreement") to a PURD zoning classification and rezones the Pennsylvania Avenue Property, as defined in the Development Agreement, to a PURD zoning classification, in each case incorporating the development standards set forth in the Development Agreement with respect to each respective parcel, and such ordinance(s) are final and not subject to appeal. In the event that such final ordinance(s) have not been adopted and any appeal period has not expired on or before ninety (9) days from the date this Contract is executed by the last party to execute this Contract, then, at, the option of the Seller, this Contract shall terminate and shall no longer be of any force or effect.

25. Contract Not Recordable. Neither this Contract nor any notice of it shall be recorded in the Public Records.

26. Cautions and Paragraph Headings. Captions and paragraph headings contained in this Contract are for convenience and reference only and in no way define, describe, extend or limit the scope or content of this Contract nor the intent of any particular provisions hereof.

27. Number and Gender. Whenever used herein, a singular number shall include the plural, the plural shall include the singular, and the use of any gender shall include all genders, as the context requires.

28. Severability. If any provision of this Contract is held to be illegal or invalid, all other provisions shall remain in full force and effect, unless holding a particular provision or provisions illegal or invalid shah serve to frustrate the purpose of this Contract.

29. Radon Gas Notification. In accordance with the requirements of the Florida Statutes, **Section** 404.056(8), the following notice is hereby given: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risk to persons who are exposed to it over time. Levels of radon that exceed Federal and State guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county public health unit.

31. Condition of Property.

(a) Buyer acknowledges and agrees that other than as specifically stated herein Seller has not made, does not make and specifically negates and disclaims any representations, warranties (other than the warranty of title as set out in the general warranty deed conveying title to the Property), 'promises, covenants, agreements or guaranties of any kind or character whatsoever, whether express or implied, oral or written, past, present, or future, of, as to concerning or with respect to (a) the value, nature, quality or condition of the property, including, without limitation, the water, soil and geology, (b) the income to be derived from the property, (c) the suitability of the Property for any and all activities and uses which Buyer may conduct thereon, (d) the compliance of or by the Property or its operation with any laws, rules,

ordinances or regulations of any applicable governmental authority or body, (e) the habitability, merchantability, marketability, profitability or fitness for a particular purpose of the Property, (f) the manner or quality of the construction or materials, if any incorporated into the Property (g) the manner, quality, state of repair or lack of repair of the Proper@, or (h) any other matter with respect to the Property, and specifically, that Seller has not made does not make and specifically disclaims any representations regarding compliance with any environmental protection, pollution or land use, zoning or development of regional impact laws, rules, regulations, orders or requirements, including the existence in or on the Property of hazardous materials (as defined below). Buyer further acknowledges that Buyer has been in possession of and operating the Property, Buyer is relying solely on its own investigation of the Property and not on any information provided or to be provided by Seller and at the Closing agrees to accept the Property, and Buyer waives all objections or claims against Seller (including, but not limited to, any right or claim of conhibution) arising from or related to the Property or to arty hazardous materials on the Property. Buyer further acknowledges and agrees that any information provided or to be provided with respect to the Property was obtained from a variety of sources and that Seller has not made any independent investigation or verification of such information and makes no representations as to the accuracy or completeness of such information. Buyer further acknowledges and agrees that to the maximum extent permitted by law, the sale of the Proper@ as provided for herein is made on an "AS IS" condition and basis with all faults. The provisions of this Section 31 shall survive the Closing.

(b) "Hazardous Materials" shall mean any substance which is or contains (i) any "hazardous substance" as now or hereafter defined in the Comprehensive Environmental

of pollutants, contaminants, chemicals, or industrial, toxic or hazardous substances or waste or Hazardous Materials into the environment (including, without limitation, ambient air, surface water, ground water or land or soil).

(d) Buyer on behalf of itself and its successors and assigns hereby waives, releases, acquits and forever discharges Seller, its officers, directors, employees, agents, attorneys, representatives, and any other persons acting on behalf of Seller, and the successors and assigns of any of the preceding, of and from any and all claims, actions, causes of action, demands, rights, damages, costs, expenses or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, which Buyer or any of its successors or assigns now has or which may arise in the future on account of or in any way related to or in connection with any past, present, or future physical characteristic or condition of the Property, including, without limitation, any Hazardous Materials in, at, on, under or related to the Property, or any violation or potential violation of any Environmental Requirement applicable thereto. In view of Buyer's possession of the Property under a lease from Seller for many years, Buyer also agrees to indemnify, defend, and hold harmless Seller and Seller's directors, employees, and agents against all loss, liability, claims, or damage. including but not limited to attorneys' fees, arising from such matters. Notwithstanding anything to the contrary set forth herein, this release and indemnity shall survive the Closing or termination of this Agreement.

Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. §9601 et seq.) ("CERCLA; (ii) any "hazardous waste" as now or hereafter defined in the Resource Conservation and Recovery Act (42 U.S.C. §6901 et, seq.) ("RCRA") or regulations promulgated under or pursuant to RCRA; (iii) any substance regulated by the Toxic Substances Control Act (15 U.S.C. §2601 et seq.); (iv) gasoline, diesel fuel, or other petroleum hydrocarbons; (v) asbestos and asbestos containing materials, in any form, whether friable or nonfriable; (vi) polychlorinated biphenyls; (vii) radon gas; and (viii) any additional substances or materials which are now or hereafter classified or considered to be hazardous or toxic under Environmental Requirements (as hereinafter defined) or the common law, or any other applicable laws relating to the Property. Hazardous Materials shall include, without limitation, any substance, the presence of which on the Property, (A) requires reporting, investigation or remediation under Environmental Requirements; (B) causes or threatens to cause a nuisance on the Property or adjacent property or poses or threatens to pose a hazard to the health or safety of persons on the Property or adjacent property; or (C) which, if it emanated or migrated from the Property, could constitute a trespass.

(c) Environmental Requirements shall mean all laws, ordinances, statutes, codes, rules, regulations, agreements, judgments, orders, and decrees, now or hereafter enacted, promulgated, or amended, of the United States, the states, the counties, the cities, or any other political subdivisions in which the Property is located, and any other political subdivision, agency or instrumentality exercising jurisdiction over the owner of the Property, the Property, or the use of the Property, relating to pollution, the protection or regulation of human health, natural resources, or the environment, or the emission, discharge, release or threatened release

IN **WITNESS WHEREOF,** the parties hereto have caused this Contract for Purchase and Sale to be executed in manner and form sufficient to bind them on the dates set forth below.

Signed, sealed and delivered in the presence of:	ELIZABETH MORSE GENIUS FOUNDATION, INC., a Florida not-for-profit corporation
_______________ Witness	By: _______________
Janet [illegible] Printed Name	Name: _______________
_______________ Witness	Title: President
[illegible] Printed Name	Date: February 28, 1996
	"SELLER"

	CITY OF WINTER PARK, a municipal corporation existing under the laws of the State of Florida
_______________ Witness	By: _______________
Joyce M. Swain Printed Name	Name: Gary [illegible]
_______________ Witness	Title: Mayor
[illegible] Printed Name	Date: 3-4-96
	"BUYER"

JD\mckean\genius2.opt
02/21/96 (1:37 pm)

The Escrow Agent hereby acknowledges the receipt of Buyer's check in the amount of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) subject to collection and negotiation in accordance with the terms hereof, and agrees to act as Escrow Agent hereunder.

LOWNDES, DROSDICR, DOSTER, KANTOR
& REED, PROFESSIONAL ASSOCIATION

By:______________________________
Hal H. Kantor

"ESCROW AGENT"

EXHIBIT "A"

PROPERTY DESCRIPTION

Parcel A

Lots 1 through 12, Block A, MORSELAND SUBDMSION, according to the plat thereof as recorded in Plat Book P, Page 79, Public Records of Orange County, Florida.

Parcel B

Lots 1 through 11 and Lots 13 through 23, Block B, MORSELAND SUBDMSION, according to the plat thereof as recorded in Plat Book P, Page 79, Public Records of Orange County, Florida.

Parcel c

Lots 1 through 22, Block C, MORSELAND SUBDMSION, according to the plat thereof as recorded in Plat Book P, Page 79, Public Records of Orange County, Florida.

Parcel D

Lots 1 through 12, Block D, MORSELAND SUBDMSION, according to the plat thereof as recorded in Plat Book P, Page 79, Public Records of Orange County, Florida.

Parcel E

The East 117.5 feet of Lots 1, 2 and 3, Block C, TANTUM ADDITION TO WINTER PARK, according to the plat thereof as recorded in Plat Book C, Page 32, Public Records of Orange County, Florida.

Parcel F

Lot 8 (less the W 77 feet of the S 119 feet) and lots 9 and 10, Block B, TANTUM ADDITION TO WINTER PARK, according to the plat thereof as recorded in Plat Book C, Page 32, Public Records of Orange County, Florida.

Parcel G

Lots 7 and 8, Block A, TANTUM ADDITION TO WINTER PARK, according to the plat thereof as recorded in Plat Book C, Page 32, Public Records of Orange County, Florida.

Parcel H

Lots 1 through 17, MORSELAND GARDEN SUBDIVISION, according to the plat thereof as recorded in Plat Book Q, Page 13, Public Records of Orange County, Florida.

The foregoing description is intended to include all property owned by Seller currently used by Buyer as a golf course, and if necessary, a more accurate description will be furnished by the Surveyor.

EXHIBIT "B"

CERTIFICATE

I, _______________, licensed as a registered land surveyor under the laws of the State of Florida, do hereby certify to Attorneys' Title Insurance Fund, Inc., Winderweedle, Haines, Ward & Woodman, P.A., the City of Winter Park, and Lowndes, Drosdick, Doster, Kantor & Reed, P. A., that this Plat of Survey represents a true and correct survey of the real property described hereon which was made on the ground under my direct supervision on _____________, 199__; that it accurately shows the boundaries of the premises described hereon and the location of all buildings, structures and other improvements, if any, situate on said premises; that the legal description of the parcel of real property comprising the premises is one and the same as the perimeter boundary description of said premises; that this Plat of Survey accurately depicts all easements and other matters shown as exceptions on __________ Title Insurance Company Commitment No. _______, a copy of which has been provided to the undersigned; that except as shown, there are no recorded easements, visible easements or rights-of-way across said premises, no evidence on the ground of use of the property which might suggest a possible claim of casement, no visible encroachments from said premises onto adjoining property, streets or roadways or onto said premises from adjoining property; that ingress and egress to and from said premises is provided by __________________ being paved dedicated rights-of-way maintained by _______________; that, except as shown, the premises do not rely on or serve any adjoining property for drainage, ingress, egress or any other purposes, that all required set-back lines and building height restrictions on said premises are located as shown hereon; and that no part of the property described hereon lies in a flood plain, flood way or an area that has been identified by the Secretary of Housing and Urban Development or any other governmental authority as a flood hazard area. The undersigned further certifies that this Plat of Survey has been prepared in accordance with the adopted "Minimum Technical Standards" as required by Chapter 21 HH-6 F.A.C.

Dated this ____ day of ___________, 1994.

____

Surveyor

(SEAL)

EXHIBIT "C"

Map of Walkway Parcel

(OF THE CONTRACT)

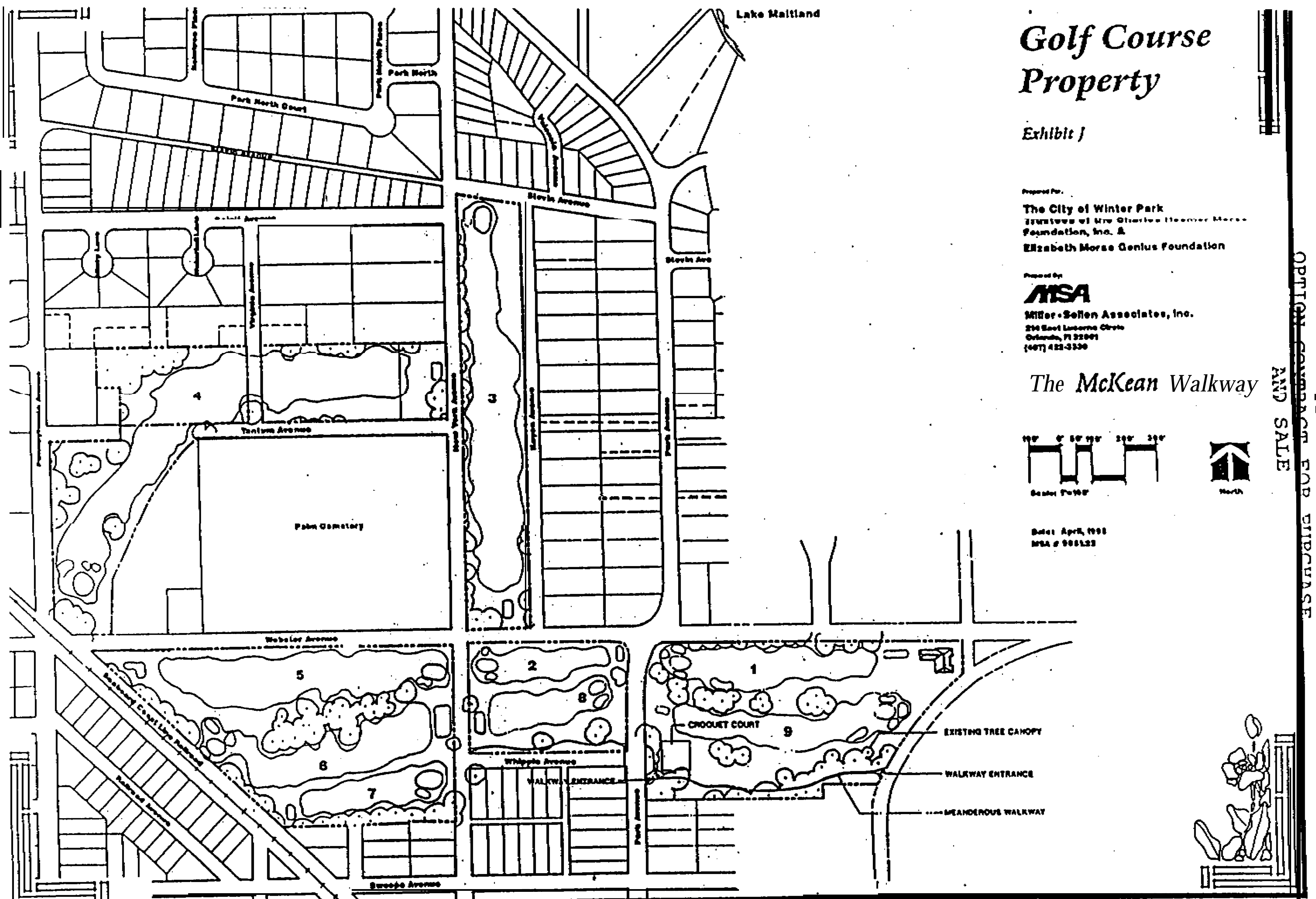

EXHIBIT "C"
TO
OPTION CONTRACT FOR PURCHASE
AND SALE

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MJ. Martin Kessler August 14, 1996

Dear Mr. Kessler:

We have been tax paying citizens of Winter Park for over 27 years and until recently we have been secure in knowing that the Winter Park government and officials have been consistently honest and forthright in representing our interests.

Recent revelations regarding the purchase and financing of the golf course property on Park Avenue appears to be fraught with deceit and connivances which are very disturbing. The voters were misled regarding the value of the property and how the purchase was to be financed. We were led to believe that 8 million was a reasonable price, and if it were not purchased by the city we could lose it to developments or at the very least lose the much desired green area on North Park Avenue.

We were not informed that the property had an assess value of 2 million dollars and that the property was protected from development by *existing zoning.* Fear tactics came into serious play in order to have the voters vote in favor of the proposition. The Mayor made a big play on the worthiness of the proposal in a Winter Park Newsletter and never mentioned that 3 million would be taken from the City reserves to facilitate the purchase. We were led to believe that the financing would be handled through a bond issue and that the tax payers obligations would be nominal over a period of 20 years. As you are probably aware, the new budget already calls for an increase in the Winter Park Debt Service, even without the new obligations of a bond issue.

Had all of the facts been presented honestly I am confident that the tax paying residents of the city would have rejected the propostion. I can assure you that I would have voted against it. I am troubled that a few well-positioned individuals in the city government broke faith with the residents of Winter Park simply by skewing the facts. I am incensed by the idea that a few special interests individuals were allowed to structured a highly suspect deal without question or accountability to the citizens.

I support your appeal to the court to set aside the flawed and dishonest referendum and to block the bond issue that has been proposed. There is no question that voters were deliberately misled and I personally refute my affirmative vote for acquisition of the Park Avenue property.

Carlton F Weber & Margaret J. Weber

Witnessed William E. Holmes

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Contributing to the sense of time, place and historical development of Winter Park

The Winter Park Country Club and Golf Course Historic District meanders across the landscape five blocks north of downtown Winter Park. It measures approximately forty acres and contains two contributing buildings, one contributing site, and one non-contributing site.

> "It contributes to the sense of time, place and historical development of Winter Park through its location, design, material, workmanship, feeling and association."

Designed around natural features and the town plan's system of roads and transportation channels, the course is roughly bounded by Interlachen, Pennsylvania, Stovin, Webster and Whipple Avenues.

With its approximate center near the intersection of New York and Webster Avenues, the district takes in all of parts of eight blocks. Palm Cemetery, a historic-period burial ground measuring some 12 acres, is enclosed by the golf course, bordered by holes three, four and five. Lake Maitland and Lake Osceola each lie approximately 1,000 feet to the north and east, respectively, from the outermost reaches of the course. US. Highway 17/92 (Orlando Avenue) lies approximately one-half mile west of the golf course.

John McMillian, 92, far left, joins other golfers as they tee off at the first hole.

The contributing resources, developed for expressed recreation and social functions, are significant for their architectural and historical associations. The buildings rise one story in height and display Craftsman and vernacular influences.

It contributes to the sense of time, place and historical development of Winter Park through its location, design, material workmanship, feeling and association. The district also possesses a Significant continuity of sites and building united by plan and physical development and provides important architectural, cultural, recreation, and social links to the heritage of Winter Park.

How Green Space Millage will be calculated if residents vote yes on referendum

By Julie Hopper, Finance Director

The Green Space tax millage is derived from two components. The following computation is used: The City's Annual Debt Payment divided by Citywide Property Assessment Values times .001 equals Green Space Millage.

The first component is the payment the City makes annually on the amount of money borrowed and used to purchase the Green Space. This amount varies slightly each year, therefore, an average debt payment amount is used to calculate the Green Space millage rates below.

The second component of the Green Space millage is the citywide assessed property values for the year. This is comprised of both residential and commercial properties. In fact. 28 percent of the assessed value is commercial property.

Therefore, 28 percent of the $5 million debt payment the City makes will be paid by commercial properties. Historical trends of the City show citywide property assessment values increasing each year. In the past five years, citywide property assessments have increased an average of 2 percent to 2.5 percent. In addition, as the Genius/Morse properties begin to develop additional assessment values will be gained, thereby reducing the annual Green Space millage rate.

Lastly, the city wide assessment is multiplied by .001 to provide for a Green Space millage rate.

$$\frac{\text{The City's Annual Debt Payment}}{\text{Citywide Property Assessment Values} \times .001} = \text{Green Space Millage}$$

As shown in the table below, as assessment values increase the annual Green Space tax millage will decrease to the property owner. Likewise, as the Genius property is developed, a higher assessment value will be derived, spreading the Green Space tax payment obligation over more property owners.

For example. the average annual payment made by the City on $5 million borrowed to pay for the purchase of the Green Space at current interest rates would be approximately $402,190 per year.

Assuming citywide property values will continue to increase by 2 percent each year, the following Green Space tax payment millage would be expected:

Year	Millage rate per $1,000 of property owned	$100,000 property-net of homestead exemption per year	$100,000 property-net of homestead exemption per month
1996	0.2326	$23.26	$1.94
1997	0.2280	$22.80	$1.90
1998	0.2236	$22.36	$1.86
1999	0.2192	$21.92	$1.83
2000	0.2149	$21.49	$1.79

To estimate an individual's share of the Green Space tax that would be paid on a $5 million bond issue, the worksheet on page 7 can be used.

Due to changes in the interest rates between now and when the bonds may be issued, the City's average annual debt payment may vary. ◆

Mayor Brewer uses back hoe during ground-breaking at Lake Island Park

By James S. Williams, City Manager

About 100 residents. community leaders, City officials and members of the Winter Park Little League, Soccer League and Pop Warner Football League turned out for a very upbeat, but chilly Parks and Recreation Master Plan ground breaking ceremony Saturday, Jan. 10 at Lake Island Park.

Mayor Gary Brewer showed his support and enthusiasm for the Master Plan by taking the controls of a large back hoe and turning the first clump of dirt in an area which will eventually be transformed into a beautiful walking path which will totally surround two lakes.

Other individuals who participated in the ground breaking ceremony included city Commissioners Peter Cottfried, Roland 'Terry" Hotard, III and Joe Terranova; James Williams, City Manager; James English, Public Works Director; Bill Carrico, Parks and Recreation Director; Ernie Manning, Asst. Parks and Recreation Director; Rev. Christopher Poole, Mt. Moriah Church; Mike Hofbauer, the Hedor Development Company and David Barth with Glatting - Jackson - Kercher - Anglin - Lopez - Rinehart.

With everyone wearing plastic hard hats supplied by the Parks and Recreation Department, Bill Carrico opened the Program behind the shuffle board courts in an open field west of the softball field at Lake Island Park.

The Rev. Christopher Poole gave the invocation followed by Mayor Brewer who gave the keynote address.

He referred to the ground breaking as a day that marked the beginning of the process which will launch us into the first phase of the Parks and Recreation Master Plan and into a new era for the City of Winter Park,

"This setting today reminds me of the movie *"Field of Dreams"* where Kevin Costner first looks out at a vast corn field and sees the possibility of a beautiful baseball field and all the good times that could be had by the thousands of players, spectators and families who would use it day in and day out," he remarked

"In many ways, our Parks and Recreation Director Bill Carrico and his dedicated staff had the same foresight, vision and faith

(continued on next page)

MILLAGE

(continued from page 5)

City of Winter Park
Taxpayer's Worksheet
Green Space Tax Calculation

Example: Home valued at $150,000

Assessed value of property	(See Note 1 below)	(1) $	150,000.00
LESS $25,000 homestead exemption if applicable		(2) $	(25,000.00)
Net assessed value of property	(Line 1 - Line 2)	(3) $	125,000.00
Tax Rate for Greenspace	(See Note 2 below)	(4) x	0.0002326
Annual Greenspace Property Tax Payment	(Line 3 x Line 4)	(5) $	29.08
Monthly Greenspace Property Tax Payment	(Line 5 divided by 12)	(6) $	2.42

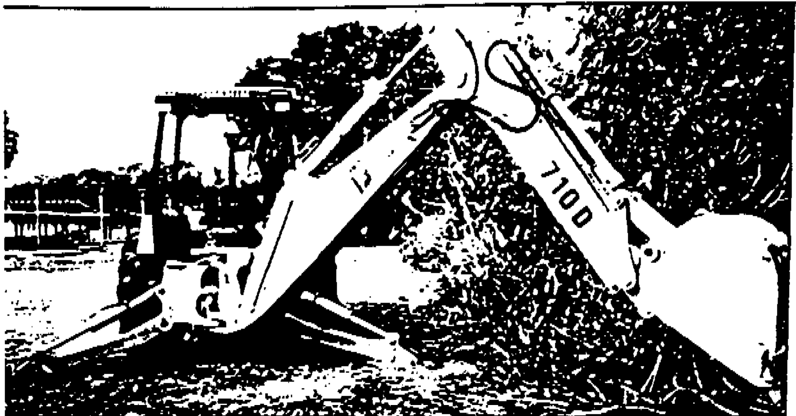
To calculate your own Greenspace Property Tax payment, just fill out the form below

If you have any questions, please contact us at the City of Winter Park at 623-3222 which is the Finance Department.

Assessed value of property	(See Note 1 below)	(1) $	
LESS: $25,000 homestead exemption if applicable		(2) $	(25,000.00)
Net assessed value of property	(Line 1 - Line 2)	(3) $	
Tax Rate for Greenspace	(See Note 2 below)	(4) x	0.0002326
Annual Greenspace Property Tax Payment	(Line 3 x Line 4)	(5) $	
Monthly Greenspace Property Tax Payment	(Line 5 divided by 12)	(6) $	

Note 1:
This amwnt can be found on your property tax bill. It is listed on the top portion of the bill after your account number and after the Escrow code.

Note 2:
This millage rate is estimated based on an average debt service payment of $402,190 that the City would make on a $5 million bond issue at current interest rates. See detailed explanation on the previous sheet.



Mayor Brewer uses a back hoe to unearth a mound of dirt during the Parks and Recreation Master Plan ground breaking ceremonies at Lake Island Park January 20

Commissioner Gottfried addressed the city's proposed purchase of the golf course. He expressed his concerns regarding voter turnout and the public's perception regarding the benefits of **purchasing the golf** course. He suggested that the city **obtain another appraisal based** on the property's use as a'golf course rather than residential use and that the city reconsider the inclusion of the provision in the option agreement that requires the property's continued use as a golf course.

Mayor Brewer reviewed the chronology of events that led to the option agreement and said that the city, not the Foundation, is placing the restriction on the use of the property. He pointed out **that** if the bond referendum fails and the city does not buy the property or renew the lease, the property will probably be sold to another party.

Commissioner Terranova pointed out that if the city renews the lease, **the rental** fee would increase since it has not been raised in two years.

Commissioner Murrah said that she feels the city would not benefit by obtaining another appraisal. She questioned whether the city could commit some of the city's reserve funding toward the purchase of the **golf course** in order to reduce the burden to the taxpayers.

In response to a question by Commissioner Murrah, Mr. Kantor said that he feels the city would not benefit from obtaining another appraisal.

Mayor Brewer said that he has written a letter to the Supervisor of Elections, Betty Carter, stating the city's preference to hold the referendum no earlier than June 4, 1996.

Commissioner Hotard said that he feels there will be a lower voter turn out if this referendum is the only issue on the ballot.

Mayor Brewer stated that a political action committee will be formed and that the process for educating the public will be handled similar to a regular election campaign, i.e. raise money, **print and distribute** brochures and signs. The next issue of the Update will be devoted to this matter.

Mayor Brewer further explained that if the city does not acquire the golf course property *or* renew the lease, it would not effect the development of the Foundations properties; however, it could effect the future use of the golf course, i.e. change of land use **designation** so as to be compatible with the surrounding property.

Mayor Brewer declared the work session adjourned at 8:35 p.m.

CITY CLERK

Mayor Brewer suggested that the proposed Resolution establishing the Committee be amended so as to shorten the time between the deadline for presentation of the Committee's recommended plan and date the Committee will be dissolved.

Consensus was to approve proposed Park Avenue Master Planning Program as amended. **CONSENT AGENDA.**

Commissioner Hotard commended Mr. Martin and city staff for their hard work in preparing this Program. He expressed the importance of the city's commitment to implementing this Program. **CONSENT AGENDA.**

6. Discussion of proposed plan to install a "pig trough" around the pig topiary at the Farmers' Market.

Consensus was to approve proposed plan to install a "pig trough" around the pig topiary at the Farmers' Market. CONSENT AGENDA.

7. Discussion of proposed schedule for a bond referendum to purchase the Golf Course property.

Mayor Brewer stated that a reply has not been received from the Supervisor of Elections, Betty Carter, regarding the city's request to hold the bond referendum on June 4, 1996. He asked whether the election date can be set prior to execution of the Development Agreement and Option Agreement.

City Attorney McCaghren stated that the date could be set, however it may have to be canceled depending on Mrs. Carter's response.

Commissioner Terranova said that the length of the bond issue and the amount of the bond needs to be addressed.

Mr. McCaghren said that the ordinance states that the length of the bond issue cannot exceed twenty years, however it can be changed.

In response to a question by Mayor Brewer, Mr. McCaghren said that reserve funds can be used "buy down" the amount of the bond. He added that a voter referendum is required to issue general obligation bonds, to issue bonds for which the proceeds will be used to acquire real estate and to issue revenue bonds pledging non ad valorem taxes in excess of $1.5 million. Voter referendum is not required to acquire real estate.

Commissioner Terranova said that if reserve funds are used, the issue becomes how much of the reserve funds should be used because it may affect the city's bond rating.

It was suggested that Finance Director Julie Hopper prepare an analysis to determine what effect using between one and two million dollars of reserve funds will have on the city's bond rating.

After further discussion, consensus was to defer action pertaining to scheduling a bond referendum to purchase the Golf Course

ADDENDUM

PLEASE NOTE:

Appellant is under the order of the court to strike Exhibit **#19** as a result of granting **appellee's** prior Motion to Strike. However, **Appellee's** Motion to strike ought not to have included this exhibit in the series of alleged improper exhibits to strike since Appellant's inclusion of Exhibit **#19** in the Appendix to the Initial Brief was valid in that the exhibit was a copy of the record on appeal, and is designated therein as Defendants Exhibit **#2** on the Evidence Control Report.

In a series of **correspondance,** Appellee and Appellant have resolved the issue of Exhibit # 19, as evidenced in the items of correspondence offered as a joint stipulation and shown in this addendum to the appendex.

MARTIN KESSLER
1555 WILBAR CIRCLE
WINTER PARK, FLORIDA 32789
407-645-3113

January 3 1, 1997 VIA FAX: 645-3728

Mr. Brent McCaghren,Esq.
Winderweedle, Haines, Ward & Woodman, P. A.
Post Office Box 880
Winter Park, Fl. 32789

Dear Mi. McCaghren:

Re: Martin Kessler V. City of Winter Park, Case 89,501

I am writing to confirm our telephone conversation that you and I agree that what I have included within the Appendix of my Initial Brief as Exhibit 19 is a document shown on the Evidence Control Report as defendants exhibit #2 and is on the record of appeal.

As you are aware, the Court has granted me permission to amend my brief and to do so by February 10, 1997, as extended. , Since the time is so short, I want to be certain that our agreement is as I understaned it before I make reference to Exhibit#19. Would you then kindly confirm my understanding as soon as possible and fax this back to me?

AGREED AS TO THE FACT:

Brent McCaghren, Esq.
Attorney for the Appellee

Very Truly Yours,

Martin Kessler, Appellant

cc: Judson Freeman,Jr. Esq.

WINDERWEEDLE, HAINES, WARD & WOODMAN, P.A.

ATTORNEYS AT LAW

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W. GRAHAM WHITE
VICTOR E. WOODMAN

REPLY TO:
Winter Park

February 4, 1997

VIA FACSIMILE (407) 645-0106

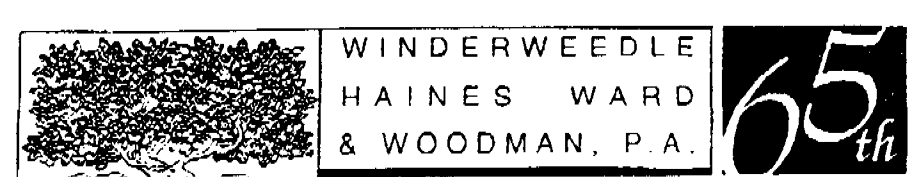
Mr. Martin Kessler
1555 Wilbar Circle
Winter Park, Florida 32789

RE: Martin Kessler vs. City of Winter Park
Supreme court Case No. 89,501

Dear Mr. Kessler:

In earlier correspondence, I have agreed that you may include as part of your appendix and your amended brief any document received in evidence at the bond validation hearing. Specifically, that would include defendant's Exhibit #2 shown on the evidence control report.

However, neither before the bond validation hearing nor at the bond validation hearing did you furnish me with copies of your proposed exhibits. Therefore, I do not have a furnished copy of the letter included in your brief as Exhibit #19 to compare with the document actually admitted into evidence as defendant's Exhibit #2. In order to do so would require me to go to the clerk's office at the Orange County Courthouse and make that comparison. I do not feel it necessary for me to do so.



Mr. Martin Kessler
February 4, 1997
Page 2

However, if in fact Exhibit #19 to your appendix to your initial brief is in fact the same document as defendant's Exhibit #2 shown on the evidence control report, then I have agreed that it may be included as an exhibit in your amended brief and appendix.

It is not necessary for me to stipulate that Exhibit #19 is the same document shown on the evidence control report. All that is necessary is my agreement that you may include the document shown on the evidence control report as defendant's Exhibit #2 as part of your appendix.

My agreement to your inclusion of defendant's Exhibit #2 as part of your appendix and brief does not constitute any waiver of any objection to the admissibility, relevancy or materiality of that document, nor does it constitute an admission as to the authenticity of the document or the truthfulness of the conclusions and opinions stated therein.

Very truly yours,

C. Brent McCaghren

CBM/aw
cc: Judson Freeman, Jr., Esq.

PLAINTIFF

CONTROL REPORT

TRIAL CLERK Susan Chipner

VS

State of Florida, et al

DATE 11-6-96

JUDGE John H. Adams, Jr.

DEFENDANT

EXHIBIT NO.	DESCRIPTION	LOCATION
Plaintiff's ✓1	City of Winter Park Ordinance No. 2137	Attached
✓2	Publication of Notices	
✓3	Resolution No. 1635	
✓4	Resolution No. 1636	
✓5	Composite - Option Contract	
✓6	Composite - City Commission Minutes	
✓7	Composite - Newspaper Articles and Publications	
Defendant's ✓ A	Letter from Louis A. Campanelli, 8/5/96	Attached
✓1 B	Memorandum from P. Gottfried, 8/15/95	
✓2 B	Letter from W. Holmes, 8/14/96	
✓3	Public Hearing Notice	

11/8/96

11/7

32-85 (8/78)

Page 1 of 1

EXHIBIT 24

Commissioner Hotard said that he feels there will be a lower voter turn-out with a stand-alone election.

Commissioner Murrah said that she believes there is no guarantee that people will vote for municipal issues citing the 1992 election where unused municipal ballots were found.

Commissioner Terranova said that he feels a November election is not logistically possible.

Mayor Brewer said that he feels that this is an important issue and the citizens will make the extra effort to vote.

In response to a question by Commissioner Hotard, Mr. McCaghren said that a bond referendum does not meet the criteria for conducting a mail ballot election.

Discussion ensued regarding the city's and county's responsibilities for conducting the election on June 4th.

Mayor Brewer explained that $1.12 million has been set aside for the purchase of the golf course property at a price of $8 million and according to the bond advisors, the Commission can commit up to $3 million from the Contingency Fund without jeopardizing the city's bond rating. He asked whether the city could pay back the bonds early or whether additional Contingency Funds could be committed and the Fund reimbursed if the city receives a commitment for funding from the P2000 Grant.

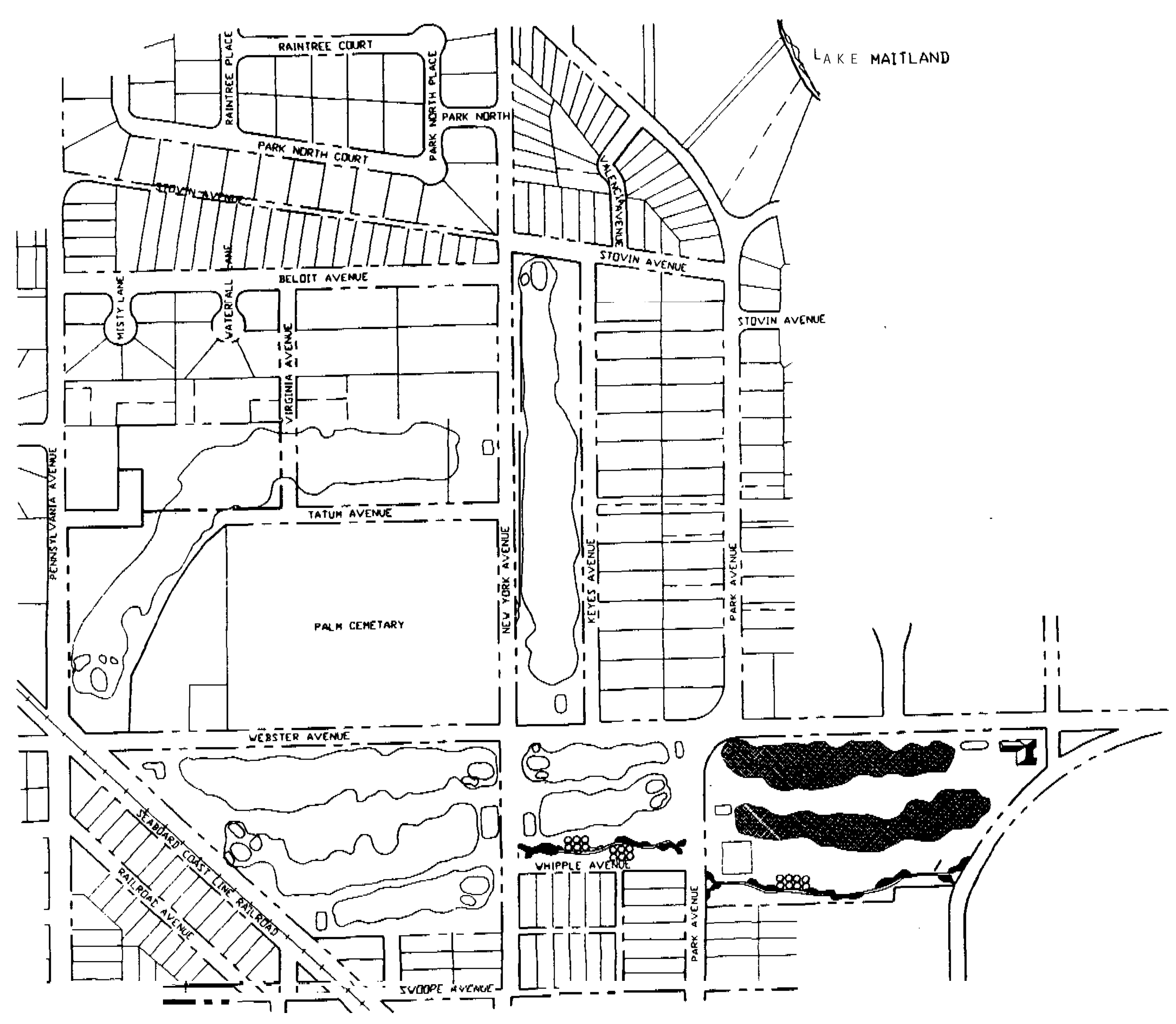
Assistant City Manager Randy Knight said that if a commitment is received prior to issuance of the bonds, the city could issue less bonds because the ordinance establishes a "not to exceed" amount. He added that there are numerous restrictions for early repayment of the bonds. He explained that because of the proposed timing of the closing for the purchase of the golf course, funds may not be expended prior to receiving a commitment for receipt of P2000 Grant funds. He confirmed that no funds will be expended from the Contingency Fund if the bond referendum is defeated.

Commissioner Terranova said that he feels the disadvantages of using Contingency Funds are that it reduces the funds available in case of disaster or other emergency and that reduces the amount of interest that would be earned by those funds.

Commissioner Murrah said that if the city acquires the golf, the savings derived from the lease payment and taxes could be put back into the Contingency Fund or be used to reduce the operating millage.

Discussion ensued on the options available, the effect the bond amount will have on property taxes and the citizens' perception of the city's acquisition of the golf course i.e. increased taxes or preservation of green space.

Winter Park
Golf Course



HOLES 1 & 9 OWNED BY THE CITY OF WINTER PARK