IN THE SUPREME COURT

OF THE STATE OF FLORIDA

RAYMOND P. MURPHY,

Appellant, Case No. 96,997

LEE COUNTY, FLORIDA,
Appellee.

ON APPEAL FROM A FINAL JUDGMENT OF THE
CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, IN CASE NO. 99-3534-CA-JBR

AMICUS BRIEF OF THE TOWN OF FORT MYERS BEACH

(Revised 1/11/2000)

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TYPE CERTIFICATION

I hereby certify that the type in the body of this Amicus Brief is 14-point Times New Roman, and the type in the headings is 14-point (or higher) Univers.

INTRODUCTION

This Amicus Brief is submitted on behalf of the TOWN OF FORT MYERS BEACH, which will be addressed as the "the Amicus." This Amicus Brief is submitted in support of the position of the Appellant/Defendant RAYMOND P. MURPHY, who will be addressed herein as "Murphy". The Appellee/Plaintiff, LEE COUNTY, will be addressed as "the Plaintiffs" or "County."

Reference to the Appellant's Appendix will be indicated by "APP" followed by the appropriate volume and page number.

The Amicus thanks the Court for allowing the expression of views as to the potential impact of this case upon the municipalities.

INTEREST OF THE AMICUS

The Amicus was created by Ch. 95-495 Laws of Fla., and became a municipality on December 31, 1995. Plaintiff's Complaint Allegation #3

reads in part " The 1999B Project is located within the municipal boundaries . . . the consent of the Town is not required." The Amicus is one of a class of towns and cities encompassed by Art. VIII §2(b), Fla. Const. (1968).

STATEMENT OF THE CASE & FACTS

In general it can be said that the Final Judgment found the issuance of bonds and proceedings proper and lawful. The Amicus will rely upon the undisputed facts disclosed by the actual parties in their respective briefs.

SUMMARY OF DISCUSSION

The facts of this case include the purchase by the county, without the consent of the Town Council, of a separable water system lying solely within the Town boundaries.

When two local governments have a legal basis for the claim of right to provide water service, the earliest acquired right will prevail. Since the municipality existed prior to the Plaintiff contracting to purchase the water system, the municipality would have the first right to purchase.

Art. VIII § 4. Transfer of Powers, Fla. Const. (1968), provides a procedure

whereby any function of one local government may be transferred to another. This applies to both charter and non-charter counties.

The essence of the concept of utilities serving the public is that each entity be given an exclusive service area. The purchase of the water utility is a function of a municipality. §125.0101, Fla. Stat. (1997) lists water services as available for a county to contract with a municipality.

The constitutional limitation on the power of a county provides all powers of local self-government not inconsistent with general law. The word "inconsistent" means contradictory in the sense of legislative provisions which cannot coexist. §180.02 Fla. Stat. (1997) provides that any municipality may purchase a water system within its corporate limits. This provision cannot coexist with the county having the same right. The granting of powers to municipalities Art. VIII §2(b), Fla. Const. (1968) must not be construed to be concurrent with the same grant of powers to charter counties.

DISCUSSION

WHETHER THE PRIMARY RESPONSIBILITY TO PROVIDE WATER SERVICE LIES WITH A COUNTY OR A

MUNICIPALITY.

In the instant case, the lower tribunal, of necessity, considered the following Constitutional provisions:

> **ARTICLE VIII**
> LOCAL GOVERNMENT
>
> **SECTION 1. Counties.**--
> (g) CHARTER GOVERNMENT. Counties operating under county charters shall have **all powers of local self-government not inconsistent with general law**, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.
>
> **SECTION 2. Municipalities.**--
> (a) ESTABLISHMENT. Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the protection of its creditors.
> (b) POWERS. Municipalities **shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.** Each municipal legislative body shall be elective.
>
> **SECTION 4. Transfer of powers.**--By law or by resolution of the governing bodies of each of the governments affected, **any function or power of a** county, **municipality** or special district **may be transferred to** or contracted to be performed by **another county**, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.
> (*Emphasis added)* Art.VIII, Fla. Const., (1968)

The facts of this case include (1) the **purchase** from the private owner of the (2) **separable water system** (3) lying solely **within the Town** boundaries,(4) **without the consent** of the Town Council.

THE PURCHASE:

The water system being totally within the Town, because there is no general or special law prohibiting the purchase, under Art. VIII §2(b) Fla. Const. (1968), the Town is authorized to purchase the system. The total area of the State of Florida is divided into sixty-seven counties, therefore all municipalities lie within the boundaries of one or more of the Florida counties. Because the water system also lies within Lee County, and because there is no general or special law prohibiting the purchase, the lower tribunal found that the Plaintiff was authorized under Florida Statutes Chapter 125 and the Florida Constitution to purchase the system.

It is interesting to compare, word for word, the statute which authorized the purchase and that was submitted by the Plaintiff, namely §125.3401, Fla. Stat. (1997) with §180.301, Fla. Stat. (1997), authority for municipalities to purchase a water utility:

125.3401 ~~180.301~~ Purchase, sale, or privatization of water, sewer, or wastewater reuse utility by county ~~municipality.~~--No county ~~municipality~~ may purchase or sell a water, sewer, or wastewater reuse utility that provides service to the public for compensation, or enter into a wastewater facility privatization contract for a wastewater facility, until the governing body of the county ~~municipality~~ has held a public hearing on the purchase, sale, or wastewater facility privatization contract and made a determination that the purchase, sale, or wastewater facility privatization contract is in the public interest. In determining if the purchase, sale, or wastewater facility privatization contract is in the public interest, the county ~~municipality~~ shall consider, at a minimum, the following:
(1) The most recent available income and expense statement for the utility;
(2) The most recent available balance sheet for the utility, listing assets and liabilities and clearly showing the amount of contributions-in-aid-of-construction and the accumulated

depreciation thereon;
(3) A statement of the existing rate base of the utility for regulatory purposes;
(4) The physical condition of the utility facilities being purchased, sold, or subject to a wastewater facility privatization contract;
(5) The reasonableness of the purchase, sales, or wastewater facility privatization contract price and terms;
(6) The impacts of the purchase, sale, or wastewater facility privatization contract on utility customers, both positive and negative;
(7)(a) Any additional investment required and the ability and willingness of the purchaser, or the private firm under a wastewater facility privatization contract, to make that investment, whether the purchaser is the county ~~municipality~~ or the entity purchasing the utility from the county ~~municipality~~;
(b) In the case of a wastewater facility privatization contract, the terms and conditions on which the private firm will provide capital investment and financing or a combination thereof for contemplated capital replacements, additions, expansions, and repairs. The county ~~municipality~~ shall give significant weight to this criteria.
(8) The alternatives to the purchase, sale, or wastewater facility privatization contract, and the potential impact on utility customers if the purchase, sale, or wastewater facility privatization contract is not made; and
(9)(a) The ability of the purchaser or the private firm under a wastewater facility privatization contract to provide and maintain high-quality and cost-effective utility service, whether the purchaser is the county ~~municipality~~ or the entity purchasing the utility from the county ~~municipality~~.
(b) In the case of a wastewater facility privatization contract, the county ~~municipality~~ shall give significant weight to the technical expertise and experience of the private firm in carrying out the obligations specified in the wastewater facility privatization contract.
(10) All moneys paid by a private firm to a county ~~municipality~~ pursuant to a wastewater facility privatization contract shall be used for the purpose of reducing or offsetting property taxes, wastewater service rates, or debt reduction or making infrastructure improvements or capital asset expenditures or other public purpose; provided, however, nothing herein shall preclude the county ~~municipality~~ from using all or part of the moneys for the purpose of the county's ~~municipality's~~ qualification for relief from the repayment of federal grant awards associated with the wastewater system as may be required by federal law or regulation.

The county ~~municipality~~ shall prepare a statement showing that the purchase, sale, or wastewater facility privatization contract is in the public interest, including a summary of the purchaser's or private firm's experience in water, sewer, and wastewater reuse utility operation and a showing of financial ability to provide the service, whether the purchaser or private firm is the county ~~municipality~~ or the entity purchasing the utility from the county ~~municipality~~.
History.--s. 1, ~~2~~ch. 84-84; s. 1,~~6~~ ch. 93-51; s. 6,~~7~~ch. 96-202.

The two statutes are word for word the same, except for exchange of the word "municipality" for the word "county" and for the statute numbers. When two local governments have a legal basis for the claim of right to provide water service, the earliest acquired right will prevail. *Lake Utility Services, Inc. v. City of Clermont,* 727 So.2d 984 (5thDCA 1999). Since the municipality (Town of Fort Myers Beach), existed prior to the private corporation having offered the system for sale, or for that matter even prior to the Plaintiff contracting to purchase the water system, the municipality would have the first right to purchase and, in a conflict between a county and a municipality, the municipality should prevail.

SEPARABLE WATER SYSTEM,

LYING SOLELY WITHIN THE TOWN:

The water system servicing the Town is currently owned and operated by a private corporation while at the same time the Plaintiff owns and operates the sewer system. Clearly the water system is separate from and independent of the county sewer system. As further evidence of its separability, the Plaintiff's resolution submitted into evidence at the hearing made just that factual determination and further stated that the system is located only within the municipal boundaries of the Town. (APP III,263)

(4) **WITHOUT THE CONSENT OF THE TOWN:**

The Florida Legislature recently enacted Ch. 99-279 Laws of Fla. and stated:

> The purpose and intent of this act is to promote, protect, and improve the public health, safety, and welfare and to enhance intergovernmental coordination efforts by the creation of a governmental conflict resolution procedure that can provide an equitable, expeditious, effective, and inexpensive method for resolution of conflicts between and among local and regional governmental entities. It is the intent of the Legislature that conflicts between governmental entities be resolved to the greatest extent possible without litigation. §164.102, Fla. Stat. (1999)

This litigation may never have happened if there could have been compliance with that law. There is a fierce competition between counties and municipalities for the limited revenue available for operation of government and it is this conflict that is the source of most of the disputes between them. The county's duty to provide "core level" services to all residents, including those within a municipality, obscures their responsibility to allocate proper charges for municipal services for the un-incorporated area to the un-incorporated property owners. This water system is just such a municipal service which would, if consolidated with the Plaintiff's water system, require the Town to share the burden of providing municipal services to the un-incorporated area.

MUNICIPALITIES SHALL HAVE . . . POWERS

TO ENABLE THEM TO . . . RENDER MUNICIPAL SERVICES. . .

Historically, within the Roman Empire, municipalities were granted a certain measure of inherent local self-government. Prior to our nation's independence from England, the law was, "But with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. . . The city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created." *Commentaries on the Laws of England,* William Blackstone, Oxford, (1765) reprint The University of Chicago Press (1979). The early development of Florida included the existence of municipalities long before the establishment of any state or territorial government; however, consistent with the law in England, municipalities in Florida have no inherent right of self-government. *State ex rel. Johnson v. Johns,* 92 Fla., 187, 109 So. 228 (Fla. 1926). This court, in considering a decision affecting the autonomy of a municipality, should consider that while the Florida Constitution generally exists to limit the powers of the legislature, the early constitutions established **the legislature** as having **has plenary power over corporations, including municipalities**, with no residual authority being retained by the people or the municipalities.

(Emphasis added) Cobo v. City of Key West, 116 So.2d 233 (Fla. 1959). The Florida Constitution of 1968 in some respects reverted to the Roman concept of inherent self-government and gave home rule powers to both the counties and to the municipalities under the new provisions of Article VIII.

The theory and reasoning behind the purpose of local government is that local citizens should make local decisions concerning public regulation and the election of local officials. *State ex rel. Johnson v. Johns, supra* at (92 Fla., 187, 109 So. 228). Further, a municipality is not just a place on a map, to be valid it must have inhabitants within its territorial limits and it must have **a community of people with social contacts so as to create common interests and a concern for the general welfare of those within the community**. *(Emphasis added) State ex rel. Davis v. Town of Lake Placid,* 109 Fla. 419, 147 So. 468 (Fla. 1933).

Art. VIII § 4. Transfer of Powers, Fla. Const. (1968), provides a procedure whereby any function or power of one local government may be transferred to another local government.

This court in *Sarasota County v. Longboat Key*, 355 So.2d 1197 (1978), considered the application of this constitutional provision to charter counties and found that Article VIII Section 4., **did apply to both charter and non-charter counties.** This court also found that the introductory "by law or

by resolution of the governing bodies" could not be accomplished by general law. *(Emphasis added) Sarasota County v. Longboat Key, supra* at 1201.

The functions and powers of the Sarasota County case were identified as: air pollution control, water pollution control, parks, recreation, roads, bridges, planning, zoning, and police. These functions are more akin to governmental functions, in that they are not traditionally provided by private enterprise, than a water system that is more proprietary in nature. Functions of local government are not limited to governmental functions as is evidenced by the expressed provision of §125.0101, Fla. Stat. (1997) which lists **water services** as available for a county to contract with a municipality, as provided by Article VIII §4, Fla. Const. (1968).

There are a few cases that are helpful in understanding the effect of Article VIII §4, Fla. Const. (1968). This court when considering the agreement between a sheriff and a municipality found that Article VIII §4, Fla. Const. (1968)., did not apply to constitutional officers, who are not governments, as such an agreement under the constitution would not involve consolidation of powers or functions. Article VIII §4, Fla. Const. (1968). is a constitutional method for the **partial consolidation of powers and functions for better efficiency** without requiring total consolidation. *(Emphasis added) City of*

Palm Beach Gardens v. Barnes, 390 So.2d 1188 (1980). The change of boundaries of a fire district did amount to such consolidation and therefore

that provision applied*. Fire Control Tax District, No.7, Trail Park v. Palm Beach County,* 423 So.2d 539 (1982).

This court in *Broward County v. City of Fort Lauderdale,* 480 So.2d 631 (1985) stated, "We hold that Section 1(g) permits regulatory preemption by counties, while Section 4 requires dual referenda to transfer functions or powers relating to services." (634) Legislative acts (of a county) would not trigger the constitutional requirements (of consent). However, if the legislature provides for required municipal consent, then a county may not usurp the municipal's authority. *Metropolitan Dade County v. City of Miami,* 396 So.2d 144 (Fla. 1980).

The essence of the concept of utilities serving the public is that it is in the best interests of the public that the entities providing utility services not be permitted to compete as to rates and service and that **each entity be given an exclusive service area and monopolistic status**. *(Emphasis added) City of Mount Dora v. JJ's Mobile Homes, Inc*., 579 So.2d 219 (5thDCA 1991). This exclusive nature of a water system makes the purchase exclusive and deprives either the Plaintiff or the Town from further participation in providing the

service.

The question then remains, "Is the purchase of the water utility a function of a municipality?" The answer must be in the affirmative. We need to go no further than the Chapter of Florida Statutes relied upon by the Plaintiff as their authority, §125.0101 (1), Fla. Stat. (1997) "It is the legislative intent of this act to permit counties to contract for services with municipalities and special districts as provided by s. 4, Art. VIII of the State Constitution. (2) In addition to the powers enumerated in this chapter, the legislative and governing body of a county shall have the power to contract with a municipality or special district within the county for . . . **water,** . . . and other essential facilities and municipal services."

Of the services listed in §125.0101, Fla. Stat. (1997), recreation services and facilities, water, garbage and trash collection and disposal, waste and sewage collection and disposal, may be considered proprietary in nature, however they are also clearly a function of a municipality.

The legislature enacted both §125.3401, Fla. Stat. (1997) and §180.301, Fla. Stat. (1997) at the same time, and placed the municipal provision in Chapter 180 Municipal Works. That chapter in §180.02 Powers of municipalities. Fla. Stat. (1997) provides, "(1) For the accomplishment of the purposes of this chapter, any municipality may execute its corporate powers (to

purchase a water system) within its corporate limits." This provision, granting the Town the right to purchase the water system, cannot coexist with the county having the right to purchase the town's water system. The constitutional limitation on the power of a county expressly provides "**all powers of local self-government not inconsistent with general law**." The word "inconsistent" as used in this provision of the constitution means contradictory in the sense of legislative provisions which cannot coexist. *State ex rel. Dade County v. Brautigan,* 224 So2d 688 (Fla. 1969). The legislature cannot give the exclusive right to provide water service to both the county and a municipality.

The granting of powers in Art. VIII §2(b), Fla. Const. (1968) must not be construed to be concurrent with the same grant of powers, provided in that same article, to charter counties. Knowing that all municipalities lie within at least one county, that may subsequently become a charter county, making such powers concurrent emasculates the powers of a municipality and deprives it of any autonomy. Further such concurrent construction renders Art. VIII §4 ineffective in dealing with charter counties, contrary to the holding of *Sarasota County v. Longboat Key, supra* at 1201.

CONCLUSION

No county has the authority to provide municipal services to a legislatively created community of people without the consent of the municipality. The Florida Constitution requires that all decisions regarding municipal services be made by the local government most responsive to the community of people being served.

A municipality has the responsibility to provide all of the municipal services except as otherwise provided by the legislature.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Summary of Argument was furnished to ROBERT L. DONALD,ESQ., Co-Counsel for the Appellant, LAW OFFICE OF ROBERT L. DONALD, 1375 Jackson Street, Suite 402, Fort Myers, FL 33901-2841, YOLAND VIACAVA, ESQ., Assistant State Attorney, P.O. Box 399, Fort Myers Florida 33902, DAVID M. OWEN, ESQ., JOHN J. RENNER, ESQ., Assistant County Attorney, P. 0. Box 398, Fort Myers, FL 33902, JOHN R. BERANEK, ESQ., Co-Counsel for the Appellant, AUSLEY & McMULLEN, P.A., 227 South Calhoun Street, Post Office Box 391, Tallahassee, FL 32302-0391, GREGORY T. STEWART, ESQ., and HARRY F. CHILES, ESQ., Nabors, Giblin & Nickerson, P.A., Post Office Box 11008, Tallahassee, Florida 32302, EDWARD W. VOGEL, III, ESQ., Holland & Knight LLP, Post Office Box 32092, Lakeland, Florida 33802-2092, and MICHAEL L. CHAPMAN, ESQ., Holland & Knight LLP, Post Office Box 1288, Tampa, Florida 33602-4300, by regular U.S. Mail this 11th day of January, 2000.

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