SUPREME COURT OF FLORIDA

RAYMOND P. MURPHY,

Appellant, CASE NO. 96,997

vs.

LEE COUNTY, FLORIDA, et al.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE LEE COUNTY, FLORIDA

On Appeal from the Twentieth Judicial Circuit,
in and for Lee County, Florida
Case No. 99-3534-CA-JBR

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This Answer Brief is reproduced in 12 point Courier, a font that is not proportionately spaced.

REFERENCES

Appellant Raymond P. Murphy shall be addressed as "Murphy."

Appellee Lee County, Florida, shall be addressed as the "County."

The Appendix accompanying the Initial Brief of the Appellant shall be referenced as "App.," followed by the appropriate page number.

The Appendix accompanying the Answer Brief of Lee County, Florida, shall be referenced to as "Cty App.," followed by the appropriate page number.

The trial transcript, included as part of the Appendix of the Appellant, shall be referenced as "TR," followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This appeal is from a circuit court order, validating the issuance of certain bonds by Lee County, Florida, pursuant to Chapter 75, Florida Statutes.[1] (App. 1) Although Murphy's Statement of Facts and Statement of the Case is generally correct, Murphy has omitted certain pertinent matters which are necessary for a complete and accurate understanding of the background of these proceedings.

During 1998, various counties throughout the state, including Lee County, had separately sought to acquire the assets of certain water and/or wastewater facilities located within their respective jurisdictions and owned by the Avatar Corporation or its subsidiaries. To address certain concerns of Avatar and to obtain the most cost-effective acquisition of the respective facilities, these counties entered into an interlocal agreement pursuant to section 163.01(7)(g), Florida Statutes (the "Interlocal Agreement"), and created the Florida Governmental Utility Authority (the "GUA").[2]

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[1]Lee County, Florida, is a charter county, operating under Article VIII, section 1(g) of the Florida Constitution and its County Home Rule Charter.

[2]The GUA is a separate legal entity created pursuant to the Interlocal Agreement, entered into originally by Brevard County, Lee County, Polk County and Sarasota County. Collier County subsequently became the fifth member county.

The Interlocal Agreement was entered into for the express purpose of acquiring and operating all of the water and wastewater facilities owned by Avatar Corporation or its subsidiaries. One of these facilities was the North and South Fort Myers Utility System, which was operated within Lee County by the Florida Cities Water Company (FCWC Facilities).[3]

Lee County, through its Board of County Commissioners, approved the Interlocal Agreement and the terms for the acquisition of the various Avatar facilities with the adoption of Resolution No. 99-01-31, on January 26, 1999. (App. 183) The other member counties adopted similar resolutions. Pursuant to section 4.02 of the Interlocal Agreement, each GUA member county has the right to acquire any utility system or portion thereof located within the member's jurisdiction. Lee County elected to exercise its rights under the Interlocal Agreement and acquire the FCWC Facilities with its own funding concurrently with the acquisition of the remaining utilities by GUA. Pursuant to the exercise of the County's rights

[3]The other utilities acquired were the Poinciana Utility System operating in Osceola and Polk Counties, the Golden Gate Utility System operating in Collier County, the Barefoot Bay Utility System operating in Brevard County, the Sarasota County Utility System operating in Sarasota County, and the Carrollwood Utility System operating in Hillsborough County.

under the Interlocal Agreement, GUA assigned its rights for the acquisition of the FCWC Facilities to the County. (App. 256)

Lee County has owned and operated water and wastewater facilities within its boundaries since the early 1970s. The County presently operates water or wastewater facilities throughout the unincorporated area and within various municipalities. Since 1979, the County has provided wastewater services to the area which has now become incorporated as the Town of Fort Myers Beach.[4]

Also on January 26, 1999, the Lee County Board of County Commissioners, at a duly noticed public hearing and following citizen input, adopted Resolution No. 99-01-30. (App. 30) This resolution approved and authorized the County's acquisition of the FCWC Facilities located within the County boundaries pursuant to its home rule powers. Further, the resolution considered those factors required by section 125.3401, Florida Statutes, and determined that the acquisition of the FCWC Facilities by the County served a public purpose and was in the public’s interest.

The FCWC Facilities that were to be acquired by Lee County included a wastewater collection, transmission, treatment and disposal system, and a water supply, treatment and distribution

[4]The Town of Fort Myers Beach is a municipal corporation within Lee County, incorporated in 1995 pursuant to Ch. 95-494, Laws of Florida.

system. All of the wastewater treatment and water provision facilities are located within the unincorporated area of the County, with the exception of a small terminal portion of the water distribution system that lies within and serves the Town of Fort Myers Beach.[5]

On March 4, 1999, the Town of Fort Myers Beach filed a complaint in circuit court for declaratory and injunctive relief against the County and the GUA, seeking to prohibit the acquisition of the FCWC Facilities within Lee County and the acquisition of the remaining Avatar facilities by the GUA.[6] (Cty App. 12) The Complaint filed by Town Attorney Richard Roosa alleged, among other things, that the acquisition was contrary to Chapter 153, Florida Statutes, in that the Town of Fort Myers Beach did not consent to the acquisition. Further, the Complaint alleged that the County did not consider the impact of the acquisition on the rate payers within the Town of Fort Myers Beach.[7] Subsequently, the Complaint

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[5]The facilities that make up the water distribution system within the municipal boundaries of the Town of Fort Myers Beach consist of a series of pipes for water delivery, three booster stations and two storage tanks to facilitate water flow.

[6]Town of Fort Myers Beach v. Lee County, Florida and the Florida Governmental Utility Authority, Case No. 99-1753-JBR (In the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida).

[7]The Town did not comply with the requirements of Chapter 164, Florida Statutes, in that the Town alleged in its Complaint that it

was amended to additionally allege that the acquisition violated Article VIII, section 4 of the Florida Constitution and Article 4.02 of the Interlocal Agreement. In March 1999, a hearing was held on the Town's Request for Temporary Injunction. The Request for Temporary Injunction was denied by the Order of the Court dated March 30, 1999. (Cty App. 24)

In an attempt to prevent the Town's lawsuit from further interfering with the GUA's acquisition of all the Avatar assets, an amended acquisition and financing plan was proposed and entered into by the GUA and the County. (App. 266) Pursuant to this plan only that portion of the FCWC Facilities located within the unincorporated areas of Lee County would be acquired by the County at the time that the remaining Avatar assets were to be acquired. That portion of the water distribution system located within the municipal boundaries of the Town of Fort Myers Beach would continue to be owned by the Florida Cities Water Company, an Avatar subsidiary. Florida Cities Water Company would then purchase water to provide service to the Town through a bulk potable water purchase agreement with the County. Furthermore, the FCWC

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had waived the penalty provisions of Chapter 164, Florida Statutes. (Cty App. 12, ¶ 13) Additionally, counsel for the Town expressly waived the requirements by separate correspondence to the County Attorney. (Cty App. 33, 34, 35)

facilities located within the boundaries of the Town would be sold to the County only following resolution of the dispute with the Town through a bond validation process. Under the amended acquisition and financing plan, the same utility fully considered by the Board in the adoption of Resolution 99-01-30 would be acquired, however, that acquisition would be through two separate financial transactions.

In May 1999, the County pursuant to Chapter 75, Florida Statutes, filed a complaint for validation asking the circuit court to validate the "Lee County, Florida Water and Sewer Revenue Bonds, 1999 Series B" (the "Bonds"). (App. 12) The proceeds of the Bonds would fund the acquisition of the Florida Cities Water Company's water distribution system located within the municipal boundaries of the Town of Fort Myers Beach. On May 21, 1999, the trial court entered an Order to Show Cause scheduling a hearing for September 7, 1999. (App. 23) In accordance with Chapter 75, Florida Statutes, notice was published as required by law and service was effectuated upon the State Attorney for the Twentieth Judicial Circuit. Additionally, the County provided a copy of the Complaint and the Order to Show Cause to Richard Roosa, Town Counsel for the Town of Fort Myers Beach, with a copy of the transmittal letter to other Town officials. (Cty App. 36) On

August 23, 1999, Murphy filed various motions directed to the validation complaint.[8] (App. 27) Murphy was allowed to intervene without objection. (App. 29) On September 7, 1999, pursuant to the Order to Show Cause, a hearing was held on the County's Complaint for Validation before Circuit Judge Jay B. Rosman.[9] On September 24, 1999, the Court entered a Final Judgment and denied the Intervenor's Motion to Dismiss. (Cty App. 1)(App. 1) A timely notice of appeal was filed.

[8]Murphy is the Mayor of the Town of Fort Myers Beach. The motions were filed on the Mayor's behalf by Richard Roosa, Town Counsel for the Town of Fort Myers Beach, who also represented the Mayor in an individual capacity at the validation hearing.

[9]Judge Rosman was the same judge who presided over the hearing on the Town's Request for Temporary Injunction in the Town's declaratory and injunctive action in March of 1999.

SUMMARY OF THE ARGUMENT

Ultimately, the issue in this cause is whether the County may negotiate and acquire, from a private entity, a utility system that provides services within municipal boundaries. The County, which already provides wastewater services in the Town of Fort Myers Beach, seeks to acquire the assets of Florida Cities Water Company, a portion of the water distribution system which is located within the Town. Article VIII, section 4, Florida Constitution, is not implicated by this acquisition. That provision seeks to prohibit the relinquishment of a governmental function or power to another governmental entity without the consent of the citizens. The Town of Fort Myers Beach provides no utility services to its citizens nor does it have the facilities to provide such services. After the acquisition of the FCWC Facilities by the County, the Town will still possess the same extent of power to provide these services as it did prior to the acquisition. The actions of the County in acquiring that portion of the water distribution system located within the Town's municipal boundaries in no way limits or restricts the Town's power or authority to provide utility services.

Further, the County has fully complied with the provisions of section 125.3401, Florida Statutes. The County considered each of

the required criteria of that statute prior to determining that the acquisition of the FCWC Facilities served a public purpose and was in the public interest of its citizens. Each of the factors were considered as to the FCWC Facilities as a whole, as that was what was being acquired. It was only a result of the efforts of the Town of Fort Myers Beach to block not only the acquisition of the FCWC Facilities by the County but also those of the remaining Avatar systems by the GUA that resulted in the County separating the FCWC Facilities acquisition into two financial transactions. The same utility considered as a whole by the Board of County Commissioners at its public hearing will be acquired and ultimately operated by the County as a whole.

In addition, the Interlocal Agreement entered into between the County and the Governmental Utility Authority does not provide any rights to the Town. To the extent that the agreement grants any rights to the Town to acquire that portion of the water distribution system located within its boundaries, that right is not exclusive. Rather, it is shared with the County. Nor does the County's Code of Ordinances prohibit the acquisition. The particular provision cited as prohibiting the acquisition of the infrastructure within municipal boundaries applies only where

special assessments and a municipal service benefit unit are utilized. Neither are applicable in this present case.

Finally, the Town of Fort Myers Beach is not an indispensable party to these proceedings. All parties necessary to the validation were before the Court. The Town of Fort Myers Beach was provided with a copy of the Validation Complaint and Order to Show Cause and was fully aware of the proceedings. If the Town desired to intervene, it clearly could have done so. Its decision not to participate was solely a voluntary one.

ARGUMENT

INTRODUCTION

This appeal ultimately concerns the ability of a County to negotiate and acquire from a private entity a utility system that provides services within municipal boundaries. If two private parties negotiated to acquire these facilities, absolutely no objection would or could be raised. However, because the acquiring party is a county, Murphy has raised several objections. Each of these objections are based upon the faulty premise that the acquisition results in a diminution of the Town of Fort Myers Beach's sovereignty. To the contrary, the actions of the County in acquiring that portion of a water distribution system which is located within the municipal boundaries of the Town of Fort Myers Beach merely consolidates the provision of water services in the Town with the wastewater services which have been provided by the County for over twenty years. No aspect of this transaction in any way restricts the Town's power or authority.

I. THE REQUIREMENTS OF ARTICLE VIII, SECTION 4 OF THE FLORIDA CONSTITUTION DO NOT APPLY AND THE CONSENT OF THE TOWN OF FORT MYERS BEACH IS NOT REQUIRED.

Murphy argues that the County's purchase of the privately-owned FCWC Facilities amounts to a transfer of governmental powers from the Town to the County, and, therefore, that the dual

referenda provisions of Article VIII, section 4, Florida Constitution, must be followed. That constitutional provision governs the transfers of powers between governmental entities and provides:

> 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.

Art. VIII, § 4, Fla. Const.

Contrary to Murphy's argument, the County's acquisition of a water distribution system from a private party does not constitute a transfer of powers from one governmental entity to another as contemplated by Article VIII, section 4 of the Florida Constitution. Rather, this constitutional provision contemplates that only a specific law or a joint resolution between two governmental entities may trigger the transfer of powers restriction.[10] This section expressly states that it only applies

[10]The Florida Supreme Court has also reconciled the transfer of power provision in Article VIII, section 4, Florida Constitution, with the potential municipal power preemption envisioned in a county charter provided in Article VIII, section 1(g), Florida Constitution, even though no dual referenda is held on the county charter preemption issue. See Broward County v. City

when a power or function of a "county, municipality or special district" is transferred to another "county, municipality or special district."

The applicability of this provision is best demonstrated by two decisions of this Court. The court initially considered the applicability of this provision in Sarasota County v. Town of Longboat Key, 355 So. 2d 1197 (Fla. 1978). In that case, Sarasota County had sought to amend its charter so as to vest the provision of air and water pollution control, parks and recreation, roads and bridges, planning and zoning and police exclusively and solely with the County. This Court held that the provisions of Article VIII, section 4 of the Florida Constitution prohibited the County from adopting such amendments as they would divest all municipal power and function in those areas to the county. Therefore, a transfer of power resulted from the amendment and the procedures of Article VIII, section 4 were required to be complied with.

By contrast, this Court in City of Palm Beach Gardens v. Barnes, 390 So. 2d 1188 (Fla. 1980), considered whether a city could enter into a contract with the sheriff for the performance of law enforcement services for the city. The contract had been

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of Fort Lauderdale, 480 So. 2d 631 (Fla. 1985). No issue of charter county preemption has been raised in the present matter.

approved by a referendum of the city voters but not by a county referendum. Consequently, the issue in the case was whether the sheriff contract was governed by Article VIII, section 4, requiring a separate vote of both the city and the county electors. In response, the Supreme Court analyzed Article VIII, section 4, as follows:

> Section 4 allows any of three local government taxing entities, specifically counties, municipalities, and special taxing districts, to place under one of the taxing entities specific powers or functions of both. It is, in effect, a means to partially consolidate certain local governmental powers and functions for better efficiency without requiring total consolidation.

City of Palm Beach Gardens, 390 So. 2d at 1189 (emphasis added). The Court held that the agreement was a contract for services that was not prohibited by Article VIII, section 4 of the Florida Constitution. In addressing the application of the constitutional provision, the Court stated:

> In our opinion, the framers of section 4 had no intention of applying its provisions to a sheriff as a county official, and his contracting for services within a municipality is clearly different from a municipality transferring or contracting away the authority to supervise and control its police powers to the county government.

City of Palm Beach Gardens at 1189.

From these decisions, it is clear that Article VIII, section 4 is applicable only when powers and functions are wholly and completely transferred from one governmental entity to another governmental entity and not a situation where, as here, a private company is selling a water distribution facility to a county as part of the sale of all of its utility systems.

The fundamental flaw in Murphy's argument is that it equates the provision of water service with the divestiture of municipal power and authority in the constitutional sense. On the contrary, the County's acquisition of the FCWC Facilities does not result in any loss of power or authority by the Town. The only change will be that the County, rather than a private investor-owned utility, will supply water to the Town's inhabitants. Upon the acquisition by the County, the Town will still possess the same amount of powers as it presently holds; no transfer or diminution of power will occur.[11] The only impact to the Town is not that its power or authority has been transferred to the County but, rather, that the

[11]Presently, the power and authority of the Town in regard to the regulation of the utility is limited. As an investor-owned utility system, the rates of the FCWC Facilities are regulated by the Public Service Commission. Under County ownership, rates will be regulated by the County, giving citizens of the Town the opportunity to express their concerns at publicly held and advertised rate hearings and ultimately at the ballot box in the election of County Commissioners.

opportunity for the Town to acquire the FCWC Facilities directly from the private owner has been lost. The Town has always had the ability to operate a utility system and the acquisition of the FCWC Facilities by the County in no way deprives the Town of that authority.[12] The provisions of Article VIII, Section 4 are clearly not implicated by this transaction.

In addition, contrary to the argument contained within the Amicus Brief of the Town of Fort Myers Beach, the consent of the Town for the County's acquisition is not otherwise required by any provision of general law.[13] Section 153.03, Florida Statutes, contains a general grant of power which authorizes Florida counties to "purchase and/or construct and to improve, extend, enlarge, and reconstruct" water and sewer systems and to thereafter operate and control those systems, with the following proviso:

> [P]rovided, however, that none of the facilities provided by this chapter may be constructed, owned, operated or maintained by

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[12]The Town provides no utility services to its citizens and, with the exception of its attempts to prevent the acquisition of the FCWC Facilities by the County, it has never sought to exercise this authority.

[13]In the trial court, Murphy strenuously argued that the provisions of section 153.03, Florida Statutes, required the consent of the Town. Murphy appears to have abandoned this argument on appeal. However, as the Amicus Brief of the Town argues that the consent of the Town is required before any County services can be provided within its boundaries, this issue will be addressed.

> the county on property located within the corporate limits of any municipality without the consent of the council, commission or body having general legislative authority in the government of such municipality...

§ 153.03(1), Fla. Stat.

Despite this seemingly restrictive language, Chapter 153 also contains language specifically declaring that the statutory chapter is not the exclusive means for accomplishing its purposes. Rather, Chapter 153 is additional and alternative authority that counties may choose, but are not required, to use. Specifically, section 153.20(1), Florida Statutes, states:

> This chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized hereby and shall be regarded as supplemental and additional to the powers conferred upon the commission by other laws, and shall not be regarded as in derogation of any powers now existing. This chapter being necessary for the welfare of the inhabitants of the several counties of the state shall be liberally construed to effect the purposes thereof.

Id. (emphasis added); see also § 153.88, Fla. Stat. ("The provisions of this law shall be liberally construed to effect its purposes and shall be deemed cumulative, supplemental and alternative authority for the exercise of the powers provided herein.")

Given this express acknowledgment that Chapter 153, Florida Statutes, serves as supplemental and alternative authority, if other statutory or constitutional authority exists for the exercise of the same powers as authorized under Chapter 153, then a county may freely proceed under its alternative powers and choose not to invoke the authority of Chapter 153, thereby avoiding its restrictions. In other words, Chapter 153 is purely optional and does not constitute a limitation on a county's home rule powers. In fact, with the advent of home rule through the 1968 Florida Constitution revision, the provisions of Chapter 153 have arguably become obsolete.[14] The Florida Supreme Court has confirmed this conclusion in no less than four decisions.

The first was Speer v. Olson, 367 So. 2d 207 (Fla. 1978), which expressly addresses the precise issue before this Court: whether Chapter 125, Florida Statutes, could be utilized by a county to authorize bonds for the acquisition of a water and sewer system. The Court found that noncharter counties have broad home rule power pursuant to Chapter 125 to authorize the bonds and

[14]Even before home rule, the courts regarded Chapter 153 as supplemental and held that counties were not required to proceed under this chapter. See Mountain v. Pinellas County, 152 So. 2d 745, 747 (Fla. 2nd DCA 1963) ("a county which is otherwise empowered by a special act to install and operate such a facility [water system] may elect to do so [under that authority] rather than to proceed under Chapter 153.").

rejected the notion that Chapter 153 was a mandatory provision. The Court cited section 153.20, Florida Statutes, for the proposition that Chapter 153 is merely additional and supplemental authority and as to section 153.20, stated:

> This language, or language similar to it in other general laws, has been construed by this Court on many occasions and always for the purpose for which the Legislature intended it; not as a limitation or prohibition of a power but as an added grant of authority or power to do a particular thing or perform a particular act the power or authority for which was not contained in, or in fact was in conflict with the authority of, any other law, and then only when the public entity was invoking such additional and supplemental power and availing itself of its use.

See Speer, 367 So. 2d at 212 (emphasis added). Therefore, when an act recites that it is an additional and supplemental power, it may "be used in addition to other laws on the same subject, but may be rejected by a public entity and another applicable law used in its place." Id. at 213.

The same reasoning was applied by the Florida Supreme Court in Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986). In this case, Taylor, a Lee County taxpayer, challenged the County's ability to proceed under its home rule power in issuing bonds and pledging toll revenues for the construction of a bridge. Taylor argued that Chapter 159, Florida Statutes, specifically authorized the instant

bonds and, therefore, the County was required to follow its provisions. Id. at 425. The Court disagreed and held that Lee County had ample home rule power to authorize and issue the bonds. Id. As to Chapter 159, the Court stated:

> Additionally, section 159.14 states that sections 159.01 through 159.19 "shall be regarded as supplemental and additional to powers conferred by other laws." Chapter 159, therefore, provides an alternate method of issuing bonds, use of which is optional, not mandatory. Because the county could proceed under chapter 125, it did not have to use chapter 159.

Id. at 426 (emphasis added). See also City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); and Rowe v. St. Johns County, 668 So. 2d 196 (Fla. 1996), in each of which the Supreme Court found similar language as providing supplemental authority.

Based on these consistent holdings from the Florida Supreme Court, it is clear that Chapter 153, Florida Statutes, is only an additional and alternative source of authority by which counties may own, construct or operate water and sewer systems. A county is not required to proceed under Chapter 153 and, thus, may avoid the restrictions contained in that chapter if an alternative source of authority exists. With the constitutional revision of 1968, ample alternative authority exists for counties to acquire water and

wastewater systems pursuant to its home rule powers, none of which requires municipal consent.

In the present situation, the County has expressly stated that it is proceeding under its constitutional home rule power granted by Article VIII, section 1(g), Florida Constitution, the Lee County Home Rule Charter, and section 125.01, Florida Statutes. Both of the relevant County resolutions, 99-01-30 and 99-01-31, expressly declare that the County is relying on and proceeding solely under its home rule power. For example, Resolution No. 99-01-30 states, in part:

> WHEREAS, the Board of County Commissioners is authorized by Florida law to acquire or sell utilities pursuant to Section 125.01 and Section 125.3401, Florida Statutes; and,
>
> * * *
>
> WHEREAS, the Board of County Commissioners now desires to purchase, and the Avatar Corporation now desires to sell, the Florida Cities Water Company's Water and Wastewater Facilities to the County for its subsequent incorporation into the Lee County Utilities System pursuant to the County's authority under Section 125.01, F.S.; ...

(Emphasis added). Similarly, Resolution No. 99-01-31 provides, "WHEREAS, Lee County, Florida (the "County") has the power to acquire, own, improve, operate and maintain water and wastewater

utility facilities pursuant to Section 125.01, Florida Statutes..." Neither resolution nor any other document associated with the present transaction invokes the provisions of Chapter 153, Florida Statutes.

As the County has ample home rule authority to purchase and operate a water utility and is relying solely on that authority, the provisions of Chapter 153 are not applicable. Therefore, the consent of the Town of Fort Myers Beach is not required. A claim that municipal consent is necessary for the County to complete the utility acquisition is directly contrary to clear and well established law and should be rejected.

II. THE COUNTY HAS FULLY COMPLIED WITH SECTION 125.3401, FLORIDA STATUTES.

Murphy argues that the County has failed to comply with the provisions of section 125.3401, Florida Statutes, which states in pertinent part:

> No county may purchase or sell a water, sewer, or wastewater reuse utility to provide 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 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 is in the public interest.

See i.d. After this quoted language, section 125.3401 enumerates various issues, which, at a minimum, should be considered at a public hearing in determining whether the purchase or sale is in the public interest. These factors include such matters as consideration of the income and expense statement of the utility, the utility's most recent balance sheet, the physical condition of the facility and the reasonableness of the price.

On January 30, 1999, Lee County, in compliance with section 125.3401, Florida Statutes, held a duly advertised public hearing where anyone wishing to provide comments on the proposed acquisition by the County was given the opportunity to do so. Representatives from the Town of Fort Myers Beach were present at the hearing, made their presentations and entered their objections into the record. (App. 31) At that hearing the County adopted Resolution No. 99-01-30, which addressed each and every matter required to be considered by section 125.3401, Florida Statutes. The County, in determining whether the acquisition was in the public interest, considered the entire water and wastewater system of Florida Cities Water Company located both within the unincorporated area of Lee County and that terminal portion of the water distribution system which is contained within the Town of Fort Myers Beach. The system was considered as a whole and in its

entirety, since Florida Cities Water Company operated the facilities as a consolidated utility system. In considering the system under the requirements of section 125.3401, Florida Statutes, the County found that the acquisition served a public purpose and was in the best interest of the citizens of Lee County.

In addition to the numerous findings made by the County which applied to the system as a whole, the County also specifically found as to that portion of the distribution system located within the Town of Fort Myers Beach as follows:

> As a result of the acquisition of the FCWC system, most FCWC customers within the Town of Ft. Myers Beach and the Iona/McGregor area will become retail water customers of the County. Many of these customers are already retail wastewater customers of the County, and this purchase will result in consolidated water and sewer billing as well as one point of contact for all water and sewer utility matters. (App. 45)

Further, the County, in considering the acquisition, extensively analyzed the difference in water and wastewater rates that customers of the Florida Cities Water Company would pay following acquisition of the FCWC Facilities under the County utility rates for different levels of water usage. (App. 41) The difference in rates for those water customers within the municipal

boundaries of the Town of Fort Myers Beach were included within that analysis.[15]

It is only as the result of the actions of the Town of Fort Myers Beach in seeking to prevent the acquisition not only of the facilities within Lee County, but those located within the other counties being acquired through the GUA, that the County elected to separate its acquisition of the FCWC Facilities into two separate financial transactions.

The determination that the price for the entire utility was reasonable and that the acquisition of the utility as a whole was in the public interest is equally applicable to that portion of the water distribution system located within the Town of Fort Myers Beach. The price for the water distribution system located within the Town was calculated in the same manner as the price for the system as a whole. (TR 67)

Contrary to the allegations of Murphy's Initial Brief, there are not two utility systems which are being acquired, there is only

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[15]The rate analysis showed that a majority of water customers within the Town of Fort Myers Beach would pay less than the rates they currently pay under the FCWC ownership. The most significant difference was in high water consumption customers who would pay more due to the higher rates imposed by the County on large users as a conservation measure. Another difference, though less significant in cost, is a small increase in the rates charged to multi-family dwelling units. (App. 41)

one system, a small, terminal portion located within the Town's boundaries. The utility, as a whole, was considered for the purposes of section 125.3401, Florida Statutes, however, the acquisition was through two separate financial transactions. Ultimately, the same single utility which was considered by the County at the public hearing will be acquired.

The Board of County Commissioners had the opportunity to consider the comments and material submitted to it by the citizens of Lee County, including the objections of the Town. In weighing each of the required criteria, the Board determined that the acquisition of the utility served a public purpose and was in the public interest. Having made those determinations, it is not the province of this Court to substitute its judgment for that of the Board of County Commissioners. DeSha v. City of Waldo, 444 So. 2d 16 (Fla. 1984); Partridge v. St. Lucie County, 539 So. 2d 472 (Fla. 1989).

Each of the requirements of the section 125.3401, as they relate to public interest in the various findings were considered with respect to the system as a whole, including the water distribution system within the Town of Fort Myers Beach. Therefore, all conditions precedent to the County's acquiring the

FCWC system as required by section 125.3401, Florida Statutes, have been fulfilled.

III. THE PURCHASE OF THE WATER SYSTEM WITHIN THE TOWN OF FORT MYERS BEACH DOES NOT VIOLATE THE COUNTY CODE OF ORDINANCES, OR THE GUA INTERLOCAL AGREEMENT.

Murphy argues that the County's purchase of the FCWC water distribution facilities lying within the Town violates various provisions of the Interlocal Agreement entered into between the County and the GUA. Murphy also argues that such acquisition violates the County's own code of ordinances.

Initially, Murphy argues that the GUA Interlocal Agreement granted to the Town of Fort Myers Beach certain "exclusive" rights to acquire that portion of the water distribution system which is located within its municipal boundaries. Murphy cites Section 4.02 of the Interlocal Agreement, adopted by the County through its Resolution No. 99-01-31, as authority for the "exclusive" right of the Town of Fort Myers Beach. That particular provision states:

> **SECTION 4.02. ACQUISITION OF UTILITY SYSTEMS BY AUTHORITY MEMBERS.** (A) Each Authority Member or other Public Agency in whose jurisdiction the Authority owns a Utility System, or portion thereof, shall have the exclusive right to acquire such Utility System, or portion thereof. The terms of such acquisition and purchase price thereof shall be established pursuant to the Utility Acquisition Agreement between the Authority

> and the respective Authority Member or other Public Agency relating thereto.

(App. 211)(emphasis added).

Even if it could be construed that this provision granted any form of enforceable right to the Town, it clearly did not receive an "exclusive" right. The use of the disjunctive "or" makes it clear that a utility system could be purchased either by an authority member, such as the County, or by another public agency. The quoted language, at best, only gives the Town an alternative right with the County, as the entire FCWC Facilities are located within the jurisdictional boundaries of Lee County, which includes the unincorporated area and also those areas within any municipality located within the County. Therefore, the provision of Section 4.02 is equally applicable to the County and has been duly exercised by it.

Apart from the clear lack of exclusivity contained within the Interlocal Agreement, Murphy's argument does not even attempt to reach the threshold question of whether the Town could enforce an interlocal agreement to which it is neither a party nor a third party beneficiary. In any event, the question of the

interpretation of the Interlocal Agreement is a collateral matter to the validation and is not an appropriate matter for review.[16]

Murphy also argues that the County's proposed acquisition of the balance of the FCWC water distribution system within the Town is prohibited by "... Article VII [sic] of the Lee County Code of Ordinances...," as it only authorizes the acquisition or construction of improvements within the unincorporated area. (Page 30 of the Initial Brief of Appellant)

Murphy misunderstands the scope of this provision. Chapter 1., Article VIII. "Revenue Bonds for Local Improvements*" of the Lee County Code of Ordinances is applicable only to certain local infrastructure improvements that are constructed or acquired by the County exclusively through Special Improvement Service Districts and Municipal Service Taxing and Benefit units, as is clearly indicated by the notation of the title of the Article. Such improvements made in this manner are limited to the unincorporated areas without municipal approval pursuant to section 125.01(1)(q)

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[16]The scope of judicial inquiry in bond validation proceedings is limited to determining: (1) whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of law. See Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997); Rowe v. St. Johns County, 668 So. 2d 196, 198 (Fla. 1996); and Taylor v. Lee County, 498 So. 2d 424, 425 (Fla. 1986). Matters beyond this limited review are collateral issues to these proceedings.

and (r), Florida Statutes, and funded by special assessments. The proposed utility acquisition by the County in this case is not being financed pursuant to the creation of a Special District or Municipal Service Benefit Unit (MSBU), nor are special assessments being levied against benefitted real property to finance the acquisition. Instead, the Bonds sought to be validated are to be secured solely be a pledge of the revenues generated by the County's water and sewer systems.[17]

The County Code Article cited by Murphy for the proposition that the County's own ordinances prohibit the contemplated transaction is clearly in error inasmuch as the County ordinance being relied upon by Murphy has no bearing on the County's right to purchase private property anywhere within the County and finance such purchase with revenue bonds supported by means other than the levy of special assessments imposed within a MSBU, or special taxes imposed within a special taxing district or municipal service taxing unit (MSTU).

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[17]Lee County Ordinance 85-9, which was the enacting ordinance for Section 1-111 cited in the Murphy's Initial Brief, is strictly an optional, supplemental and alternative authority for County infrastructure development. (Cty App. 37) Ordinance 87-28 superceded the provisions of Ordinance 85-9, except to the extent that special improvement districts or municipal service benefit units had already been established. (Cty App. 52) Subsequently, Ordinance 98-25, adopted on November 24, 1998, repealed Ordinance 87-28 in its entirety. (Cty App. 81)

In this instance, the County has fully complied with the applicable general law and its own ordinances relating to the acquisition of the FCWC water and wastewater utilities, to include the water distribution facilities located within the Town.

IV. THE TOWN OF FORT MYERS BEACH WAS NOT AN INDISPENSABLE PARTY TO THE BOND VALIDATION.

The law in Florida is clear that the only necessary parties for a validation are the issuing party and the State of Florida, which appears on behalf of the taxpayers, property owners and citizens of the issuing party. More specifically, section 75.02, Florida Statutes, requires:

> For this purpose a complaint shall be filed in the circuit court in the county or in the county where the municipality or district, or any part thereof, is located against the state and the taxpayers, property owners, and citizens of the county, municipality or district, including nonresidents owning property or subject to taxation therein.

See i.d. The Complaint filed in the present matter complies with section 75.02, Florida Statutes, and the Order to Show Cause was entered in accordance with section 75.05, Florida Statutes, which states:

> The court shall issue an order directed against the state and the several property owners, taxpayers, citizens and others having or claiming any right, title or interest in

> property to be affected by the issuance of bonds or certificates, or to be affected thereby, requiring all persons, in general terms and without naming them and the state through its state attorney . . . .

See i.d. (emphasis added).

The essential purpose of the validation process is to resolve, with finality, those issues relating to the authority of the issuer and the purpose of the proposed bonds without the necessity of suing every person or entity that may have some interest. To facilitate this process, general law provides a very liberal intervention standard to allow any person who has a justiciable interest, concern, or is in any way impacted by the bonds to fully participate in the proceedings. The entire validation procedure exists to resolve those issues that may affect the public generally; the procedure does not exist to require an issuing entity to attempt to identify and address each and every party that may have some interest. See § 75.07, Fla. Stat.; see also, Rich v. State, 663 So. 2d 1321 (Fla. 1995). Finally, section 75.09, Florida Statutes, provides that a final judgment in a bond validation is binding on those persons and "on all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds," regardless of whether such persons elected to intervene.

In the present case, the County published notice as required by law and even provided a copy of the Complaint and Order to Show Cause to Richard Roosa, Town Counsel, with a copy of the transmittal letter to other Town representatives. (Cty App. 36) The Town was aware of the proceedings, as demonstrated by the intervention of the Mayor of the Town, albeit in his individual capacity, and his representation by Richard Roosa, Town Counsel, in his individual capacity. For whatever reasons, the Town has made a strategic decision not to intervene as provided for by law -- perhaps so that it could raise the "indispensable party" issue. However, the absurdity of this situation is that the Town, if it truly wanted to participate, could still intervene before this Court or could have appealed the trial court's ruling directly without even having appeared before the circuit court. Rowe v. St. Johns County, 668 So. 2d 196, 197 (Fla. 1996). Rather, the Town, with full knowledge of the proceedings and solely of its own accord, continues to elect to not participate as a party.[18]

The issue of indispensable party within the context of the validation process has been litigated on several occasions. In Broward County v. State of Florida, 515 So. 2d 1273 (Fla. 1987),

[18]The Town has filed an amicus brief in support of Murphy's position. The County did not object to this request by the Town.

the Supreme Court considered whether bondholders whose interest in various bonds were being extinguished or refunded were indispensable parties. The Supreme Court held that:

> Under Chapter 75 it appears that the only parties absolutely necessary to a bond validation are the issuing entity and if the conditions necessitating a defense are met, the state.

In addition, the Florida Supreme Court has most recently reaffirmed that decision in State of Florida v. Osceola County, 24 Fla. L. Weekly S245 (Fla. May 27, 1999) (pending rehearing), finding that the only necessary parties under Chapter 75 would be the bond issuing entity and the State of Florida.[19]

There has been no contention that the County has failed to comply with any provision of the statutory requirements for notice. Further, the Town of Fort Myers Beach clearly has been fully aware of these proceedings by being provided a courtesy copy of the Order to Show Cause and the Complaint. The decision of the Town to not participate is purely a voluntary one and cannot serve as a basis for it to later attempt to collaterally attack the judgment of the Court. See Wright v. City of Anna Maria, 34 So. 2d 737 (Fla. 1948); Lee v. Atlantic Coast Line R. Co., 194 So. 252 (Fla. 1940).

[19]Rehearing was sought on matters other than the issue of indispensable party.

CONCLUSION

For the foregoing reasons, the Judgment of the trial court validating the Bonds should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to John R. Beranek, Esquire, Ausley & McMullen, P.A., 227 South Calhoun Street, Post Office Box 391, Tallahassee, Florida 32302-0391; and by U.S. Mail to Yolande G. Viacava, Esquire, Assistant State Attorney, Twentieth Judicial Circuit of Florida, 1700 Monroe Street, 3rd Floor, Post Office Box 399, Fort Myers, Florida 33902; Richard V.S. Roosa, Esquire, Roosa, Sutton, Burandt & Adamski LLP, 1714 Cape Coral Parkway, Cape Coral, Florida 33904; and Robert L. Donald, Esquire, 1375 Jackson Street, Suite 402, Fort Myers, Florida 33901-2841, this _____ day of January, 2000.

GREGORY T. STEWART

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