IN THE SUPREME COURT
OF THE STATE OF FLORIDA

RAYMOND P. MURPHY,

Appellant,

v.

LEE COUNTY, a political subdivision of the State of Florida, and THE STATE OF FLORIDA,

Appellees.

Supreme Court Case No. 96,997

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

INITIAL BRIEF OF APPELLANT MURPHY

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TYPE CERTIFICATION

The undersigned certify that the type in the body of this Initial Brief is 14-point Times New Roman, and the type in the headings is 16-point (or higher) Univers.

INTRODUCTION

This is an appeal from a Final Judgment rendered by the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, in a bond-validation case. This Court has appellate jurisdiction pursuant Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i) and Section 75.08 of the Florida Statutes.

The Appellant, RAYMOND P. MURPHY, is a citizen of Lee County, and he was the intervening Defendant in the proceedings below; he will be addressed herein by surname. The Appellee, LEE COUNTY, a political subdivision of the State of Florida, was the Plaintiff below seeking validation, and it will be addressed as "Lee County." The Appellee, THE STATE OF FLORIDA, was a Defendant below (as required by §75.05 of the Florida Statutes), and it will be addressed as "the State."

There is a an Appendix accompanying this Initial Brief as required by Florida Rule of Appellate Procedure 9.110(i). Reference to the transcript of the validation hearing will be indicated by "TR" followed by the appropriate page number. The remaining four volumes of the Appendix contain the consecutively-numbered pleadings, exhibits, and other miscellaneous documents, and reference to this material will be indicated by "APP" followed by the appropriate volume and page number.

STATEMENT OF THE CASE

In May of 1999 Lee County filed its Complaint for Validation pursuant to Chapter 75 of the Florida Statutes, asking the trial court to validate a bond issue entitled "Lee County, Florida Water and Sewer Revenue Bonds, 1999 Series B." (APP I 12-22) The Complaint states that the purpose of the bond issue is to purchase an existing water system operated by a private company within the corporate limits of the Town of Fort Myers Beach. (APP I 13) The Complaint contains the allegations required by Section 75.04, but it also has an allegation that is outside the statute. This extraneous allegation will be important to this case, and it reads as follows:

> Inasmuch as the acquisition of the 1999B Project is not pursuant to Chapter 153, Florida Statutes, but rather pursuant to Chapter 125, Florida Statutes, **the consent of the Town of Fort Myers Beach is not required. Nor is the consent of the Town required for such acquisition under any other provisions of Florida law.**
>
> (APP I 13; emphasis added.)

So the County expressly raised the issue of whether it had to obtain the Town's permission in order to purchase the utility within the Town's corporate boundaries.[1]

The only party named as a Defendant in the suit was the State of Florida (in accordance with Section 75.05 of the Florida Statutes). The Town was not named as a

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[1]Subsequent discussion will show that the County raised this issue because the Town itself had asserted that its permission was necessary in a declaratory-judgment action filed by the Town earlier in the year. (APP III 269,281)

party, despite the allegation in the County's Complaint raising the issue of whether the Town's consent was required.

The trial court entered an Order to Show Cause, setting the final hearing for several months later. (APP I 23-26) Publication duly occurred prior to the final hearing. (TR 39-40)

A citizen of Lee County and the Appellant before this Court, Raymond P. Murphy, intervened in the trial-court proceeding as permitted by Section 75.07.[2] (APP I 29-30) Mr. Murphy also filed a Motion to Dismiss, arguing that the Town of Fort Myers Beach was an indispensable party to the litigation, and that the County was required by law to obtain the Town's permission in order to purchase the water system located within the Town's borders. (APP I 27-28)

The trial court took Mr. Murphy's Motion under advisement and proceeded with the final hearing on September 7, 1999. (TR 10) The evidence elicited at the hearing will be discussed in the Statement of the Facts, but the County naturally contended that it was entitled to the validation of its bond issue. Counsel for Mr. Murphy again argued that the proceedings were tainted because of the failure to name the Town as an indispensable party. (TR 16,17) He also raised several other arguments, to wit: that pursuant to Article VIII, Section 4 of the Florida Constitution the purchase of the utility system within the

[2]Though not shown by the evidence, Mr. Murphy is the Mayor of the Town of Fort Myers Beach.

Town could not proceed without the Town's permission; that the Town had the exclusive right to purchase the utility system, and the County could therefore not purchase the system; and, that the hearing conducted by the County on the purchase of the utility system did not comply with Section 125.3401 of the Florida Statutes. (TR 16-17,33-34,37-38,43-45,50,89,109) The trial court also took these issues under advisement. (TR 18,118)

Several weeks after the hearing the trial court entered its Final Judgment validating the bond issue. (APP I 1-11) The court echoed the allegations of the County's Complaint, finding that the "consent of the Town is not required" for the County's purchase of the utility. (APP I 3) The court also held that the acquisition of the utility system was not contrary to Article VIII, Section 4 of the Florida Constitution, and that the remaining arguments of Mr. Murphy were without merit. (APP I 10)

This timely appeal followed.

STATEMENT OF THE FACTS

Though the procedural history of this case is straightforward, the facts are more complicated. The evidence introduced at the validation hearing shows the following:

The Water System to be Purchased

A private company known as "Avatar" owns, through two subsidiaries, a number of water and sewer systems in seven different counties in Florida. In Lee County Avatar

owns, through its subsidiary Florida Cities Water, both water and sewer facilities. The Florida Cities service area in Lee County is not a cohesive whole, but rather is located in two distinct, non-contiguous areas of the County. The smaller area is known as "North Fort Myers," which is an unincorporated community north of the Caloosahatchee River that covers about five square miles. (APP I 58) The second and larger area is some miles away in southern Lee County. This second service area covers 40 square miles, a small portion of which is the Town of Fort Myers Beach.[3] (APP I 57)

The Florida Government Utilities Authority

At some point Avatar expressed a willingness to sell all of its utilities systems around the state, including those in Lee County, but only on the condition that all the facilities would be sold at one time. (APP II 194) The lead consultant in this effort to allow the Avatar facilities to be sold was the law firm that represents the County in this proceeding. (APP I 38)

In 1997 Section 163.01 of the Florida Statutes was amended to facilitate the sale of the Avatar utilities. Ch. 97-236, § 19, Laws of Florida. The new legislation, found in Section 163.01(7)(g), permits cities and counties to band together to create by interlocal agreement an entity with the power to "acquire, own, construct, improve, operate or

[3]The Town of Fort Myers Beach is actually an island (Estero Island), and covers 2.7 square miles. (APP I 57,72; IV 432) The Town was incorporated in 1995, and Florida Cities Water began supplying water to the Town long before it was incorporated.

manage public facilities relating to a governmental function or purpose, including, but not limited to . . . water supply facilities." The entity would have "the powers provided by the interlocal agreement under which it is created." Id.

The statute does put some limits on the powers of the entity that can be granted by the interlocal agreement. The entity may not provide utility services within the service area of any existing utility, unless the utility gives its permission. Id. Further, neither the entity nor any of its members "may exercise the power of eminent domain over the facilities or property of any existing water or water plant utility system," nor may the entity acquire a utility, after the effective date of the legislation, that was acquired by a county or municipality by eminent domain. Id. So the entity created by the interlocal agreement may not use the coercive power of government to acquire an existing utility, nor may it compete with a utility within its service area.

The statute does permit the entity created by an interlocal agreement to acquire an existing utility or utilities, however. It is this power that is relevant to the instant case, and it is the exercise of this power that started the wheels rolling toward the instant case.

In February of 1999 Lee County and several other counties formed the "Florida Governmental Utilities Authority" by interlocal agreement to purchase the Avatar facilities. (APP II 191-228) The GUA is composed of four counties, those being Brevard,

Polk, Sarasota and Lee, but the majority of the Avatar facilities are in Lee County. (APP II 196; II 231)

The Interlocal Agreement states in its preamble that Avatar was willing to sell its utilities located in the member Counties, but that it wanted to sell them all at one time. (APP II 194) The GUA members therefore determined that it was appropriate to create the GUA to handle the purchase of the utilities from Avatar and then transfer these facilities to the local governments where they are located.

The Interlocal Agreement provides that the member Counties were consenting to the GUA acquiring the Avatar facilities, and that the GUA would only continue in existence so long as it owned any of these facilities. Upon divesting itself of the utilities the GUA would automatically cease to exist. (APP II 201)

Since the ultimate goal was to have the GUA transfer the Avatar facilities to the local governments themselves, the Interlocal Agreement contains a provision concerning the transference of the utilities by the GUA:

> 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 II 211; emphasis added.)

So the Interlocal Agreement states that the GUA may only sell an individual utility to the member County "or other Public Agency" where the utility is located. The definitional portion of the Interlocal Agreement incorporates by reference the definition of "public agency" found in Section 163.01(3)(h) of the Florida Statutes. (APP II 198-99) The Town of Fort Myers Beach is a "public agency" within the meaning of the statute, and hence is a public agency that has an "exclusive right" under the Interlocal Agreement to acquire a utility within its jurisdiction.

The Purchase of the Utilities Systems from Avatar

A number of other things were going on while the GUA was being formed. At the end of 1998 Avatar sent a document to counsel representing the GUA and its constituent Counties setting forth the terms of the sale of the utility systems. (APP II 299-40) This document contains specific prices for the Avatar facilities in each of the member counties. The price attributed Lee County, which included all of the Avatar facilities in the County, was $135,885,000. (APP II 231) The total purchase price for all of the Counties was to be $226,000,000, so as mentioned previously, the Lee County facilities made up the bulk of the purchase. Id.

Lee County approved the terms of the purchase of the Avatar facilities by the GUA in the same Resolution wherein the County approved the Interlocal Agreement creating the GUA. (APP II 185) The GUA itself enacted a Resolution on March 12, 1999, approving the purchase of the utility systems. (APP II 241-55) This Resolution also

specifies that the purchase price for the Avatar systems in Lee County would be $135,885,000. (APP II 249)

The Assignment from the GUA to Lee County

On the same day that the GUA approved the purchase of the utilities systems, it also approved the assignment of the utilities located in Lee County to the County itself.[4] (APP II 258) Lee County enacted a Resolution accepting the assignment several days later. (APP III 266-95)

The Hearing on the Lee County System

On January 26, 1999, about two months before the GUA purchased the utilities and made the assignment, Lee County conducted a hearing on the advisability of the purchase of the Avatar facilities in Lee County. (APP I 31) This hearing was required by Section 125.3401, which is the authority cited by the County for the purchase of the Avatar facilities in Lee County. (APP I 31; III 297) The statute states that no county may purchase a utility system without first conducting a hearing to ensure that the purchase of the system is "in the public interest." (APP I 36) In making this determination the county is required to consider, "at a minimum," a number of specifically-listed criteria. These

[4]This document and many others refer to the Avatar facilities in Lee County as "the Fort Myers system." This is an inapt appellation, since Avatar had no facilities within the City of Fort Myers. The descriptor is probably used because Fort Myers is the county seat for Lee County and its oldest city. All the Avatar facilities are in the unincorporated area of the County, except for the water utility in the Town of Fort Myers Beach.

criteria, which will be discussed in more detail in the Argument portion, require the county to consider the impact of the purchase upon the county itself as well as upon its citizens who are the customers of the utility.

The hearing conducted by Lee County considered the information prepared by its staff and consultants to meet the requirements of Section 125.3401. (APP I 38-140; II 141-161) This material showed that the total purchase price for the Avatar facilities in Lee County was to be $135,885,000. (APP I 41) The staff specifically listed the criteria of Section 125.3401, and made comment upon each. (APP I 43-48)

After the hearing the County Commission enacted a Resolution approving the purchase of the Avatar facilities in Lee County. (APP I 31-34)

It is important to note that the hearing and the resulting Resolution considered the Avatar facilities in Lee County as a whole, and made no attempt to specifically address the water utility located within the corporate limits of the Town of Fort Myers Beach that serves only the Town's residents. It will be recalled that the bond issue that is the subject of this validation proceeding concerns only the purchase of the water system within the Town of Fort Myers Beach. The voluminous material submitted by the County's staff and consultants at the January 26 hearing rarely mentions Fort Myers Beach, and does not address the criteria in Section 125.3401 as they pertain to the water utility within the Town's corporate limits.

There is one other element of the County's Resolution that is worthy of note. The Resolution states that the Avatar facilities are being purchased "in lieu of the initiation of eminent domain proceedings by the County, and as such . . . [the facilities] are being acquired under a threat of condemnation." (APP I 32) It will be recalled that Section 163.301(7)(g) specifically prohibits the GUA or any of its constituent members from using condemnation to acquire a utility. The County's staff report even said that one of the advantages of the purchase was that no condemnation would be required. (APP II 146) The staff went on to note, however, that a "threat of condemnation" would give tax advantages to Avatar in the sale, and that Avatar was insisting that this provision be included in the Resolution "as a condition of the sale."[5] (APP II 147,160) So the threat of condemnation was included in the Resolution at the insistence of Avatar, despite the prohibition of Section 163.301(7)(g).

The Separation of the Fort Myers Beach System

About six weeks after Lee County conducted its hearing and entered its Resolution approving the purchase of the Avatar facilities, it enacted another Resolution breaking off the water utility in Fort Myers Beach from the rest of the acquisition. (APP III 266-71) This subsequent Resolution states that the water system "substantially within and which services the incorporated area of the Town of Fort Myers Beach is separate, distinct and

[5]This "condition of sale" does not appear in the actual purchase documents. (APP III 229-40)

severable" from the remainder of the Avatar facilities in Lee County. (APP III 263) This being so, and since the Town of Fort Myers Beach had initiated litigation concerning the County's right to purchase the water utility within the Town's municipal boundaries, the County determined to separate the acquisition of the Fort Myers Beach water utility from the remainder of the Avatar facilities in Lee County. (APP III 268) The County found that this severance of the purchase was "financially feasible and that it will not detrimentally impact the service within either area." Id.

The Resolution also approved the Addendum to the Acquisition Agreement pertaining to the Avatar facilities in Lee County. (APP III 266-71) The Addendum is attached to the Resolution, and it provides that the water utility within the Town of Fort Myers Beach that serves only its residents is "separate, distinct and severable" from the other Avatar facilities in Lee County. (APP III 280) The Addendum further provides that the purchase of the water utility in Fort Myers Beach would not be completed until the lawsuit between the County and the Town was either resolved or settled, but that the sale of the rest of the Avatar facilities in Lee County would go forward in the interim. (APP III 281) Finally, the Addendum states that the purchase price for the water utility within the Town of Fort Myers Beach would be $3,330,255, which is about two percent of the total purchase price of the Avatar facilities in Lee County that had been approved by the County Commission at the January 26 hearing. (APP III 281)

The Bond Resolution instructed the County Attorney to seek validation of only the bond issue that would fund the purchase of the Fort Myers Beach water utility. (APP III 318) The Bond Feasibility Report (attached to the Resolution) discussed the "Town of Fort Myers Beach Issue." (APP IV 523) It disclosed that the Town had brought suit contesting the County's right to purchase the Fort Myers Beach water utility without the Town's permission.[6] Id. The Report states the bonds would not issue until there was some settlement with the Town or until a court determined that the purchase "does not require the Town's authorization." Id.

The Final Hearing in the Validation Case

Much of the evidence adduced at the validation hearing, especially as it relates to the Points on Appeal, has been set forth above. The County's two witnesses stated that the County had found that it was in the public interest to acquire the water utility in Fort Myers Beach and the other Avatar facilities in Lee County. On cross-examination the County staff person conceded that no separate hearing had been conducted on the water utility in the Town of Fort Myers Beach, but said that Fort Myers Beach had been part of the entire Avatar system considered at the hearing on January 26, 1999. (TR 58-59) The County's financial consultant similarly conceded that at the January 26 hearing there

[6]This suit, which bears 20th Cir. Case No. 99-1753 CA-JBR, remains pending in a quiescent state.

was no financial information available to the County Commission on the Fort Myers Beach water utility alone. (TR 71)

The final hearing concluded with the legal arguments of counsel, after which the trial court took the case under advisement. The Final Judgment that brings the parties before this Court was entered a short time later. (APP I 1-11)

SUMMARY OF ARGUMENT

This case tests the limits of a county's intrusion into the internal affairs of a municipality within its borders. Mr. Murphy is a citizen of the Town of Fort Myers Beach, and he believes that Lee County has gone too far in purchasing the water facility located within the Town and serving only the Town's residents.

Article VIII, Section 4 of the Florida Constitution requires a county to obtain the permission of a municipality and its citizens before "any function or power" of the municipality is assumed by the county. The case law interpreting this constitutional provision shows that it applies particularly to instances where a county "intrudes upon a municipality's provision of services." City of Fort Lauderdale v. Broward County, 480 So.2D 631 (Fla. 1985). Here that is exactly what Lee County has done. It has intruded upon the Town's function or power of providing water services to its residents, and the County has done this without the permission of the Town or its residents. As one of those residents, Mr. Murphy asserts that the County's acquisition of the water utility (and

the issuance of the bonds to finance the purchase) are in violation of Article VIII, Section 4 of the Florida Constitution.

Section 125.3401 was the statutory basis cited by the County for the purchase of the water utility within the Town. This statute requires the County "at a minimum" to consider specifically-listed factors reflecting upon the issues of whether the purchase is good for the citizenry in general and the customers of the water utility in particular. The County did not gather the required information concerning its purchase of the Fort Myers Beach water utility. The hearing conducted by the County to consider the purchase of the Avatar facilities in Lee County did not satisfy the letter or intent of the statute. At this prior hearing the purchase price for the Fort Myers Beach water utility had not even been formulated, nor had the contract by which this water utility would be purchased. The purchase of the Fort Myers Beach water utility alone presented a very different picture in regard to the alternatives to the purchase, and this is one of the factors that the County is required to consider under Section 125.3401. The County itself acknowledged that the Fort Myers Beach water utility was "separate and distinct" from the other Avatar facilities in Lee County, so there can be no legal excuse for not gathering the information and holding a separate hearing on the acquisition of this water utility as required by Section 125.3401. Mr. Murphy therefore contends that this is a second reason that the purchase of the Fort Myers Beach water utility (and the bonds to finance that purchase) are invalid.

There are additional problems with the County's purchase of the water utility. The Interlocal Agreement says the Town–not the County–has the exclusive right to purchase the water utility. The County's own Code of Ordinances states that it may purchase facilities through the issuance of bonds only in the unincorporated area of the County, thus excluding the water utility within the Town of Fort Myers Beach.

The final flaw in the trial-court proceedings is that the County did not make the Town of Fort Myers Beach a party. It appears that the sole purpose of this validation proceeding was to obtain an adjudication that the Town's permission was not necessary for the County's purchase of the water utility within the Town's borders. Yet the County did not name the Town as a party! Mr. Murphy specifically argued that the Town was an indispensable party, but the trial court rejected this argument without discussion. The trial court did find, however, that the consent of the Town was not required for the County's purchase of the water facility. So the County specifically raised the issue of whether the Town's permission was necessary, and the trial court specifically ruled on this issue. In Mr. Murphy's view it is inconceivable that the Town could not have been an indispensable party under these circumstances. It is therefore respectfully submitted that this is still another reason that the trial court erred in validating the County's bond issue.

ARGUMENT

The water utility that will be purchased with the bonds is located within the Town of Fort Myers Beach, and it serves only the Town's residents. Mr. Murphy objects to the County's purchase of this utility for two reasons. First and least importantly, it is likely that the County will subsidize the higher costs of providing water services to the inland, rural areas of the County with the "profit" it will make from servicing a developed area like Fort Myers Beach.

The second reason that Mr. Murphy objects, and the most important one, is that the citizens of Fort Myers Beach have shown that they want decisions to be made as to their public interests by the officials of their Town, and not by the County. This, after all, is why the Town incorporated in 1995–to remove its citizens from the direct control of the County. In Davis v. Town of Lake Placid, 147 So. 468,471 (Fla. 1933) this Court said that a municipality is "a village, a community of people, a settlement or town . . . [having] such social contacts as to create a community of public interest." So Mr. Murphy wants the water utility serving him and his fellow residents within the Town to be supervised or owned by the Town, and not by the County. It is the Town that should decide what best serves the public interests of its residents.

Though Mr. Murphy does challenge the County's $3.3 million bond issue to purchase the water system within the corporate limits of the Town of Fort Myers Beach, it should be understood from the outset that he does not challenge the much larger bond issue that will be utilized to purchase the other Avatar facilities in Lee County. All of the

arguments to follow are specific to the bonds that will purchase the water system within the Town, and if this Court accepts these arguments, the larger bond issue will not be impugned in any way. This being said, let's turn to the arguments as to why the bond issue the County will use to purchase the water utility should be stricken down.

I. The Trial Court erred in holding that Article VIII, Section 4 of the Florida Constitution does not require Lee County to obtain the Town's permission before purchasing the water utility within the Town's municipal limits.

The trial court specifically held in its Final Judgment that Article VIII, Section 4 of the Florida Constitution does not require Lee County to obtain the Town's permission before purchasing the water system that is located within the Town's corporate limits and that serves only the Town's residents. (APP I 10) The effect of the trial court's holding is to grant Lee County a status superior to that of the Town of Fort Myers Beach, even within the corporate limits of the Town.

The trial court's holding is at odds with the general conception of city/county relationships. In 56 Am.Jur.2d Municipal Corporations § 18 (1971) the author states, "[A] municipal or city government, in its relation to the county, is supreme within its own territorial jurisdiction, at least where the legislature has not decreed otherwise." See also Art. VIII, § 1(f), Fla.Const. Here it will be seen that there is no law in giving the County

superiority over the Town within its own jurisdiction; to the contrary, the Constitution provides that in regard to municipal services the County cannot intrude upon the Town's powers without the permission of the Town and its residents.

Article VIII, Section 4

The constitutional provision, which appeared for the first time in the 1968 Constitution, reads as follows:

> **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 transferee**, or as otherwise provided by law.
>
> (Emphasis added.)

This language, while couched in obscure terms, does state that a function or power of a municipality cannot be transferred to a county without the approval of the municipality and its citizens.[7] Here the County did not seek or obtain the permission of the Town or its citizens.

The Case Law

[7]There are several statutes in Florida that embody this same concept under analogous circumstances. See, e.g., § 125.01(q), Fla.Stat. (1999); § 153.03(1), Fla.Stat. (1999); § 163.07(5), Fla.Stat. (1999) .

Fortunately there is some case law on the constitutional provision, and this case law clarifies the language. The gist of the case law is that the constitutional provision is intended to prohibit one unit of local government from interfering with the ability of another unit of local government to provide services to its citizens.

A. Sarasota County v. Town of Longboat Key

The first case to deal with the constitutional provision was Sarasota County v. Town of Longboat Key, 355 SO.2D 1197 (Fla. 1978), and it is still an important case in this area. There Sarasota County sought to amend its charter so that it would be solely responsible for "performing five distinct governmental functions." 355 SO.2D at 1198. These five functions were 1) air and water pollution control, 2) parks and recreation, 3) roads and bridges, 4) planning and zoning, and 5) police protection. The charter amendment was to be voted on in a general election, but the assent of the four individual cities within the county was not obtained. The cities brought suit, and the trial court found the charter amendments to be invalid.

This Court reviewed the trial court's decision, first noting that "significant principles of local government autonomy are at stake in this proceeding." 355 So.2D at 1199. Justice England, speaking for the unanimous Court, said that plainly the proposed charter amendments attempted to transfer governmental functions from the cities to the county without the permission of the cities, and the question for the Court was whether there was some reason this permission was not necessary. The county argued that

permission was unnecessary because it was a charter county and therefore had the right to preempt city ordinances (under Art. VIII, § 1 of the Constitution). So the county argued that it did not need to comply with Article VIII, Section 4, because a charter county is exempt from this provision. This Court unanimously rejected the county's contention on the following basis:

> **Section 4 of Article VIII refers to "counties" without distinction**. The same term is used throughout the Constitution to refer both to charter and to non-charter counties. Where there has been an intent to distinguish the two forms of county government, it has been done explicitly. Not **only are we disinclined to read into Section 4 something that is not expressly provided, but we are all the more reluctant to elevate the general provisions of Article VIII, Section 1(g) [dealing with charter counties] to a dominant position over the specific provisions of Article VIII, Section 4. We hold that Section 4 applies both to charter and non-charter counties.**
>
> (Emphasis added, footnotes omitted.)

So in Sarasota County this Court held that the county's attempt to consolidate five governmental functions under its control was invalid, since permission had not been obtained from the cities that would necessarily lose their control over these functions by virtue of the county's actions. Here too the permission of the Town has not been obtained, and it will also lose control over the ability to provide water to its citizens.

B. City of Fort Lauderdale v. Broward County

The next significant case was decided seven years later. In City of Fort Lauderdale v. Broward County, 480 So.2d 631 (Fla. 1985) the county sought to amend its charter to

assume exclusive control over certain aspects of handgun management for the whole county. It proposed to do this without the consent of the cities within its borders, and the City of Fort Lauderdale brought suit to prohibit the charter amendment. The trial court ruled in favor of the county, and the city appealed. The fourth district held that the charter amendment was invalid under Article VIII, Section 4, and therefore ruled in favor of the city. The fourth district certified the issue to this Court.

This Court, speaking through Justice Ehrlich, considered the interaction between two sections of Article VIII; Section 1(g) pertaining to charter counties, and Section 4, which is central to the instant case. Justice Ehrlich noted that in Sarasota County this Court had refused to exalt Section 1(g) over Section 4, but that the case before the Court presented the obverse circumstance, since the effect of the lower court's holding was to raise Section 4 over the charter-county provision. Justice Ehrlich explained that if literal effect were given to the broad language in Section 4 that "any function or power" must be approved by the municipalities in the county, this would give the cities the veto power over county legislation and thereby negate the right of a county to provide in its charter that its ordinances should prevail over those of the cities within its borders.[8]

[8]It is interesting to note that the Lee County Charter provides that city ordinances shall control over county ordinances; so the electors of Lee County decided in passing their Charter that they wished municipalities to have the supreme legislative right within their borders. (APP IV 631)

Justice Ehrlich went on to say that the Court's task was "to glean the intent of the framers and strike the balance necessary to give both provisions the effect intended." 480 So.2D at 634. Justice Ehrlich said the purpose of Section 1(g) is "to specifically give charter counties two powers unavailable to non-charter counties: the power to preempt conflicting municipal ordinances, and the power to avoid intervention of the legislature by special laws." This first power would be negated if Section 4 were interpreted to give a city veto power over all county actions. Justice Ehrlich and the unanimous court harmonized the two constitutional provisions in the following manner:

> A line must be drawn between these overlapping provisions. **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.** A charter county may preempt a municipal regulatory power in such areas as handgun sales when county-wide uniformity will best further the ends of government. **Dual referenda are necessary when the preemption goes beyond regulation and intrudes upon a municipality's provision of services**.
>
> (Underlining in the original, emphasis added, citations omitted.)

480 So.2D at 635. This Court concluded its opinion with the explanation that "[w]e believe the distinction between regulatory preemption and transfer of functions and powers relating to services achieves the balance between sections 1(g) and 4 intended by the framers of the 1968 constitution." Id.

The Town's Home-Rule Powers vis à vis the County

Here there can be no doubt that Lee County's contract to purchase the water utility within the Town of Fort Myers Beach (and the Resolutions effectuating this plan) intrude upon the Town's functions and powers relating to the provision of water services to its citizens. Cities are granted broad home rule powers by Article VIII, Section 2(b) of the 1968 Constitution, and are thereby empowered to "perform municipal functions, and . . . exercise any power for municipal purposes except as otherwise provided by law." The Legislature enacted the Municipal Home Rule Powers Act in 1973, confirming the broad home-rule powers "to perform municipal functions, and render municipal services." § 166.021(1), Fla.Stat. (1999).

This broad home-rule power of a municipality is limited in only three instances: 1) where the subject is prohibited to municipalities by the Constitution, 2) where the subject has been preempted by law to another governmental entity, or 3) where the subject has been preempted by a county charter. § 166.021(3), Fla.Stat. (1999). There is nothing in the Constitution giving a county primacy over a city in providing water to the city's residents, nor is there any statute giving a county such superiority.

And the Lee County Charter actually gives the Town and the other municipalities in Lee County superiority when there are conflicts with the County. (APP IV 631) The importance of this point cannot be overemphasized. Article VIII, Section 1(g) of the

Constitution requires that a county charter shall state "which shall prevail in the event of a conflict between county and municipal ordinances." A noncharter county has no power within the boundaries of a municipality; so one of the reasons a county would become a charter county would be so that it could centralize power within itself with superiority over its constituent municipalities. In Wolff, "Home Rule in Florida: A Critical Appraisal," Stetson Law Review 869,881 (1990) the author explains:

> Noncharter counties possess only those powers given by either general or special law, and they may only enact ordinances not inconsistent with general or special law. Further, **in the event of a conflict, municipal ordinances prevail over county ordinances within the jurisdiction of the municipality**. In **contrast, charter counties have all powers of local self-government** not inconsistent with general law . . . **Also, municipal ordinances do not automatically prevail over conflicting county ordinances; rather, each charter is to provide which ordinance shall prevail**.
>
> (Emphasis added, footnotes omitted.)

The reason the Constitution requires the charter to so provide becomes apparent when charter counties and municipalities are compared. In Volusia County v. Dickinson, 269 So.2d 9 (Fla. 1972) Justice Ervin said that when the constitutional provisions pertaining to municipalities and charter counties are read together, it can be seen that "charter counties and municipalities are placed in the same category for all practical purposes." See also 12 Fla.Jur.2d Counties etc. § 6 (1998). So there needs to be some way of

determining which shall have priority over the other in matters of common concern, and this is why the Constitution requires the county charter to address this issue.

In City of Coconut Creek v. Broward County, 430 So.2d 959,962 (Fla.4th DCA 1983) the court said, "Thus, the question of whether the county has usurped the power of the municipalities can ordinarily be answered by examining the charter and general law." The charter is where the citizens state whether they want to preserve the power of their municipalities within the municipal borders, or whether they wish to entrust this power to a centralized county government. Here the citizens of Lee County, in adopting the Lee County Charter in 1997, opted to have the municipalities remain supreme within their own boundaries. There is nothing in the Charter giving the County superiority in the provision of services. So turning to the Lee County Charter to resolve city/county conflicts (as City of Coconut Creek says a court should do) reveals that the Town must be considered supreme within its municipal boundaries.

The Town through its home-rule powers certainly is authorized to operate a water utility within its boundaries, and the Town's powers in this regard are not limited by the Constitution, statute, or the County Charter. So the law of this state does not negate the broad home-rule powers that the Town would have to operate a water utility within its borders.

There is also additional statutory and case law confirming that a water utility is a proper municipal function. Section 180.06(3) of the Florida Statutes provides that a

municipality may "provide water and alternative water supplies . . . for domestic, municipal or industrial uses." In State v. City of Miami, 152 So.2d 6,12 (Fla. 1933) this Court remarked upon the "long-established state policy" of municipalities operating water utilities. In Town of Riviera Beach, 53 So.2D 828,830 (Fla. 1951) this Court held that under the law applicable to municipalities the town had the power to acquire a water utility. Perhaps the place to end this discussion is with the legislation that authorized the GUA. There it is stated that the GUA "may acquire [or] own . . . **public facilities relating to a governmental function or purpose, including**, but not limited to, wastewater facilities, **water** or alternative **water supply facilities** . . . ." (Emphasis added.) § 163.01(g)(1), Fla.Stat. (1999). So clearly a water utility is a "government function or purpose" which can be exercised by a municipality, and there is nothing in the law of this state taking this function away from the Town of Fort Myers Beach.

Article VIII, Section 4 Applied to the Instant Case

Article VIII, Section 4 prohibits a county from assuming governmental powers and functions within a municipality without the municipality's permission. The City of Ft. Lauderdale case states that the constitutional provision applies to "functions or powers relating to services." Plainly a water utility is a municipal service. Yet the County has usurped this function without seeking or obtaining the permission of the Town or its citizens. This, it is respectfully submitted, was a direct violation of Article VIII, Section

4 of the Florida Constitution, and shows that the bonds proposed to be issued by the County to fund this illegal purchase are in violation of the Florida Constitution.

II. The County did not comply with Section 125.3401 of the Florida Statutes in approving the purchase of the water utility within the Town of Fort Myers Beach.

The County purported to purchase the water utility within the Town of Fort Myers Beach under the authority of Section 125.3401 of the Florida Statutes, and this statute requires counties to adhere to certain procedures and to make certain findings of fact when purchasing utilities. It is Mr. Murphy's contention that the County did not comply with the express provisions of this statute. Section 125.3401 is a lengthy statute that was enacted by the Legislature in 1984.[9] It reads as follows:

> 125.3401 Purchase, sale, or privatization of water, sewer, or wastewater reuse utility by county.—**No county 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 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

[9]The same law enacted identical statutes applying to the purchase of utilities by municipalities (§ 180.301), special districts (§ 189.423), and community development districts (§ 190.0125). Ch. 84-84, Laws of Fla.

privatization contract **is in the public interest, the county 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 or the entity purchasing the utility from the county;

(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 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 or the entity purchasing the utility from the county.

(b) In the case of a wastewater facility privatization contract, the county 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 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 from using all or part of the moneys for the purpose of the county'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 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 or the entity purchasing the utility from the county.
>
> (Emphasis added.)

So the statute requires a county wishing to purchase a utility to gather certain information about the utility, to hold a public hearing to consider the information and decide whether it is in the public interest to purchase the utility, and to then prepare a statement explaining why the purchase of the utility is in the public interest.

Of course the heart of the statute is the information that must be gathered about the utility and considered by the county. The county must consider the accounting documents and the utility's rate base, thereby getting a handle on the financial ramifications of the purchase. The county must also consider the physical condition of the utility, the

reasonableness of the purchase price, and also the reasonableness of the terms of the contract by which the system will be purchased.

Most importantly for users of the water utility such as Mr. Murphy, the county must consider both the positive and negative impact the purchase will have upon the utility's customers, the other alternatives to the county's purchase of the system, and whether the county's purchase will result in a high-quality and cost-effective system.

In the instant case Lee County, by its own admission, did not hold a separate hearing on the purchase of the Avatar water utility within the Town of Fort Myers Beach. (TR 58-59) Rather, the only hearing conducted by the County occurred on January 26, 1999, at which time the County considered the purchase of all the Avatar facilities in Lee County for the purchase price of $135,885,000. The decision by the County (and the GUA) to make the purchase and sale of the water utility in Fort Myers Beach a separate transaction did not occur until some six weeks ***after*** the hearing. (APP III 266-71) The County never compiled the information on the Fort Myers Beach water system that Section 125.3401 says must be considered "at a minimum." The County never had a hearing to consider this non-existent information and determine if the purchase of the Fort Myers Beach water system was in the best interests of the citizens served by that water system. The County never issued a statement explaining why it was in the public interest to acquire the Fort Myers Beach water system as required by Section 125.3401. So plainly the County did not comply with Section 125.3401.

The County apparently takes the view that the hearing it conducted on January 26, where it considered the purchase of all Avatar facilities in Lee County, was sufficient to satisfy the requirements of Section 125.3401 in regard to the purchase of the Fort Myers Beach water utility. There are several reasons why the County's position cannot prevail.

A review of the documents considered at the January 26 hearing shows that there is little mention at all of Fort Myers Beach, or the Avatar water system within the Town's borders.[10] This is not surprising, since the water system within the Town comprised only about two percent of the total value of the Avatar facilities in Lee County. No attempt was made at the hearing to isolate the information required by Section 125.3401 in regard to the water system within the Town of Fort Myers Beach.

Mr. Murphy does not argue that the County could not have considered the purchase of the Fort Myers Beach system at the same hearing where it considered the purchase of the other Avatar facilities in Lee County. But the County would have had to meet the requirements of Section 125.3401 as to **each** of the utility systems that it was considering

[10]The County's Staff Report, which acted as the "statement" required by §125.3401, in fact states that the purpose of the acquisition of the Lee County facilities was to develop a water system "in portions of unincorporated Lee County," that the goal was to provide efficient water service "to the unincorporated area" of the County. (APP I 38,48) So obviously the Town and its water system were not prominent in the County's thought processes at the January 26 hearing.

purchasing. It did not do so, and thereby violated the dictates of the statute. This Point is really that simple.

It will likely be the County's argument that all of the Avatar facilities within Lee County are really only one utility, hence it could lump the constituent parts together for consideration at one hearing. If the County does make this argument, it will be inconsistent with previous positions the County has taken in regard to the Avatar utilities. The County passed a Resolution when it decided to break off the Fort Myers Beach system and issue separate bonds for its purchase, and this Resolution states that the water system "is separate, distinct and severable" from the other Avatar facilities. (APP III 268) Similarly, the purchase document attached to the Resolution states that the water utility within the Town of Fort Myers Beach is "distinct and severable from the remaining assets of the Fort Myers System [i.e., the other Avatar facilities in Lee County] which is located outside of the municipal boundaries of the Town." (APP III 280) So the County is on record as stating that the Fort Myers Beach water utility is a separate utility, and it is therefore not in a position to now argue that the water utility is not really separate. The facts also belie any contention by the County that it properly considered the purchase of the water system at the January 26 hearing. It would literally have been impossible to do so.

The Contract on the Fort Myers Beach System did not Exist at the Time of the January 26 Hearing

It will be recalled that Section 125.3401 requires the County to consider the reasonableness of the price and terms of the purchase contract. Yet the County did not enter into the separate contract for the Fort Myers Beach water system until six weeks ***after*** the January 26 hearing! The purchase price of $3,330,255 was not formulated until after the hearing, and there was no information before the County at the January 26 hearing that would show directly or indirectly that this was a reasonable price for the Fort Myers Beach water system. There could have been no discussion of the terms of the purchase contract for the water system, since that contract was not then in existence. So almost by definition, the January 26 hearing did not comply with Section 125.3401 in regard to the Fort Myers Beach water utility.

The County could not and did not Consider the Impact of the Purchase upon the Customers of the Water Utility

Again, the County could not have considered this factor had it wanted to at the January 26 hearing. The impact, both positive and negative, of the purchase of a utility will depend upon the debt service on the utility, which is a function of how much is paid for it and the revenues that will be produced. The purchase figure for the Fort Myers Beach utility had not even been formulated at the time of the January 26 hearing, and there was no information before the County as to what revenue the water system would produce. Perhaps the County's purchase contract will require the water rates in Fort

Myers Beach to be raised threefold, or perhaps the water rates will be cut in half. The resolution of these issues is the purpose of the hearing required by Section 125.3401, and no such hearing was conducted here.

The County did not Consider Alternatives to the Purchase of the Fort Myers Beach Water System

The requirement of Section 125.3401 that is most important from Mr. Murphy's perspective is the requirement that the County consider alternatives to the purchase. At the January 26 hearing the County was committed to purchasing all of the Avatar facilities in Lee County in one deal. So necessarily the County could not consider the ramifications of not purchasing the Fort Myers Beach water system alone. (APP I 44) But once the Fort Myers Beach utility was recognized as being a separate system, the alternatives to the County's purchase of the system drastically changed.

There is only one municipality within the service areas encompassed by the Avatar facilities in Lee County, and that is the Town of Fort Myers Beach. The other municipalities in Lee County have their own public utilities, or are serviced by other private utilities. It would not have been a viable alternative for the Town of Fort Myers Beach to purchase all of the Avatar facilities in Lee County. But once the decision was made to break off the Fort Myers Beach water system and treat that utility separately, it became entirely feasible for the Town to purchase the water utility servicing its citizens. It is Mr. Murphy's contention that it would in fact have been preferable, from a public-

policy standpoint, for the Town to purchase the water system.[11] Indeed, it will be recalled that the Interlocal Agreement actually gives the Town the exclusive right to purchase the water utility. (APP II 211) Be that as it may, the fact is that the County by definition could not have considered the legitimate alternatives to its purchase of the Fort Myers Beach water system at its January 26 hearing, because that purchase by the Town was not even a possibility at the time.

There are no cases discussing Section 125.3401, nor any of the parallel statutes applying to municipalities and special districts. But the statute is plain, and the County's failure to comply with it is equally as plain.

In Madison County v. Foxx, 636 So.2d 39 (Fla.1st DCA 1994) the county cited a particular statute (§ 125.01[1][q]) in its ordinances imposing a special assessment, yet the county did not comply with the requirements of this statute. The first district held that this made the special assessment invalid, since "[f]ailure to comply with the statute referenced in the ordinances as authority therefor is critical . . . the method prescribed by the legislature must be substantially followed." 636 So.2d at 48. Here the statute cited by the County as authorizing the purchase of the water utility in Fort Myers Beach was

[11]It should be noted that the Town's only hope for having its own water utility for its citizens was to purchase the existing utility. By statute (§ 180.06) the Town is prohibited from starting its own water system that would compete against an existing private water utility.

Section 125.3401, yet the County did not comply with the minimum requirements of that statute.

In a bond validation proceeding the court must determine whether the purpose for bond obligation is a legal one, and whether the proceedings authorizing the bonds were proper. GRW v. Dept. of Corrections, 642 SO.2D 718,720 (Fla. 1994). Here the bonds were not authorized for a valid purpose, since the underlying purchase of the water utility was not accomplished by the County in conformance with the express requirements of Section 125.3401. This is a second reason that the trial court's Final Judgment must, it is respectfully submitted, be reversed.

III. The Purchase of the water system within the Town of Fort Myers Beach violated the powers granted to the County and the GUA in the Interlocal Agreement, and also violated the County's own Code of Ordinances.

It will be recalled that Section 163.01(7) of the Florida Statutes was the statutory basis for the formation of the GUA that purchased the Avatar facilities and then transferred them to Lee County. That statute provides that the GUA "shall possess the common power specified in the [interlocal] agreement and may exercise it in the manner or according to the method provided in the agreement." So the Interlocal Agreement is

the "constitution" of the GUA, and it is this document that vests it with powers and that specifies how these powers are to be exercised.

The Interlocal Agreement by which the GUA was formed specifically sets forth the local governments to whom the utilities acquired can be transferred. This provision reads as follows:

> 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 II 211; emphasis added.)

So the Interlocal Agreement states that the GUA may only sell an individual utility to the member County "or other Public Agency" in whose jurisdiction the utility is located. The definitional portion of the Interlocal Agreement incorporates by reference the definition of "public agency" found in Section 163.01(3)(b) of the Florida Statutes. (APP II 198-99) This statute defines such entities to include "cities", thus the Town of Fort Myers Beach is a public agency within the meaning of the statute. This being so, the Town is also a "public agency" that has the exclusive right to purchase within the meaning of the Interlocal Agreement.

The Interlocal Agreement grants the exclusive right to purchase a utility within its borders to an "Authority Member **or** other Public Agency" where the utility is located.

(Emphasis added.) Obviously from the disjunctive language employed it can be seen that the exclusive right to purchase was not limited to public agencies that were also authority members. So the plain language of the Interlocal Agreement states that the GUA can ***only*** sell the water utility within the corporate limits of the Town of Fort Myers Beach to the Town itself. It therefore follows that the GUA did not have the power to sell the Fort Myers Beach water utility to the County.

There is also insurmountable trouble on the other end of the transaction. Article VII of the Lee County Code of Ordinances has as its subject "Revenue Bonds for Local Improvements." (APP IV 633-34) It is of course revenue bonds that are presently before the Court for validation. Section 1-112 of Article VII states that the County may issue revenue bonds to acquire or construct such improvements. But Section 1-111 is the important one for present purposes. It reads as follows:

> The board of county commissioners of Lee County, Florida (hereinafter called "board" and "county," respectively) is hereby authorized to acquire and construct any of the improvements, from time to time, **in the unincorporated areas of the county**.
>
> (APP IV 633; emphasis added.)

So Lee County's own Code of Ordinances says that it can acquire improvements and finance the acquisition with revenue bonds ***only*** "in the unincorporated areas of the county."[12] This obviously does not include the Town of Fort Myers Beach.

So there are illegalities on both ends of the transaction whereby the GUA transferred the Fort Myers Beach water utility to Lee County. The GUA was prohibited by its own "constitution" from making such a transfer to Lee County, since the Town of Fort Myers Beach had the exclusive right to purchase the system. Lee County was prohibited by its own Code of Ordinances from purchasing the utility (and issuing revenue bonds to fund the purchase) that was in an incorporated municipality. These illegalities are independent reasons showing that the trial court erred in validating the bond issue.

IV. The trial court erred in holding that the Town of Fort Myers Beach was not an indispensable party to this validation proceeding.

It has been argued above that Article VIII, Section 4 of the Florida Constitution requires the Town's permission before the County can purchase the water utility within the County's municipal boundaries. The County itself raised this issue in its Complaint,

[12]It will be recalled that the Staff Report considered at the January 26 hearing also referred to the Avatar facilities in the "unincorporated areas" of the County, which is consistent with the County's Code of Ordinances but inconsistent with the actual facts of this case.

alleging that "the consent of the Town of Fort Myers Beach is not required . . . the consent of the Town [is not] required for such acquisition under any other provisions of Florida law." (APP I 13) The trial court in its Final Judgment found that "[t]he County's acquisition of the system is not contrary to the requirements of Article VIII, Section 4 of the Constitution of the State of Florida." (APP I 10) So clearly this issue was raised by the County, and ruled upon by the trial court.

The documents show that the County intended to seek a judicial pronouncement on this issue, and this is apparently why it sought to validate this small bond issue and not the much larger one whereby it purchased the other Avatar facilities in the County. (APP III 318; IV 523) Yet the County did not make the Town of Fort Myers Beach a party to the action, and the trial court denied Mr. Murphy's Motion to Dismiss for the County's failure to join the Town as an indispensable party. The metaphor that best describes this unusual scenario is that of "one hand clapping." The party most interested in the issue (other than the County) was of course the Town of Fort Myers Beach, so it is difficult to understand how the Town could not have been an indispensable party in the resolution of this issue.

A number of cases have defined an indispensable party as "[a] person whose rights and interests are to be affected by a decree and whose actions with reference to the subject matter of litigation are to be controlled by a decree . . . ." Blue Dolphin v. Swim Ind., 597 SO.2D 808,809 (Fla.2nd DCA 1992). In HRS v. State, 472 SO.2D 790,792

(Fla.1st DCA 1985) the court said, "An indispensable party is generally defined as one whose interest is such that a complete and efficient determination of the cause may not be had absent joinder." In W.R. Cooper v. City of Miami Beach, 512 SO.2D 324,326 (Fla.3d DCA 1987) the court said an indispensable party is "a person with such an interest in the subject matter of the action that a final adjudication cannot be made without affecting his interests or without leaving the controversy in such a situation that its final resolution may be inequitable."

All of these descriptions fit the Town to a tee. Several analogous cases will demonstrate the point. In HRS v. State, supra, a group of corrections officers brought suit against HRS concerning a pay issue. HRS moved unsuccessfully to dismiss for failure to join an indispensable party, arguing that the Department of Administration had to be joined because it was the state agency charged with establishing and maintaining the state's career service plan. The first district reversed on appeal, holding that the Department's "presence as a party in the action is essential for a complete and efficient determination of the [pay] claim." Here the Town of Fort Myers Beach was also essential for a valid determination of whether Article VIII, Section 4 of the Constitution required its permission for the County to purchase the water utility within its borders.

In Savage v. Olson, 9 SO.2D 363,364 (Fla. 1942) the plaintiffs alleged that the surviving spouse's prior divorce was invalid, hence his subsequent marriage to the

decedent was invalid. This Court held that this issue could not be determined in the absence of the prior spouse, since she was an indispensable party:

> It is patent that any judgment in the circuit court or opinion here holding void the divorce of Genia W. Savage from Charles B. Savage **would materially affect her rights**. **It would be unjust and inequitable**, therefore, to hold that the bonds of matrimony existing between those parties had not been properly severed without giving her the opportunity to resist the assailment of the decree . . . **It is generally agreed that those persons must be joined who are materially interested in the suit**. It is our view that Genia W. Savage is an indispensable party . . . .
>
> (Citations omitted, emphasis added.)

Here too the trial court's resolution of whether the Town had to give its approval materially affected the Town's rights, and it was unjust and inequitable to proceed without the Town's presence.

All of these cases show that when a plaintiff brings suit and makes allegations that necessarily affect or call into question the actions of a third party, that third party is an indispensable party to the suit. Here the County alleged that it did not have to obtain the Town's permission to purchase the water utility, and thus directly put into dispute an issue affecting the Town. This made the Town an indispensable party.

The County will no doubt defend its non-joinder of the Town by pointing to validation cases holding that only the State need be made a party. See, e.g., State v. Osceola County, 24 FLW S245 (Fla. 1999)(still on rehearing); Broward County v. State,

515 SO.2D 1273,1274 (Fla. 1987). If this were a normal validation proceeding, these cases would perhaps be dispositive. But this is not a normal validation case.

It will be recalled that the only reason the County sought to validate these particular bonds was because the Town had taken the position that its permission was necessary for the purchase of the water utility within its borders. The Town had in fact brought suit against the County to establish that its permission was necessary. (APP III 269,281) So the whole purpose of this validation suit was to overcome the Town's objections to the purchase. The County specifically alleged in this action that the Town's permission was not necessary, and thereby shifted the resolution of this issue from the Town's suit to this validation proceeding. Validation proceedings are accorded an expedited hearing, and the law concerning validation is favorable to the validating entity. Even though the purpose of the validation suit was to overcome the Town's objections, the Town was not named as a party.[13]

So this was not a generic validation suit. Rather, the County made specific allegations that directly implicated the Town's constitutional rights. In 59 Am.Jur.2d Parties § 97 (1987) the author states the general rule: "[W]here the plaintiff seeks some other type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined, that third person is an indispensable party." Here the County did

[13]The failure to name the Town as a party also short-circuited Ch. 164 known as the "Florida Governmental Conflict Resolution Act," which sets up a procedural mechanism when local government entities find themselves embroiled in a dispute.

seek affirmative relief that directly implicated the constitutional rights of the Town. The Town was plainly an indispensable party, and the suit should not have proceeded in its absence. It is therefore respectfully submitted that this is still another reason why the trial court erred in entering its Final Judgment in the absence of the Town of Fort Myers Beach.

CONCLUSION

The trial court erred in entering its Final Judgment validating the bond issue for the reasons set forth above, and it is therefore respectfully submitted that the Final Judgment should be reversed and the cause should be remanded with instructions to enter a judgment refusing to validate the County's bond issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief has been furnished by hand delivery to Yolande G. Viacava, Assistant State Attorney, THE STATE ATTORNEY'S OFFICE, Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901; by hand delivery to James G. Yaeger, David M. Owen & John J. Renner, co-counsel for Lee County, of THE LEE COUNTY ATTORNEY'S OFFICE, 2115 Second Street, Fort Myers, FL 33901; by hand delivery to Richard V.S. Roosa, counsel for the Town of Fort Myers Beach, of ROOSA, SUTTON, BURANDT & ADAMSKI, LLP, 1714 Cape Coral Parkway East, Cape Coral, FL 33904; by regular United States Mail to Gregory T. Stewart & Harry F. Chiles, co-

counsel for Lee County, of NABORS, GIBLIN & NICKERSON, P.A., P.O. Box 11008, Tallahassee, FL 32302; by regular United States Mail to Edward W. Vogel, III, co-counsel for Lee County, of HOLLAND & KNIGHT, LLP, P.O. Box 32092, Lakeland, FL 33802-2092; and, by regular United States Mail to Michael L. Chapman, co-counsel for Lee County, of HOLLAND & KNIGHT, LLP, P.O. Box 1288, Tampa, FL 33602-4300, this 20th day of December, 1999.

Respectfully submitted,

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