SUPREME COURT OF FLORIDA

CASE NO. SC02-2166

CHRISTOPHER J. SCHRADER

Appellant,

v.

FLORIDA KEYS AQUEDUCT AUTHORITY

Appellee

APPELLANT'S REPLY BRIEF

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References to the Parties, Briefs and the Record

CHRISTOPHER J. SCHRADER shall be referred to as SCHRADER or Appellant. References, if any, to the Initial Brief of SCHRADER shall be cited as "SCHRADER Brief" followed by the page number. References to the Appendix to the SCHRADER Brief shall be cited as "SCHRADER App." followed by a tab and/or page number.

The FLORIDA KEYS AQUEDUCT AUTHORITY shall be referred to as "FKAA" or Appellee. References to the Answer Brief of FKAA shall be cited as "FKAA Brief" and references to the Appendix to the Answer Brief of FKAA shall be cited as "FKAA App." followed by a tab(s) and/or page number.

SUPPLEMENTAL STATEMENT OF THE FACTS

The statements of the facts of FKAA and the City of Marathon distort and omit significant facts in an effort to create the much relied upon illusion the law in question is a general law and an adverse decision in this case will sound the death knell for the Florida Keys eco-system. For this reason, supplementation of the facts is necessary.

Without question both the Federal Government and the State of Florida have properly recognized the Florida Keys as a national treasure and the need to reverse the degradation of their nearshore waters. The State of Florida has also designated the Florida Keys as an area of critical state concern. FKAA , however, has not, been given any "mandate from the State of Florida" (FKAA Brief pg. 2) to finance and construct a wastewater system in the Florida Keys that will cure this problem.

FKAA's wastewater jurisdiction is actually confined to a limited portion of the Florida Keys, and it does not include some of the most populated areas of

Monroe County. The City of Key West, the City of Key Colony Beach, the City of Layton, Islamorada, Village of Islands, and all unincorporated areas of Monroe County North/East of the Village of Islamorada, except the Ocean Reef Club, are excluded from the wastewater jurisdiction of the FKAA. *See*, Chapters 76-441, 98-519, and 2002-337, Laws of Florida. Of the area that is within its jurisdiction, FKAA is presently constructing a wastewater system in one small area of the Middle Keys known as Little Venice (SCHRADER App., Tab 6, pg. 17). The sense of urgency expressed by FKAA in its Answer Brief appears to be new found.

It is true that the Florida Legislature has issued a mandate concerning wastewater in the Florida Keys, but that mandate has nothing to do with FKAA. Through Section 6, Chapter 99-395, Laws of Florida, the Legislature has ordered the stoppage of certain types of on-site wastewater discharge and that various

other wastewater treatment systems, including package wastewater treatment facilities ("Package Plants"), meet advanced wastewater treatment standards (hereafter "Advanced Wastewater Standards") established therein. In what would seem to be an obvious effort to avoid undue hardship, the Legislature has given Keys property owners and/or governments until July 31, 2010 to comply with this mandate.

Construction of new island wide or centralized type sewer systems is being explored by local governments as *one possible method* to meet the Advanced Wastewater Standards mandate. These same governments are also exploring the possibility of integrating all or some existing Package Plants into their plans. (FKAA App., Tab G-4).

FKAA is correct when it states that under existing general law, the City of Marathon can still require everyone except the owners of the 70 Package Plants in the area of its proposed project to connect to any FKAA constructed system if the Court rules in favor of the Appellant (FKAA Brief pgs. 10-11). However, in furtherance of its efforts to create the illusion that Package Plants will destroy the Florida Keys eco-system if this Court rules in favor of Appellant, FKAA omits to advise the Court that the great majority of environmental damaging nutrients that end up in the waters surrounding the Florida Keys are from sources other than Package Plants such as septic tanks, cesspits, existing central treatment plants, and live aboard vessels. (FKAA App., Tab F, pg. 64). Further, as already noted, existing Package Plants will have to comply with the Advanced Wastewater Standards established by the Legislature. Thus, contrary to what FKAA and its allies would have this Court believe, FKAA has not been charged with saving the fragile eco-system of the Florida Keys, and an adverse decision in this case will not thwart or

prevent compliance with any mandate of the Governor or Legislature.

In its Counter Statement of the Facts, FKAA claims that the issue presented in this case is "much the same issue" (Answer Brief, pg. 9) that was presented to this Court in *Keys Citizens for Responsible Government v. Florida Keys Aqueduct Authority*, 795 So.2d 940 (Fla. 2001). This characterization is, to be kind, a ruse.

In *Keys Citizens* FKAA filed a bond validation proceeding that included a request for approval of the first mandatory connection ordinance passed by Monroe County and that requires property owners to connect to the system FKAA is now constructing in the Little Venice area. The trial court entered a final judgment approving the mandatory connection ordinance, and one of the interveners in the case appealed. The basis of the appeal was threefold. First, the mandatory connection ordinance was a collateral issue that the Circuit Court

should not have entertained; second, if the connection ordinance was properly before the Court, the final judgment in the bond validation proceeding should not preclude future attacks on the connection ordinance, and, third, the bond validation provisions of Chapter 75, Florida Statutes violated citizens rights to procedural due process as guaranteed by the Florida and Federal Constitution.

This Court's opinion included a general discussion about the power of

government to require connection to a sewer system, wherein it referenced Section 4, Chapter 99-395, Laws of Florida (hereafter "Section 4"). However, the interveners appeal did not assert, like the instant case, that Section 4 was a special law that had been passed in violation of Article III, Section 10 of the Florida Constitution, and this Court did not address that issue. Accordingly, the legal issues in *Keys Citizens* and this case are not even distantly related.

Finally, FKAA's Counter-Statement of the Facts also suggests that its rule making authority and the financing of its wastewater system will be "undermined" by an adverse decision in this case (FKAA Brief, pg. 7). This too is gross exaggeration for, as noted *supra,* under existing general law the City of Marathon can require everyone, except the 70 Package Plant owners, to connect to any wastewater system constructed by the local governments. Thus, FKAA's rule making authority would only be slightly diluted. As to the issue of financing, notably absent from the briefs of FKAA, the City of Marathon and Monroe County is a claim that connection of the Package Plants is a condition to financing.

SUMMARY OF ARGUMENT

Although the Florida Legislature has designated the Florida Keys as an area of critical state concern and otherwise indicated they are an area of statewide importance, Section 4 is still a special law because it does not and can never affect

anyone outside of Monroe County.

ARGUMENT

I.

SECTION 4, CHAPTER 99-395 LAWS OF FLORIDA IS A SPECIAL LAW EVEN THOUGH THE FLORIDA KEYS HAVE BEEN DESIGNATED AN AREA OF CRITICAL STATE CONCERN

FKAA argues that because the law at issue involves an area of critical state concern, it is a matter of statewide importance, and, thus, a general law. In support of its argument FKAA relies exclusively on *State v. Leavins*, 599 So.2d 1326 (Fla. 1st DCA 1992). An understanding of the *Leavins* decision reveals the analysis advanced by FKAA is not supported by that case, and application of the law actually expressed in *Leavins* and other decisions of this Court reveals Section 4 is truly a special law.

In *Leavins* two legislative acts were at issue. The first, Chapter 89-432, Laws of Florida, prevented the taking of oysters from Appalachicola Bay, and only Appalachicola Bay, with a mechanized dredge or rake ("Dredge Law"). The other, Chapter 89-175, Laws of Florida imposed various restrictions on the oyster industry, including the imposition of a harvesting license requirement, the imposition of a surcharge tax, and the repeal of an exemption to harvest oysters in the closed

season that had been given to holders of leased beds ("License Law").

The Dredge Law was challenged as being a special law that was passed in violation of Article III, Section 10 of the Florida Constitution. The First District Court of Appeal found that because the Dredge Law applied only to Appalachicola Bay, it was in fact a special law passed in violation of the Florida Constitution.

The License Law was challenged as having been passed in violation of Article III, Section 11(a)(20) which prohibits any special law or general law of local application pertaining to the regulation of occupations that are regulated by a state agency.[1] In a single discussion, the *Leavins'* Court both distinguished the case before it from this Court's decision in *Department of Business Regulation v. Classic Mile, Inc.*, 541 So.2d 1155 (Fla. 1989) and cited its reasons for concluding the License Law was not a special law. The Court stated:

> We believe *Classic Mile* should be distinguished. First the act in that case applied only to Marion County and thus, directly intruded upon the Article III Section 11 prohibition concerning classifications of "political subdivisions or other governmental entities." Equally important, there is no suggestion that para-mutual wagering in one county is comparable in terms of import and impact statewide with the shellfishing industry centered upon the Apalachicola Bay. Apalachicola Bay is

[1] The License Law was also challenged as having been passed in violation of the single subject requirement set forth in Article III, Section 6 of the Florida Constitution. The Court did not find an Article III, Section 6 violation.

> denominated as an area of critical state concern pursuant to section 380.0555, Florida Statutes (1989). It has been variously recognized as a Natural Estuarine Sanctuary, a Florida Aquatic Preserve, an Outstanding Florida Water, and is documented to produce some 90% of this state's commercial oyster harvest. The seafood industry is an important and distinctive industry in Florida. Any classification here is merely geographical, and not political. The challenged aspects of the law apply uniformly to anyone desirous of access to the marine resources in Apalachicola Bay. The protection of valuable marine resources is a valid, and indeed inescapable, exercise of the state's police power. The geographical classification inherent in the act will not, standing alone, render the act a prohibited law of local application anymore than do Florida's pervasive regulations concerning the citrus industry, in light of incontestable climatic evidence that a majority of the state's counties cannot support a commercial citrus crop.
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> *Leavins* at 1335-1336, (citations omitted).

The *Leavins* court found the License Law was a general law for two reasons. First, the law impacted an industry that was of statewide importance. Second, it found the law to be a general law because it applied to anyone that desired to harvest oysters from the Apalachicola Bay area of critical state concern, not just those who lived there. In reaching these conclusions it is quite apparent that the *Leavins* Court properly applied the legal standards established by this Court in

prior cases. *See*, *State of Florida v. Florida State Turnpike Authority*, 80 So.2d 337 (Fla. 1955)(laws that affect every citizen of the state are general laws, thus, legislation providing for construction of turnpike in only part of the state was a general law because the turnpike would affect traffic throughout the state), *St. Johns River Management District v. Deseret Ranches of Florida, Inc*. 421 So.2d 1067 (Fla. 1982)(legislation creating first water management district was not a local law because it was passed as part of a comprehensive statewide water management plan that materially affects people throughout the state).

FKAA's claim that Section 4 is a general law is not at all supported by *Leavins* or other decisions of this Court. *Leavins*, *Turnpike Authority* and *Deseret Ranches* all stand for the proposition that laws that apply to a limited geographic area may still be a general law if it is demonstrated that they *materially affect all of the citizens of the state*. The proper focus of the analysis is, therefore, on the *affect* of the law passed by the legislature, not, as FKAA suggests, the subject matter to which the law relates. Recognition of a fundamental difference in the legislation at issue in this case and *Leavins* reveals why Section 4, standing alone, does not and can never affect the citizens of the entire state.

In *Leavins*, the legislature affirmatively exercised its police powers to regulate an important industry of statewide economic impact. The passage of Section 4,

however, was not a an affirmative act, it was a passive ceding of authority that neither regulates nor requires any conduct. Thus, even if it is assumed, *arguendo*, that a state law which actually requires some act be taken to improve the waters bounding the Florida Keys is one that materially affects the citizens of the entire state[2], Section 4 is not such a law because it *only permits* local governments in the Florida Keys to require property owners to connect to any central sewer system, instead of actually requiring those property owners to do so.

It was this same type of law that was at issue in *Alachua County, Florida v. Florida Petroleum Marketers Association, Inc.* 553 So.2d 327 (1st DCA 1989), *aff'd*, 589 So.2d 240 (Fla. 1991) and which this Court found to be a special law. Like the law in *Alachua County*, Section 4 is special law passed in violation of Article III, Section 10 of the Florida Constitution.

II.

THE PROCESS USED BY MONROE COUNTY

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[2] To accept this proposition is to frolic on a slippery slope, for in the context of environmental issues, it can almost always be argued that damage to one area will have at least some remote impact on many other areas, particularly when it involves bodies of water that bound multiple states and countries. Simply stated, environmental laws would always be general laws and the protections afforded by Article III, Section 10 of the Florida Constitution would be meaningless.

AND THE CITY OF MARATHON TO PASS MANDATORY CONNECTION ORDINANCES DID NOT PROVIDE THE SAME PROTECTIONS AS THE LEGISLATIVE PROCESS AT THE STATE LEVEL

As a fallback position**,** FKAA and the City of Marathon argue that because Section 4 did not impose obligations on the general public and because the process used by the City of Marathon and Monroe County during the passage of the mandatory connection ordinances provided the citizens the opportunity to be heard, no harm has been suffered as a result of the Legislature's failure to give the notice required by Article III, Section 10, of the Florida Constitution.

The argument advanced by FKAA and Marathon ignores the fact that there are significant other protections inherent in the legislative process at the state government level that are not present at the local level. A process which allows a proposal to become law upon the majority vote of a local board clearly does not afford citizens the same protections as a process that requires the passage of a bill by both houses of the Legislature and the signature of the Governor.

In this case, the citizens of Monroe County could not avail themselves of protections inherent in the state legislative process as they did not receive the constitutionally mandated notice. This denial of rights is not cured by subsequently allowing the citizens to participate in the less protective process at the local level.

The position of FKAA and the City of Marathon is also at complete odds with the explicit ruling of this Court in *Alachua County* wherein it was held that a law granting a single county the authority to pass more restrictive ordinances is a special law that must be passed in accordance with Article III, Section 10 of the Florida Constitution.

Therefore, FKAA and the City of Marathon's position is both unsound and unsupported.

CONCLUSION

Section 4 was passed in an effort to allow local governments in the Florida Keys to pursue one possible solution to restoring the waters surrounding the Florida Keys. It was not, however, an affirmative act by the Florida Legislature to solve the problems that are causing damage to those waters. The plain language of the law reveals it applies only to Monroe County, and its permissive nature precludes it from every affecting any person outside of Monroe County.

Thus, Section 4 is a special law passed in violation of Article III, Section 10 of the Florida Constitution, and the final judgment entered by the Circuit Court should be reversed to the extent it finds Section 4 and the mandatory connection ordinances passed by Monroe County and the City of Marathon pursuant thereto to

be legal and enforceable.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing Initial Brief of Appellant was mailed this 3rd day of December, 2002, to: Grace E. Dunlop, Esq., Bryant, Miller and Olive, P.A., 101 East Kennedy Blvd., Ste 2100, Tampa, FL 33602 and Robert Feldman, Esq., 1100 Kennedy Drive, Key West, FL 33040, Attorneys for Florida Keys Aqueduct Authority; J. Jefferson Overby, Esq., 530 Whitehead Street, Key West, FL., 33040, Assistant State Attorney; Edward G. Guedes, Esq., Weiss Serota Helfman Pastoriza & Guedes, P.A., Suite 420, 2665 South Bayshore Dr., Miami, FL. 33133, Attorneys for the City of Marathon; and James T. Hendrick, P.O. Box 1028, Key West, FL 33041-1026, Attorney for Monroe County.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Fla. R. App. P. 9.210.

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