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Local Government

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Local Government: 1991 Survey of Florida Law

Joel A. Mintz*

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I. INTRODUCTION

In its last two terms, the Supreme Court of Florida handed down fifteen opinions regarding diverse aspects of local government law. This article surveys that body of decisional law. In particular, it reviews pertinent Florida Supreme Court decisions with regard to election law, sovereign immunity, local government liability under section 1983, municipal finance, preemption of local legislation, impact fees, county responsibility for indigent criminal defendants' appeals costs and municipal liability for the attorneys' fees of public officials.¹

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1. This article considers decisions of the Supreme Court of Florida handed down between October 1, 1989 and July 15, 1991. It does *not* attempt to treat the local government law decisions of the United States District Courts for Florida, of the United States Court of Appeals for the Eleventh Circuit or of Florida courts other than the Supreme Court. Similarly, it does not discuss Florida Supreme Court decisions in non-local government areas that are substantively related to local government law *only*

II. ELECTIONS

During the period of this survey, local election law received more attention from the Florida Supreme Court than any other single aspect of local government law. The court decided five cases in this field, on matters ranging from the validity of referenda to special laws concerning school board elections to the recall of municipal governing officials.

*People Against Tax Revenue Mismanagement, Inc. v. County of Leon*² concerned the validity of a local referendum that created a local-option sales tax as the revenue source for a \$60 million bond issue for construction of a new jail and other capital improvements. Leon County named People Against Tax Revenue Mismanagement (PATRM), a political action committee which had previously brought two unsuccessful suits to set aside the result of the referendum, as defendant in a bond validation proceeding. In that context, several challenges were raised to the referendum. One of these was based on the contention that local government agencies had used public resources and funds to mount an informational campaign in favor of the referendum, thereby violating the "neutral forum" of the election.³ The supreme court soundly rejected this claim and stated that local governments are "not bound to keep silent in the face of a controversial vote that will have profound consequences for the community."⁴ Rather, in the court's view: "Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices for this purpose."⁵ Any rule to the contrary would "render government feckless" and would absolve democratic government of its "duty" to "lead the people to make informed choices through fair persuasion."⁶

The supreme court also refused to credit an argument that by including the campaign slogan "Take Charge . . . It's Your Future," and by describing planned capital improvements contemplated by the referendum as "critical," the wording of the ballot language had unfairly biased the electorate.⁷ The supreme court indicated that the language in question did reflect "a slight lack of neutrality that should not

insofar as one of the parties happened to be a political subdivision of the State of Florida.

2. 583 So. 2d 1373 (Fla. 1991).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Leon*, 583 So. 2d at 1376.

be encouraged.”⁸ It concluded, however, that inasmuch as the remainder of the ballot plainly stated that a “yes” vote meant that new taxes would be imposed, the referendum was not so confusing to the voters as to be “clearly and conclusively defective.”⁹

Finally, the supreme court gave short shrift to PATRM’s notion that the procedure established by section 102.168 of the Florida Statutes, which requires that county canvassing boards be named defendants in taxpayer lawsuits challenging elections, is the only proper method of resolving challenges to local referenda. The court noted that section 75.02 of the Florida Statutes authorizes counties to litigate the validity of tax assessments levied in connection with bond issues.¹⁰ It also observed that section 100.321, Florida Statutes, plainly states that the opportunity for taxpayers to file a lawsuit challenging a referendum is closed as soon as a bond validation proceeding is filed in the same matter.¹¹ Thus, once taxpayers are joined as defendants in bond validation proceedings, they are obligated to raise all of their objections to the validity of tax assessment referenda in the context of those proceedings, or be “forever barred from raising them again.”¹²

The supreme court considered the validity of another county referendum election in *Wadhams v. Board of County Commissioners*.¹³ There a majority of the voters of Sarasota County had approved an amendment to the county charter providing that the county’s Charter Review Board shall conduct its business “only during the year, and prior to that time, in which a general election is held in 1988, and every four years thereafter.”¹⁴ This charter amendment appeared on the ballot unaccompanied by any statement summarizing and explaining it. Reversing rulings of the trial court and the Second District Court of Appeal, the Florida Supreme Court invalidated the results of the referendum. It held that the proposed amendment had failed to comply with section 101.161(1) of the Florida Statutes, which requires that public measures submitted to votes of the people contain “an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.”¹⁵ Citing the leading case of *Askew v. Firestone*,¹⁶

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Leon*, 583 So. 2d at 1378.

13. 567 So. 2d 414 (Fla. 1990).

14. *Id.*

15. *Id.* (quoting FLA. STAT. § 101.161(1) (1991)).

the supreme court opined that the purpose of section 101.161(1) is to assure that the electorate is advised of the true meaning and ramifications of a proposed amendment.¹⁷ By failing to contain an explanatory statement of the amendment, the ballot at issue in *Wadhams* had failed to inform the public that there was presently no restriction on Charter Review Board meetings and that the chief purpose of the amendment was to curtail the Charter Review Board's right to meet.¹⁸ This was not apparent from the face of the ballot.¹⁹

The supreme court disagreed with the Sarasota County Board of County Commissioners' argument that public hearings, advance publication of the proposed amendment, and media publicity had afforded the voters of Sarasota County an "ample opportunity" to become informed on the amendment's effect. Instead, the court indicated, the ballot summary must bear the burden of informing the public—a burden that should not fall only on the press and opponents of the proposal.²⁰

Similarly, the court rejected the county commissioners' contention that approval by the voters cures any defects in the form of the submission. It reasoned the defect in the referendum at issue "went to the very heart of what section 101.161(1) seeks to preclude" and that "no one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth."²¹

Finally, the court refused to credit the proposition that challenges to allegedly defective referenda are barred if they are instituted subsequent to a special election. It indicated that, in effect, that argument asserts that "hoodwinking the public is permissible unless the action is challenged prior to the election" and stated "although there would come a point where laches would preclude an attack on the ordinance, such is not the situation in the present case where the suit was filed only a few weeks after the election."²²

Justice Kogan dissented. In his opinion, the language of the ballot in question did advise the electorate of the meaning and ramifications of the amendment, particularly in light of the advance publicity that

16. 420 So. 2d 151 (Fla. 1982).

17. *Wadhams*, 567 So. 2d at 416.

18. *Id.* at 416-17.

19. *Id.* at 417.

20. *Id.*

21. *Id.*

22. *Wadhams*, 567 So. 2d at 417.

the referendum had received.²³ In this case, Justice Kogan believed, the election was properly conducted and the petitioners had received sufficient advance notice of the proposed ballot to allow them to challenge its form before the election. Their failure to do so should bar their claim.²⁴

*In re Koretsky*²⁵ involved the issue of whether section 100.361 of the Florida Statutes applies to a municipality that has adopted no provisions for recall elections. The statutory section contains a comprehensive scheme for the recall of governing officials of municipalities and charter counties. Inter alia, it states: "the provisions of this act shall apply to cities and charter counties which have adopted recall provisions."²⁶

After briefly reviewing pertinent legislative history, the supreme court gave this statutory language a narrow reading. It stated that "the only conclusion we can draw from this inclusion is that the legislature was limiting the recall procedure to those governing bodies that provided for recall and declined to impose it on such bodies which have no such provisions."²⁷

Justice Grimes dissented on the view that the legislation at issue should be read more broadly. Grimes pointed out that other subsections of the same statute provide that "it is the intent of the Legislature that the recall procedures . . . shall be uniform statewide" and that the act authorizes and provides for voter recall of "any member of the governing body of a municipality."²⁸ In view of these sub-sections, he concluded that the statute was clearly intended to operate, in and of itself, as authorization for the removal of members of municipal governing bodies.²⁹

Justice Grimes' dissent stated one additional concern. He believed that the majority's reading of section 100.361 would permit cities that presently have municipal recall procedures to repeal those procedures at any time, simply to escape the potential for a recall of their governing officials. In Grimes' opinion, that scenario would be contrary to the public interest. Thus, he viewed the majority's approach as incon-

23. *Id.* at 423 (Kogan, J., dissenting).

24. *Id.*

25. 557 So. 2d 24 (Fla. 1990).

26. *Id.* (quoting FLA. STAT. § 100.361(9) (1987)).

27. *Koretsky*, 557 So. 2d at 25.

28. *Id.* (Grimes, J., dissenting).

29. *Id.*

sistent with the maxim that statutory ambiguities should be resolved by interpretations that best serve the public interest.³⁰

In *Kane v. Robbins*,³¹ the Florida Supreme Court declined to overturn its earlier holding, in the same case, that non-chartered county school board members may not be elected in a non-partisan election authorized by special law.³² The incumbent Martin County School Board moved for rehearing or clarification of the supreme court's original decision in the case, arguing that opinion would invalidate all acts and decisions of the School Board since 1976, and would impair the delivery of educational services to Martin County children until a new school board election is held.³³ The supreme court dismissed these concerns as unfounded. It pointed out that the official acts of a de facto officer are as valid and binding upon the public and third persons as are the acts of an officer de jure. Thus, the lawfulness of the acts of Martin County School Board members who had been elected in invalid non-partisan elections could not be doubted. Moreover, the court concluded, official acts of the incumbent school board members would continue to be valid until such time as new school board members are duly appointed.³⁴

The 1989 *Kane v. Robbins* decision was also considered in another case involving the validity of a non-partisan election of county school board members, *School Board of Palm Beach County v. Winchester*.³⁵ In that situation, Palm Beach County had been electing school board members in non-partisan elections since 1971, pursuant to a special act of the Florida legislature. In 1985, the County adopted a charter providing that the validity of any pre-existing county ordinances shall continue as if the charter had not been passed. Following the *Kane* decision, Palm Beach County sought a declaratory judgment that its method of electing school board members was valid. The county contended that because it had become a charter county, it was subject to the exception contained in article III, section 11(a)(1) of the Florida Constitution which exempts, inter alia, chartered counties from the prohibition on special laws pertaining to the election of officers.³⁶ The

30. *Id.*

31. 556 So. 2d 1381 (Fla. 1990).

32. *Id.* at 1385. This original *Kane v. Robbins* decision is summarized in Joel A. Mintz, *Local Government Law*, 14 NOVA L. REV. 919, 930 (1990).

33. *Id.* at 1381.

34. *Id.*

35. 565 So. 2d 1350 (Fla. 1990).

36. *Id.*

Florida Supreme Court agreed, noting that it was obligated to construe statutes as constitutional wherever such a construction was reasonably possible. Consequently, the court found that it was reasonable to uphold Palm Beach County's school board election system because it was not challenged prior to Palm Beach County's becoming a chartered county, and because its provisions are presently constitutional under article III, section 11(a). The *Kane* case was distinguished because it had not involved a chartered county.³⁷

Justices Ehrlich and Grimes dissented in separate opinions. Justice Ehrlich reasoned that the statute that authorized non-partisan county school board elections in Palm Beach County was unconstitutional at its inception and that the adoption of a charter "does not in some mysterious, mystical manner make it constitutional."³⁸ Referring to the majority's opinion as "judicial legerdemain" and "bad law," Ehrlich stated,

the travesty of the whole scenario is that now that the county is chartered it no longer needs to rely on special acts of the legislature to bring about non-partisan elections of the school board. The county itself has the authority to enact such a provision as the one at issue. Yet it has never done so.³⁹

Justice Grimes indicated that even though he could sympathize with the majority's "unspoken desire" to avoid disrupting an impending school board election in Palm Beach County, he saw no rational basis for doing so.⁴⁰ He wrote: "I know of no legal theory by which it could be said that the adoption of the home rule charter breathed life into the constitutionally invalid special law."⁴¹

III. SOVEREIGN IMMUNITY

In its last two terms, the Supreme Court of Florida decided two cases with regard to the doctrine of sovereign immunity. Its first decision concerned the pre-judgment interest liability of local governments and its second involved their post-judgment liability for interest payments.

37. *Id.* at 1351.

38. *Id.* at 1352 (Ehrlich, J., dissenting).

39. *Id.*

40. *Winchester*, 565 So. 2d at 1353 (Grimes, J., dissenting).

41. *Id.*

In *Broward County v. Finlayson*,⁴² the sovereign immunity issue arose in the context of a labor contract dispute between the county and its emergency medical technician (EMT) employees. These employees had entered into a contract that provided for a regular work week of fifty-six hours, with overtime rates to be paid for all hours worked in excess of scheduled shifts. At the same time, the county's civil service rules, written for all county employees, stated in pertinent part that "Overtime is work beyond the normal hours of any scheduled work week. After forty (40) hours actually worked employee[s] will be paid at the rate of time and one-half."⁴³

After an unsuccessful grievance proceeding, the plaintiff filed a class action on behalf of herself and other EMT's seeking overtime pay for work done in excess of forty hours per week.⁴⁴ At trial, a jury found that the EMT's annual salary was payment for only forty hours per week and judgment was entered providing that each class member was owed retroactive overtime pay for the entire period of the labor contract in question.⁴⁵

On appeal, Broward County argued that sovereign immunity prohibits an award of pre-judgment interest against a subdivision of the state in a contract dispute.⁴⁶ The supreme court was not persuaded. Affirming, in part, a decision of the district court, the court relied on *Pan-Am Tobacco Corp. v. Department of Corrections*⁴⁷ for the principle that the defense of sovereign immunity will not protect the state from action for breach of a contract it has entered into, so long as that contract is fairly authorized by the powers granted by general law.⁴⁸

The supreme court then considered whether Broward County should be required to pay the plaintiff pre-judgment interest from the date that the contract was entered into or the date of the plaintiff's first claim for overtime wages. Noting that the County had been unaware that the EMT's believed themselves entitled to sixteen hours of overtime per week until the date of the plaintiff's first demand for overtime compensation, the court ruled that it would be inequitable to allow the plaintiff to recover pre-judgment interest for any period prior to that

42. 555 So. 2d 1211 (Fla. 1990).

43. *Id.*

44. *Id.* at 1211-12.

45. *Id.* at 1212.

46. *Id.*

47. 471 So. 2d 4 (Fla. 1984).

48. *Finlayson*, 555 So. 2d at 1213.

date.⁴⁹

In dissent, Justice McDonald took the view that under the doctrine of sovereign immunity, the state and its political subdivisions should not be liable for interest on its debts unless that liability is called for specifically by a statute or a contract.⁵⁰ Finding no statutory authorization for suits against the state for breach of employment contracts, McDonald concluded that no interest on the unpaid overtime was due the plaintiff.⁵¹

*Palm Beach County v. Town of Palm Beach*⁵² concerned a dispute over the sufficiency of county property tax levies for roads and bridges. After winning a judgment that the county's levies were insufficient, the Town appealed a trial court remedial order that made no allowance for post judgment interest.⁵³ It relied on section 55.03 of the Florida Statutes which provides that, in general, judgments or decrees entered on or after October 1, 1981 shall bear interest at the rate of twelve percent a year.⁵⁴ The supreme court agreed with the Town. Rejecting an argument that section 55.03 was inapplicable because interest may only be awarded when the right to interest can be implied from the language of a statutory waiver of sovereign immunity, the court held that the county's immunity from suit had been established in an early phase of the suit and could not be relitigated.⁵⁵

Justice Overton dissented. He opined that, when the legislature passed section 55.03, it had not intended to apply post-judgment interest to disputes of this type between governmental entities.⁵⁶ In Justice Overton's view, Palm Beach County had been exercising a governmental function, and acting in a legislative capacity, when it levied tax assessments in the manner it did.⁵⁷ Thus, even if it had been wrong, the county was not properly subject to a claim of postjudgment interest. Such a result, he believed, is punitive to taxpayers, who must pay the county's interest costs along with any assessments levied for road and bridge purposes.⁵⁸

49. *Id.*

50. *Id.* (McDonald, J., dissenting).

51. *Id.* at 1214.

52. 579 So. 2d 719 (Fla. 1991).

53. *Id.*

54. FLA. STAT. § 55.03(1) (1991).

55. *Palm Beach*, 579 So. 2d at 720.

56. *Id.* at 721.

57. *Id.*

58. *Id.*

IV. SECTION 1983 LIABILITY

During the period covered by this survey, the Supreme Court of Florida handed down two opinions regarding the liability of municipalities under 42 U.S.C. § 1983. One of these cases concerned state trial courts' subject matter jurisdiction over section 1983 suits against municipalities. The other case focused on the circumstances in which subordinate municipal officials may be held to have been delegated final municipal policy-making authority.

In *Town of Lake Clarke Shores v. Page*,⁵⁹ a former police officer with the Lake Clarke Shores Police Department brought a section 1983 action against the town. He alleged that his civil rights had been violated because town officials had terminated his employment in response to a letter, published in the *Palm Beach Post*, in which Page had expressed his opinion about the effect of stress upon police officers.⁶⁰

The trial court dismissed the action, holding that it lacked subject matter jurisdiction over section 1983 actions. The Fourth District Court of Appeals reversed and the Florida Supreme Court unanimously agreed with the Court of Appeals.⁶¹ Quoting extensively from a recent United States Supreme Court decision, *Howlett v. Rose*,⁶² the Florida Supreme Court held that state trial courts do, in fact, have subject matter jurisdiction over section 1983 actions against municipalities. The court noted that the United States Supreme Court has held that municipal corporations and similar governmental entities are "persons" within the meaning of section 1983.⁶³ Furthermore, state courts which entertain section 1983 suits against such entities are bound to accept Congress' abrogation of municipal sovereign immunity in those actions.⁶⁴

In *Raben-Pastal v. City of Coconut Creek*,⁶⁵ the plaintiffs brought a section 1983 action against the city based upon the failure of its chief building official to lift a stop-work order he had issued as to plaintiff's residential construction project. The plaintiffs had eliminated a number of cracks in newly constructed structures, as they had been ordered to do by the building official, and an engineering firm retained by the City

59. 569 So.2d 1256 (Fla. 1990).

60. *Id.* at 1257.

61. *Id.* at 1256.

62. 110 S. Ct. 2430 (1990).

63. *Id.* at 2432.

64. *Page*, 569 So. 2d at 1257.

65. 573 So. 2d 298 (Fla. 1990).

had certified that the necessary repairs were completed. Despite this, the building official refused to rescind his stop-work order for another five months.⁶⁶

Following a trial in which a jury had returned a sizeable verdict in favor of the plaintiffs, the trial court set aside the jury verdict and dismissed the suit. The Fourth District Court of Appeals affirmed the trial court's action and the Florida Supreme Court agreed.⁶⁷

In a unanimous opinion, the supreme court considered whether the building officials' actions had established official city policies. It discussed two leading United States Supreme Court opinions, *Pembaur v. City of Cincinnati*,⁶⁸ and *City of St. Louis v. Prapotnik*⁶⁹ and cited *Prapotnik* for the principle that, in a section 1983 action, the discretionary actions of a subordinate local official will not be deemed to constitute an official municipal policy unless it is clear that the subordinate's discretionary decision was not constrained by official policies and was not subject to review.⁷⁰

Applying that rule to the facts, the court noted that the South Florida Building Code, which governs the regulation of construction projects in Broward County, vests building officials with the power to impose stop-work orders on particular projects. However, the same Code also provides that any decision made by the building official on matters regulated by the Code was subject to review by a Board of Rules and Appeals, upon written application to the Secretary of the Board. For this reason, a decision by a building official affecting a stop-work order was not "final," and the building official whose actions were challenged in this case could not be considered a "final policy-maker" for the City of Coconut Creek.⁷¹

V. MUNICIPAL FINANCE

In its last two terms, the Supreme Court of Florida considered two appeals from judicial validations of municipal bond financing agreements.

*State v. School Board of Sarasota County*⁷² concerned the valid-

66. *Id.* at 299.

67. *Id.* at 298.

68. 475 U.S. 469 (1986).

69. 485 U.S. 112 (1988).

70. *Coconut Creek*, 573 So. 2d at 301.

71. *Id.* at 302.

72. 561 So. 2d 549 (Fla. 1990).

ity of nearly identical agreements supporting bond issues that had been entered into by the school boards of Sarasota, Collier and Orange Counties. The court summarized the agreements in question as follows:

These agreements provide for the lease of public lands owned by the [school] boards to not-for-profit entities (by way of ground leases), the construction of improvement of public educational facilities upon the leased lands, the annual leaseback of the facilities to the school boards (by way of facilities leases), and the conveyance of the lease rights of the not-for-profit entities to trustees (by way of trust agreements). The trustees are to market the bonds and disburse funds to finance construction of the facilities. Title to the public lands remains in the respective school boards. Title to the facilities constructed with the proceeds of the bonds passes to the respective school boards at the end of the term of the ground lease

.....
 Money from several sources, including ad valorem taxation, will be used to make the annual facilities' lease payments. If, in any year, a board does not appropriate money to pay the lease, the board's obligations terminate without penalty and it cannot be compelled to make payments. The board then has two options. It may purchase the facilities and terminate the ground lease. Alternatively, it may surrender possession of the facilities and lands for the remainder of the ground lease and is free to substitute other facilities for those surrendered. The trustee may relet the facilities for the remainder of the lease's term or sell its interest in the leases to generate revenue to pay bondholders.⁷³

Challenging the validity of these agreements, the State of Florida asserted that the trustees and not-for-profit entities that they refer to were not authorized to seek validation of the agreements in proceedings pursuant to section 75.02 of the Florida statutes.⁷⁴ The state contended that while the benefits of chapter 75 validation proceedings are properly conferred on political subdivisions of the state, in this case it was really the not-for-profit entities and the trustees, rather than the school boards, who were employing chapter 75 procedures to obtain judicial approval of the bond financing arrangements. Citing its decision in *State v. Brevard County*,⁷⁵ the supreme court disagreed.⁷⁶ The court

73. *Id.* at 550-51.

74. *Id.* at 552.

75. *Id.*

76. 539 So. 2d 461 (Fla. 1989).

summarily found that the boards were, in fact, proper plaintiffs in a section 75.02 action.⁷⁷

The supreme court then considered whether a voter referendum was required with respect to the agreements at issue. It ruled that even though the agreements were partially supported by ad valorem revenues, a referendum was not mandated by article VII, section 12 of the Florida Constitution because the agreements specified that “neither the bondholders nor anyone else could compel use of the ad valorem taxing power to service the bonds.”⁷⁸

Similarly, the court rejected the contention that a referendum was mandated by section 230.23(9)(b)(5) of the Florida Statutes which requires an approving referendum where a school board pays rental fees, for necessary grounds and educational facilities, from funds received from ad valorem taxation pursuant to an agreement for a period greater than twelve months.⁷⁹ As interpreted by the supreme court, this section amounts to “no more than a codification of the referendum requirement set forth in the constitution.”⁸⁰

Finally, the court declined to apply other cases in which it had reversed bond validations by lower courts. It distinguished *County of Volusia v. State*⁸¹ on the basis that the obligations at issue in *Volusia*—supported as they were by a pledge of all legally available unencumbered revenues other than ad valorem taxation, along with a promise to maintain fully the programs and services that generated the non-ad valorem revenue—constituted, in effect, a promise to levy ad valorem taxes.⁸² The supreme court also distinguished *Nohrr v. Brevard County Educational Facilities Authority*,⁸³ in which it held that the predecessor to article VIII, section 12 required an approving referendum for a bond-supporting agreement which granted a mortgage with a right of foreclosure. In contrast, the court reasoned, the present case did not involve a mortgage with right of foreclosure. Moreover, in this case, the bondholders were “limited to lease remedies; and the annual renewal option preserved the school board’s full budgetary flexibility.”⁸⁴

77. *Id.*

78. *Id.*

79. FLA. STAT. § 230.23(9)(b)(5) (1989).

80. *School Bd.*, 561 So. 2d at 553.

81. 417 So. 2d 968 (Fla. 1982).

82. *School Bd.*, 561 So. 2d at 553.

83. 247 So. 2d 304 (Fla. 1971).

84. *School Bd.*, 561 So. 2d at 553.

In his dissenting opinion, Justice McDonald labeled the majority's conclusion that the financial scheme in question was not supported by a pledge of ad valorem taxation as "pure sophistry" and an approval of "form over substance."⁸⁵ McDonald noted that "if ad valorem taxes are not levied and paid each year for the duration of the agreements, the school boards default not only all interest acquired under the agreement for the remainder of the agreement, but they also lose the right to use the preowned property for the remainder of the agreement."⁸⁶ In practice, he reasoned, no school board would do that. Thus, for all practical purposes, the school boards in this case bound themselves to levy, collect and pay ad valorem taxes to finance new school construction—an arrangement which requires approval by referendum under the Florida Constitution.⁸⁷

In *State v. City of Orlando*,⁸⁸ the Florida Supreme Court considered an entirely different municipal bond financing scheme. There, the state challenged the validity of a \$500 million bond issue, the proceeds from which would be used to make loans to, or buy the debt instruments of, other local governmental units in the State of Florida.⁸⁹ Under the arrangement in question, bond revenues could be lent by the City of Orlando to finance a variety of local agency projects, including the purchase of liability coverage contracts, the funding of self-insurance reserves and the building of roads, water systems, jails, utility facilities, and sports facilities.⁹⁰ While local agencies were to be liable to the extent of their respective obligations under the loan agreements, the bonds themselves were not to be deemed "a debt liability or obligation of the state or any political subdivision or municipality."⁹¹

The Florida Supreme Court found this municipal financing arrangement to be flawed in two critical respects. First, the proposed bond issue "failed to provide enough details by which its legality could be measured."⁹² It did not identify the particular governmental entities to whom bond revenues would be lent, the revenues from which those entities would repay their loans or the specific projects or uses to which

85. *Id.* at 554.

86. *Id.*

87. *Id.*

88. 576 So. 2d 1315 (Fla. 1991).

89. *Id.* at 1316.

90. *Id.*

91. *Id.*

92. *Id.* at 1317.

bond funds would be put.⁹³ In addition, the proposed financing arrangement neglected to estimate the amount of profits that the City of Orlando might expect.⁹⁴ Also, it failed to mention what “paramount public purpose” those profits would be used for.⁹⁵

Beyond this lack of specificity—which the supreme court conceded could probably be corrected by amendment of the documents that controlled issuance of the bonds—the court noted a second and “deeper” problem. The primary purpose of the bond issue in question “was to obtain proceeds that would be used to invest for a profit.”⁹⁶ In the court’s opinion, this purpose contravened article VIII, section 2(b) of the Florida Constitution, which limits municipalities to the conduct of municipal government, the performance of municipal functions and the rendering of municipal services.⁹⁷ In the court’s view, “making a profit on an investment is an aspect of commerce more properly left to commercial banking and business entities.”⁹⁸ For this reason, the supreme court invalidated the City of Orlando’s proposed bond issue.⁹⁹ The court held, however, that its ruling was prospective only, and that “it did not prohibit the investment of bond proceeds pending later expenditures on the project contemplated by a bond issue.”¹⁰⁰ The court also indicated that its opinion should not be construed to limit the ability of municipalities to invest any previously borrowed funds used for valid municipal projects.¹⁰¹

VI. STATE PREEMPTION OF LOCAL LEGISLATION

*Florida Power Corporation v. Seminole County*¹⁰² concerned the validity of county and city ordinances that required Florida Power Corporation (FPC) to relocate underground a set of overhead power lines that FPC maintained along a two lane county road. The city’s ordinance required FPC to bear the entire cost of the undergrounding pro-

93. *City of Orlando*, 576 So. 2d at 1317.

94. *Id.*

95. *Id.*

96. *Id.*

97. FLA. CONST. art. VIII, § 2(b).

98. *City of Orlando*, 576 So. 2d at 1317 (quoting *State v. Panama City Beach*, 529 So. 2d 250, 257 (Fla. 1988) (McDonald, C.J., dissenting)).

99. *See City of Orlando*, 576 So. 2d at 1317.

100. *Id.* at 1310.

101. *Id.*

102. 579 So. 2d 105 (Fla. 1991).

ject. The county's ordinance was nominally silent as to who would bear that cost. However, it unequivocally declared that the county would not do so.¹⁰³

FPC sued the city and county for declaratory judgment and injunctive relief against enforcement of the ordinance, contending that the ordinances invade the exclusive authority of the state Public Service Commission to regulate rates and service. The utility company was unsuccessful at the trial court level, but the Florida Supreme Court reversed.¹⁰⁴ Noting that the Florida Statutes grant the state Public Service Commission broad power "to prescribe fair and reasonable rates and charges,"¹⁰⁵ and that requiring FPC to place its power lines underground clearly affects its rates, if not its service, the court held that "the jurisdiction of the Public Service Commission . . . preempts the authority of the city and county to require FPC to place its lines underground."¹⁰⁶

The supreme court gave a narrow construction to section 337.403(1) of the Florida Statutes. That section provides that utility equipment placed along public roads that is found to interfere unreasonably with "the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road," shall be "removed or relocated" by the utility at its own expense.¹⁰⁷ The court held that this provision "does not grant localities the power to mandate the type of system to be used by a utility, or to determine who should pay for such a system."¹⁰⁸ However, it does allow "for the removal or relocation of utility facilities when necessary to accommodate expansion or maintenance."¹⁰⁹ In addition, the court opined that the statutory words "removed or relocated" do not suggest conversion of an overhead electric system to an underground system as a condition of use of the right of way—a requirement which the court described as "extraordinary."¹¹⁰

Finally, the supreme court observed that the legislature had vested the Public Service Commission with the authority to require conversion

103. *Id.*

104. *Id.* at 106.

105. *Florida Power Corp.*, 579 So. 2d at 106 (quoting FLA. STAT. ANN. § 366.05(1) (West Supp. 1991)).

106. *Id.* at 107.

107. *Id.* at 108 (quoting FLA. STAT. ANN. § 337.403(1) (1991)).

108. *Id.*

109. *Id.*

110. *Florida Power Corp.*, 579 So. 2d at 108.

of overhead distribution lines to underground lines if the Commission believes that such a conversion would be “feasible” and “cost effective.”¹¹¹ In view of this, the court reasoned, permitting cities to mandate unilaterally the conversion of overhead lines would run “contrary to the legislative intent that the Public Service Commission have exclusive regulatory authority over this subject.”¹¹²

VII. IMPACT FEES

*St. Johns County v. Northeast Florida Builders Association*¹¹³ concerned the validity of an impact fee on new residential construction to be used for new school construction.¹¹⁴ The impact fee ordinance was immediately applicable in unincorporated areas of St. Johns County. However, it was ineffective within the boundaries of any municipality in the county until that municipality entered into an interlocal agreement with the county to collect the impact fees from applicants for new building permits.

In reviewing the constitutionality of this ordinance, the supreme court applied a “dual rational nexus test,” which it explained as follows:

[T]he local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.¹¹⁵

The court had little difficulty concluding that the ordinance in question satisfied the first prong of this test.¹¹⁶ The court rejected as “simplistic” a contention the “impact fee [was] nothing more than a tax” insofar as it concerned the many new residences that would have no impact on the public school system. During the useful life of the new dwelling units subject to the fees, the court noted, school age children would

111. *Id.*; see FLA. STAT. ANN. § 366.04(7)(a) (Supp. 1991).

112. *Id.*

113. 583 So. 2d 635 (Fla. 1991).

114. *Id.* at 636.

115. *Id.* at 637.

116. *Id.* at 638.

come and go.¹¹⁷ The St. Johns County impact fee, which was based upon a comprehensive study of projected growth and educational demands, was rationally designed to provide the capacity to serve the educational needs of all new dwelling units.¹¹⁸

The supreme court then turned to the second prong of the dual rational nexus test. It observed that, as written, the impact fee “ordinance permitted the St. Johns County School Board to spend the funds to build a new school that would serve only the increased needs of a municipality caused by growth within that municipality.”¹¹⁹ However, unless the municipality had signed an interlocal agreement with the county to collect impact fees, the funds to build that school would come from impact fees paid by development in unincorporated areas. This arrangement ran afoul of the requirement that the expenditure of collected impact fees be reasonably connected to the benefits that accrue to the units those fees are collected from. For this reason, the court mandated that no impact fee be collected under the ordinance until such time that municipalities containing “substantially all” of the municipal population of St. Johns County have entered into interlocal agreements with the county.¹²⁰

Since the propriety of imposing impact fees to finance new schools was an issue of first impression in Florida, the supreme court went on to examine other issues raised by the St. Johns County impact fee ordinance in *dicta*. It ruled that a subsection of the ordinance that created an alternative method of fee calculation collided with the requirement of the Florida Constitution that there be a uniform system of “free public schools.”¹²¹ As construed by the county, this provision created the potential that impact fees would in fact become user fees to be paid primarily by those households that actually contain public school children. However, the court severed the offending subsection under a severability clause of the ordinance, since its severance did not impair the operation or effectiveness of the remainder of the ordinance.¹²²

The supreme court rejected an argument that the ordinance conflicts with the requirement of a “uniform system” of public schools con-

117. *Id.* at 637-38.

118. *Northeast Fla. Builders Ass'n*, 583 So. 2d at 638.

119. *Id.*

120. *Id.* at 639.

121. *Id.* at 638.

122. *Id.* at 640.

tained in article IX, section 1 of the Florida Constitution.¹²³ It opined that the Constitution mandates neither uniform sources of school funding among the several counties nor equal funding and equivalent educational programs in every school district. "Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts."¹²⁴ The Constitution only requires that every student be provided an equal chance to achieve basic educational goals prescribed by the legislature.¹²⁵

Similarly, the supreme court rejected claims that the impact fee ordinance interjected the county into an area in which school boards have been given exclusive authority. It stated that article IX, section 4(b) of the Florida Constitution, that gives school boards the authority to tax, does not limit county involvement in school financing. Furthermore, section 230.23 of the Florida Statutes, which implements article IX, section 4(b), does not place upon school boards the exclusive duty to secure adequate public school financing. Moreover, several other enactments make clear that the legislature contemplated that counties be involved in educational funding, rather than preempted from such involvement.¹²⁶

Finally, the court concluded that the ordinance in question does not create an unlawful delegation of power. In its view, the ordinance properly calls for the county to make the fundamental policy decisions, including determinations as to the amount of the fees and how they are to be collected, at the same time as it limits the school board's discretion in expending funds for new educational facilities.¹²⁷

VIII. COUNTY RESPONSIBILITY FOR INDIGENT CRIMINAL DEFENDANTS' APPEALS COSTS

*In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*¹²⁸ was a consolidation of five cases in which six Florida counties challenged an order of the Second District Court of Appeal regarding the prosecution of criminal appeals by the

123. *Northeast Fla. Builders Ass'n*, 583 So. 2d at 640.

124. *Id.* at 641.

125. *Id.*

126. *Id.* at 642.

127. *Id.*

128. 561 So. 2d 1130 (Fla. 1990).

Public Defender for the Tenth Judicial Circuit. This order was issued *sua sponte* by the Second District Court in response to a tremendous backlog of appeals to that court by indigent defendants in which briefs were substantially overdue.¹²⁹ The principal requirements of the order in question were summarized by the supreme court in this way:

The court's order prohibits Mr. Moorman, [the Public Defender for the Tenth Judicial District], from accepting appeals from any judicial circuit other than the Tenth in which the notice of appeal was filed after May 22, 1989. The order further mandates that circuit judges within each circuit appoint that circuit's public defender to handle appeals from that circuit. If a public defender from one of those circuits has a conflict, the order requires that they [sic] file motions to withdraw so that the circuit judge may appoint other counsel to represent those clients at the expense of the local government.¹³⁰

The counties challenged this order on several grounds. First, they argued that the order abridged their due process rights because the counties were not afforded notice or an opportunity to be heard before the order was issued, even though it will have a substantial financial impact on them. The supreme court was unpersuaded. It noted that the order under review was "merely the most recent in a series of efforts" by the same court to deal with the same problem.¹³¹ "All interested parties, including the counties, [had] been given an opportunity to respond" in connection with at least two of these prior efforts.¹³² The issues remained the same, as did the counties' response. Beyond this, the court reaffirmed and reiterated its decision, in *Escambia County v. Behr*,¹³³ that counties are not entitled to respond to motions to withdraw by public defenders merely because of their financial interest in the outcome of those motions.¹³⁴

The counties also contended that the state should compensate private attorneys who must be appointed as a result of conflicts of interest created by state's underfunding of public defenders.¹³⁵ They suggested

129. *Id.* at 1131.

130. *Id.* at 1132-33.

131. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1133.

132. *Id.*

133. 384 So. 2d 147 (Fla. 1980).

134. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135-36.

135. *Id.* at 1135.

that the state had, in fact, assumed that burden in 1981, when the legislature deleted language from section 27.53(2) of the Florida Statutes that tied the payment of court-appointed attorneys in non-capital cases to a statute addressing payment of such attorneys in capital cases.¹³⁶ Once again, the supreme court disagreed. It stated that even though the amendment to section 27.53(2) had indeed removed language explicitly placing the burden of compensating court-appointed attorneys on the counties in non-capital cases, no language was added assigning that responsibility to the state. As a result, the remaining statute left an ambiguity to be resolved by examination of the legislative history of the 1981 amendment to section 27.53(2).¹³⁷

The court performed such an examination, including an analysis of the jurisdiction of the legislative committees which considered the bill that amended section 27.53(2), and a review of a staff analysis of that bill prepared for the Senate Judiciary—Civil Committee. It revealed that the bill was not intended to shift the responsibility for compensating court appointed attorneys from the counties to the state. Therefore, the supreme court reasoned, that obligation remains on the counties.¹³⁸

In support of this conclusion, the court cited section 925.037 of the Florida Statutes,¹³⁹ which created a pilot program to reimburse the counties for fees paid to court-appointed counsel in capital and non-capital conflict of interest cases. It stated:

This new statute is good evidence that the legislature views the primary responsibility for compensating court-appointed attorneys as being on the counties, that the 1981 amendment to subsection 27.53(2) did not alter that scheme, and that the legislature is only now beginning to address the tremendous financial burden the scheme places on the counties.¹⁴⁰

The supreme court further observed that appropriation of funds of the operation of government is a legislative function and that the judiciary cannot compel the legislature to exercise a purely legislative prerogative.¹⁴¹ Thus, even though the counties may well be correct in asserting that the state should accept complete financial responsibility for

136. *Id.* at 1135-36.

137. *Id.* at 1137.

138. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135-36.

139. *Id.*

140. *Id.* at 1137-38.

141. *Id.* at 1138.

the public defenders, the legislature is the proper forum to address that concern.¹⁴²

IX. ATTORNEY'S FEES FOR REPRESENTATION OF CITY OFFICIALS

*Thornber v. City of Fort Walton Beach*¹⁴³ involved claims by three members of the Fort Walton Beach City Council for reimbursement of attorney's fees expended for their private representation in matters arising from their actions as council members. The officials had successfully brought an action to enjoin a recall petition calling for their removal from office. They had also defended against a federal civil rights claim which had been dismissed by the plaintiff, with prejudice, as part of a settlement in which the plaintiff received some relief. Reversing the trial court and the First District Court of Appeal, the supreme court held that the city council members were entitled to reimbursement of their attorney's fees.¹⁴⁴

With respect to their lawsuit to enjoin the recall petition, the court agreed with the lower courts that the council members could not recover attorney's fees under section 111.07 of the Florida Statutes, a provision that is limited to reimbursing the attorney's fees of governing officials who are prevailing defendants.¹⁴⁵ Notwithstanding this, however, the supreme court ruled that the council members were entitled to recover their attorney's fees under common law.¹⁴⁶

The court cited a line of decisions that establish that public officials have a common law right to legal representation, at public expense, to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. It stated that for public officials to be entitled to such publicly financed legal representation, two conditions must be satisfied: 1) the litigation in question must arise out of or in connection with the performance of their official duties and 2) the litigation must serve a public purpose.¹⁴⁷

Applying this principle to the facts, the supreme court concluded that the council members' lawsuit to enjoin the recall petition met both

142. *Id.*

143. 568 So. 2d 914 (Fla. 1990).

144. *Id.* at 919.

145. FLA. STAT. § 111.07 (West Supp. 1991).

146. *Thornber*, 568 So. 2d at 918.

147. *Id.* at 917.

of the requisite requirements. Because the recall petition was a response to the council members' dismissal of Fort Walton Beach's city manager and police chief, the court found it sufficiently connected to the council members' official performance to satisfy the first prong of the test.¹⁴⁸

In addition, in the court's view, the council members' action in defending against the recall petition served useful public purposes. Their lawsuit ensured the effective and efficient functioning of the city's governing body, and protected city offices from untimely and illegal recall petitions. The court reasoned that officials should not have to incur personal expenses to insure that a recall committee follows proper procedures.¹⁴⁹ Even though the case presented an "unusual twist," in that the council members initiated the litigation in question, rather than defending against it, the actions of those officials amounted to a defense against an improper recall petition.¹⁵⁰ Thus, they should not be precluded from recovering their attorney's fees under common law.¹⁵¹

The supreme court also concluded that the common law doctrine that served as the substantive basis for the council members' recovery was not superseded by section 111.07.¹⁵² It noted that the statute itself was silent as to whether it superseded the common law, and that there was nothing in the legislative history of the statute that supported an implication that the common law was being derogated. Applying the well established principle that a statute will not be held to change the common law unless that statute explicitly and clearly exhibits an intent to do so, the court held that section 111.07 is not the exclusive mechanism authorizing an award of attorney's fees to public officials involved in litigation arising from the performance of their public duties.¹⁵³

The supreme court then turned to the council members' claim of attorney's fees for their defense of a federal civil rights suit against them by the former police chief of Fort Walton Beach.¹⁵⁴ That action had resulted in a settlement which called for the plaintiff to voluntarily dismiss his claim, with prejudice. In exchange, the plaintiff was reinstated as police chief, placed on permanent disability leave, reimbursed

148. *Id.*

149. *Id.* at 917-18.

150. *Id.* at 918.

151. *Thorner*, 568 So. 2d at 918.

152. *Id.*

153. *Id.* at 919.

154. *Id.*

his past lost wages, and given a pledge that the city would not interfere with his worker's compensation claim.¹⁵⁵

Notwithstanding the relief obtained by the plaintiff in this settlement, the court concluded that the council members had "prevailed" in the action and were entitled to attorney's fees under section 111.07 as prevailing defendants.¹⁵⁶ The court observed that, under the settlement, all of the plaintiff's relief was awarded by the city and the mayor, who had been co-defendants in the police chief's civil rights action. The council members had been merely signatories to the stipulated settlement; they did not contribute monetarily. The court also relied on the general rule that when a plaintiff voluntarily dismisses an action, the defendant is considered the prevailing party.¹⁵⁷

Finally, the supreme court responded to the council members' contention that, under section 57.105 of the Florida Statutes, they were entitled to recover their attorney's fees in the instant litigation. The court disagreed. It held that the purpose of section 57.105 was narrow. The section was meant to discourage "baseless claims, stonewall defenses, and sham appeals in civil litigation," by assessing attorney's fee awards on losing parties who engage in these activities.¹⁵⁸ In this case, that provision was inapplicable. The city's defense of the council members' attorney's fees claims did not completely lack a justiciable issue of either law or fact. Thus there was no basis for a section 57.105 award.¹⁵⁹

155. *Id.*

156. *Thornber*, 568 So. 2d at 919.

157. *Id.*

158. *Id.*

159. *Id.* at 920.