

IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT NO.

BREVARD COUNTY, FLORIDA,

Petitioner,

v.

GENERAL GENE STERLING, NORMA
SAVELL, DR. FREDERICK LEISER, AL
NOTARY, DEANNA RITER, JOANNE
CORBY, HANK HURLEY, and MARTIN
LAMB,

Respondents.

(In this petition, the symbol [A__] refers to an attached appendix exhibit.)

PETITION FOR WRIT OF PROHIBITION

Petitioner, Brevard County, hereby petitions the Florida Supreme Court for the issuance of its Order to Show Cause and a Writ of Prohibition directed to the Fifth District Court of Appeal in *Sterling v. Brevard County*, 25 Fla. L. Weekly D2688 (Fla. 5th DCA Nov. 17, 2000), *as modified on reh.* Jan. 19, 2001 [A6], quashing the majority's opinion in that case on the grounds that the district court of appeal

exceeded its appellate review jurisdiction. As grounds for this petition the County would state as follows:

Jurisdictional Statement

1. The Florida Supreme Court has original jurisdiction over this petition under the authority of Article V, Section 3(b)(7), Florida Constitution and Rule 9.030(a)(3), Florida Rules of Appellate Procedure.

Statement of Facts

2. This petition arises out of a lawsuit involving the charter review process set forth in section 7.4 of the Brevard County Home Rule Charter. [A1, Ex. F]. The pleadings and judicial proceedings in the circuit court for the Eighteenth Judicial Circuit as well as the Fifth District Court of Appeal resulted in the rendition of a written decision by a two judge majority of the Fifth District Court of Appeal panel that reviewed the case. That decision [Comp. A6] is the subject matter of this Petition for Writ of Prohibition.

3. On July 24, 1998, the full fifteen (15) member Charter Review Commission (CRC) voted to forward four proposed charter amendments to the County Commission for placement on the ballot at a referendum. [A2, p. 10, ¶23] However, before the vote on forwarding amendments was taken, several members, including the Plaintiffs, walked out of the CRC meeting in protest of a ruling by the

CRC attorney that a two-thirds vote was necessary to amend CRC bylaws requiring ten (10) votes to forward amendments to the County Commission. [A2, p. 10, ¶22] Upon return of this “splinter” group of eight CRC members, four of the proposed amendments received the necessary ten (10) CRC member votes to move the proposals forward to the County Commission. [A2, p. 10, ¶23; A1, Ex. A at p. 3; A2, p. 8, ¶7] Seven other proposed amendments did not receive the necessary ten (10) votes and were not forwarded to the County Commission. [A2, p. 10, ¶23] The four amendments were sent to the County Commission under a cover letter from the CRC chairman dated July 31, 1998 [A2, Ex. 10]. The letter indicated that the CRC had “. . . fulfilled its duties as set forth in Section 7.4 of the County Charter” and enclosed the four amendments together with ballot language for each amendment. These four amendments were placed on the November 1998 ballot. [A3, ¶¶ e and f]

4. On August 5, 1998, the eight member “splinter” group signed a request that the CRC secretary send out a notice of a special meeting of the CRC to be held on August 12, 1998. [A1, Ex. D] The notice prepared indicated that the special meeting would be called “. . . in order to clarify discrepancies on the issues of the meeting of July 24, 1998 and any other issues to come before the Board.”[A1, Ex. D] The notice made no mention of any proposed action to change bylaws, to amend the

ten (10) vote rule or to vote on other amendments for forwarding to the County Commission.

5. The CRC had adopted *Roberts Rules of Order* [A2, p. 6, ¶1]. *Roberts Rules* require that notice of proposed bylaw amendments should be formally worded and “[t]he notice should fairly inform the members of the changes contemplated.” Under *Roberts Rules* §56, bylaw amendments cannot be considered at an open meeting if the only notice of the proposed changes is given at the same meeting. [A4, pp. 589-590].

6. On August 11, 1998, the CRC attorney informed the CRC membership, in writing, that the CRC business had been concluded and that the CRC could take no further action on any amendments. [A2, Ex. 11]

7. On August 12, 1998, the “splinter” group of eight met and, notwithstanding the lack of sufficient notice to other members and their own attorney’s advice that no action on amendments could be taken, the “splinter” group invoked an improper June 19, 1998 change to the CRC’s ten (10) vote rule to forward, to the County Commission, six of the seven proposals that had received only eight (8) votes, not the necessary ten (10) votes that were required at the July 24, 1998 meeting of the full fifteen (15) member CRC. [A2, p. 11, ¶¶29-30; A2, Ex.12, p. 11] The County Commission refused to place these six new proposals on the ballot. [A2, p. 11, ¶32]

Two of these “splinter” group proposals have been subsequently judicially determined to be unconstitutional as inconsistent with general law in violation of Article VIII, Section 1(g), Florida. Constitution.¹ [A5] The term limits proposal was eventually placed on the ballot and passed.² [Comp. A6: 1/19/01 opinion] The County contends that, of the remaining three amendments submitted by the “splinter” group, the proposal that would limit government ownership of tax exempt land to forty-five per cent (45%) of the lands in Brevard County is constitutionally suspect as inconsistent with general law (including state and federal statutory and constitutional law) while another proposal, requiring County payment for any losses resulting from devaluation of land caused by County-caused “inordinate burdens” on land, is inconsistent with several provisions of the Florida Constitution.

8. On September 2, 1998 a suit was filed against the Brevard County Commission by the eight “splinter” group members of the former fifteen-member Brevard County Charter Review Commission (CRC). [A1] In filing the suit, this “splinter” group of eight purported to act as duly appointed representatives of the

¹ Three of the six “splinter” group amendments were later resubmitted to the County Commission under the petition process provided for in sections 7.3.2 and 7.3.3 of the County Charter. In a separate lawsuit, two of these proposals were declared to be unconstitutional and the third, a term limits amendment, was ordered to be placed on the ballot and ultimately passed. [Comp. A6: 1/19/01 opinion].

² See footnote 1, above.

original fifteen member CRC. The suit against the County and its Board of County Commissioners requested Emergency Declaratory, Injunctive, Mandamus and Other Equitable Relief and a court order to compel the County Commission to place the six proposed charter amendments sponsored by this eight member “splinter” group on the ballot at the November 1998 general election.

9. The County, in its September 4, 1998 answer, affirmatively stated that the County Commission’s duty to place the amendments on the ballot only arose if the amendments were lawfully enacted by vote of at least ten (10) members of the CRC and if the proposed amendments were constitutional. [A2] The County specifically asserted that the County Commission had standing to challenge the legality or constitutionality of proposed amendments that impact County government; denied that the six amendments were lawfully enacted; and denied that the Plaintiffs could seek an injunction requiring a special election since section 7.4 of the County Charter required CRC proposed amendments to be scheduled “. . . *concurrent with the next general election.*” The County also raised, as an affirmative defense, the insufficiency of the notice sent to the seven non-attending CRC members which failed to place those seven members on notice of the actions planned to be taken at an August 12, 1998 meeting at which, without notice to the other seven members, the eight “splinter” CRC members ignored the ten (10) vote rule and then proceeded to adopt six proposed

amendments with eight (8) votes. The County denied that the proposed amendments could be forwarded to the County Commission by a vote of eight CRC member votes as opposed to the ten (10) votes required by CRC bylaws and raised the defense that the proposed amendments were not lawfully enacted, which defense the County moved to amend, on September 9, 1998, to specifically reference section 7.4 of the Charter which requires three public hearings prior to transmittal of CRC amendments to the County Commission and a referendum “. . . concurrent with the next general election”. [A7]

10. After a hearing, on September 16, 1998, the circuit court entered an order denying emergency relief in which the court found that the necessary two-thirds vote of CRC members in attendance was not received on June 19, 1998 when members of the “splinter” group moved to amend the Charter Review Commission bylaws to require only a majority vote for all future bylaw changes. [A8] The court also found that a subsequent majority vote of the CRC was legally insufficient to change the CRC ten-vote rule for forwarding proposed charter amendments to the County Commission. Finally, the court found that, due to the ineffectual bylaw changes, that only four of ten proposed amendments were properly forwarded to the County Commission for placement on the ballot since just those four amendments had received the ten votes required under CRC rules. The court denied the Plaintiffs’

request for an injunction to require the County Commission to place the other six amendments on the ballot. The court did not address the propriety of the August 12, 1998 meeting or the notice of that meeting.

11. On October 26, 1998, the County moved for summary judgment. [A9] On January 7, 1999, *after the November 1998 general election*, the court granted the eight Plaintiffs' *ore tenus* motion for leave to amend the complaint and denied the County's motion for summary judgment. [A10] An amended complaint was served on January 8, 1999. [A11] On January 22, 1999, the County served a verified motion to dismiss the amended complaint on the grounds that the suit was moot since the general election had already taken place; on the grounds that the CRC no longer existed since, under the express terms of section 7.4 of the Charter, the CRC only remained in existence through the general election; and on the grounds that these Plaintiffs, a "splinter" group of eight former CRC members, had not exhausted the petition process for submitting charter amendments that was provided for in section 7.3.2 of the Charter. [A12] The motion was denied on June 18, 1999 and, without answering the amended complaint, the County followed with a dispositive motion for summary judgment, served on November 29, 1999, renewing the grounds that the suit was moot and that the expiration of the CRC's existence under the terms of Section 7.4 of the Charter precluded the court from granting relief. [A13]

12. On January 24, 2000, the circuit court entered an order granting summary judgment to the County. [A3] In its order, the court reiterated findings recited in the court's September 16, 1998 order and specifically found that the Plaintiffs were *former members* of the CRC, “. . . *a former body* appointed pursuant to Section 7.4 of the Brevard County Charter” and that the general election had already been conducted. The circuit court concluded that the suit by the eight member splinter group of former CRC members was moot and that relief could not be granted to a defunct CRC whose existence expired when the general election was held.

13. The Plaintiffs appealed to the Fifth District Court of Appeal. A two-judge majority issued an opinion dated November 17, 2000 [Com. A6: 11/17/00 opinion] in which the appellate court reversed the lower court and held:

a. that the Plaintiffs' request for an injunction to require the County Commission to place the six proposed amendments on the ballot was not mooted by the general election held two years earlier, in 1998;

b. that under the purported “inherent powers to order an election” vested in the Fifth District Court of Appeal, the circuit court was to enter an injunction against the County Commission to either:

(1) adopt some or all of the six proposed amendments;

(2) place the six amendments on the ballot in a special election; or

(3) place the six amendments on the ballot at the next general election (2002).

Amazingly, the Fifth District majority also made their own “finding” that had the circuit court chosen to do so “. . . he *would have found* that the CRC had properly amended the bylaws and sent the proposed amendments to the Commission after an appropriate vote on August 12th.” [emphasis supplied] [Comp. A6: 11/17/00 opinion at p. 4]

14. On November 22, 2000, the County moved for rehearing, withdrawal of opinion, consolidation of appeals and oral argument on the grounds that, pending the Fifth District’s consideration of the issues, three of the “splinter” group’s six amendments had been submitted to the County Commission under the petition procedure set forth in section 7.3.2 of the County Charter and that two of those amendments had been declared unconstitutional in a separate judicial proceeding that was also appealed to the Fifth District Court of Appeal, while the third (a term limits amendment) had been placed on the ballot and passed by the electors. [A14]

15. On January 19, 2001, the Fifth District entered an opinion modifying its November 17, 2000 opinion. [Comp. A6: 1/19/01 opinion] In that latter opinion, the

Fifth District denied consolidation of appeals³ and modified the original decision of the two-judge majority by ordering the circuit court to enter an injunction requiring the County Commission to call a referendum on the remaining three amendments, thereby completely ignoring the existence of defenses raised by the County to the original complaint and the existence of potential defenses that could have been raised by the County if the matter had been remanded with instructions to allow the County to file its answer and defenses to the amended complaint, which was the proper procedure in this case.

16. In the course of rendering its January 19, 2001 opinion, the two-judge majority gratuitously characterized the term limits amendment, which was not under appellate review, as “retroactive”. [Comp. A6: 1/19/01 opinion at p. 2] This gratuitous characterization has created doubts about whether several sitting County Commissioners are qualified to run for re-election.

Nature of Relief Sought

Brevard County seeks a Writ of Prohibition from this Honorable Court directed to the Fifth District Court of Appeal majority in the above-styled case and quashing

³ The appeal relating to the two amendments declared unconstitutional was voluntarily dismissed and the Fifth District refused to retain jurisdiction over that appeal.

the opinion of that majority, as modified, on the grounds that the Fifth District majority exceeded the appellate review jurisdiction of the District Court of Appeal. Brevard County further requests this Honorable Court, as part of its original jurisdiction or in the exercise of its discretionary jurisdiction over a companion Petition for Writ of Certiorari, to declare that the issues raised in the Plaintiffs' Complaint for Emergency Declaratory, Injunctive, Mandamus and Other Equitable Relief are moot, as originally determined by the lower court or, alternatively, to order the Fifth District Court of Appeal to remand the case for further proceedings in the circuit court.

Argument in Support of Petition

- I. THE FIFTH DISTRICT COURT OF APPEAL EXCEEDED ITS APPELLATE REVIEW JURISDICTION BY:**
 - A. MAKING ITS OWN DISPOSITIVE FINDING OF FACT WITHOUT RECORD SUPPORT THEREBY EFFECTIVELY OVERRIDING A PIVOTAL LOWER COURT FINDING OF FACT DEEMED TO BE "CORRECT" BY THE APPELLATE COURT;**
 - B. ORDERING AN ELECTION BASED ON THE APPELLATE COURT'S DETERMINATION AS TO WHAT FACTUAL AND LEGAL FINDINGS THE LOWER COURT WOULD HAVE MADE:**
 - 1. WITHOUT BENEFIT OF A TRIAL ON DISPUTED ISSUES OF MATERIAL FACT RAISED BY THE COUNTY'S DEFENSES TO THE ORIGINAL COMPLAINT AND**

2. **WITHOUT AFFORDING THE COUNTY ITS RIGHT TO ANSWER AND DEFEND AGAINST THE AMENDED COMPLAINT;**
- C. **ORDERING ENTRY OF SUMMARY JUDGMENT FOR THE PLAINTIFFS WHEN NO MOTION FOR SUMMARY JUDGMENT WAS EVER FILED BY THE PLAINTIFFS;**
- D. **ORDERING AN ELECTION ON ONE OR MORE PATENTLY UNCONSTITUTIONAL PROPOSED AMENDMENTS; AND**
- E. **GRATUITOUSLY LABELING A TERM LIMITS CHARTER PROVISION AS RETROACTIVE WHEN THAT PROVISION WAS NOT EVEN BEFORE THE COURT.**

Issue I.A: The Fifth District Majority Exceeded its Appellate Review Jurisdiction by Making an Unsupported and Dispositive Finding of Fact that Effectively Overrode the Lower Court’s “Correct” Finding of Fact

The Fifth District majority exceeded the court’s appellate jurisdiction by making a dispositive finding of fact that was *contradicted* by the record on appeal and by a “correct” finding of fact made by the circuit court. An appellate court cannot make determinations of fact in the exercise of its appellate jurisdiction and in doing so the appellate court exceeds its scope of appellate review. *Conner v. Conner*, 439 So. 2d 887 (Fla. 1983).

At page 4 of the original opinion, the Fifth District majority expressly states that Judge Jackson *correctly* ruled that the CRC *did not* properly amend its ten-vote bylaw

at a meeting held on June 19, 1998.⁴ Judge Jackson’s specific finding of fact was as follows:

“CRC Rule 9, requiring ten votes to forward a proposed Charter amendment to the County Commission for inclusion in the ballot, was not properly changed to require a majority vote because two-thirds of the members of the CRC present on June 19, 1998 did not vote for the change.” [A8, p. 2, ¶2b]

Critically, there is *nothing* in the record before the appellate court to indicate that the ten (10) vote requirement in Rule 9 was ever *properly* changed prior to or at the August 12, 1998 meeting of the CRC “splinter” group where the charter proposals at issue in this case were “adopted” and forwarded with only eight (8) votes. In fact, the verbatim minutes of the August 12th meeting that were part of the record before the appellate court explicitly indicate that the eight member “splinter” group voted to forward six new amendments *based upon the June 19, 1998 change the ten (10) vote rule that Judge Jackson had found to be improper!* At page 11 of the August 12, 1998 minutes, the following motion was made and passed unanimously by the eight member “splinter” group:

⁴ The appellate court did not disturb Judge Jackson’s findings that only four of ten proposed amendments were properly forwarded to the County Commission on July 31, 1998 for placement on the ballot. Those four had received the ten (10) votes required by Rule 9.

“Motion by Commissioner Notary/Commissioner Hurley that the voting take place in accordance with the motions made on 6/19/98 wherein Rule 9 was changed to require a simple majority to pass an amendment on to the County Commissioners.” [A2, Ex. 12, p.11]

But, according to the Fifth District majority, Judge Jackson had “*correctly*” found that the “change” to the ten (10) vote rule referenced by the “splinter” group in the above-quoted motion was *improper*!

Incredibly, after determining that Judge Jackson was “correct” in finding that the CRC’s ten (10) vote rule *had not been* properly changed, the Fifth District majority made their own crucial and completely unsubstantiated finding of fact that effectively displaced Judge Jackson’s “correct” finding. In the face of the written record of the August 12th minutes indicating that the “splinter” group used the *improper* bylaw change of June 19, 1998 to forward six new charter amendments with only eight (8) votes, the Fifth District majority stated:

“However, Judge Jackson in his written order never addressed the legality of the action taken at the August 12, meeting. *Had he chosen to do so, he would have found that the CRC had properly amended the bylaws and sent the proposed amendments to the Commission after an appropriate vote on August 12th.*” [emphasis supplied] [Comp. A6: 11/17/00 opinion at p. 4]

There is absolutely no indication in any portion of the record before the Fifth District Court of Appeal that there had been any attempt to amend the ten (10) vote

bylaw after the June 19th CRC meeting. On the contrary, the record shows that on August 12th the “splinter” group voted to use the improper June 19th change that allowed “majority” approval in lieu of the ten (10) vote rule that the full CRC had previously used to forward amendments. [A2, Ex. 12, p. 11] Therefore, with no support in the record, the Fifth District majority transformed the June 19th “improper” bylaw change into an August 12th “proper” bylaw amendment thereby condoning the “splinter” group’s act of forwarding the six new amendments with only eight (8) votes instead of the required ten.

The Fifth District majority’s astounding “finding” sanctioning an eight vote forwarding procedure is the only factual underpinning that would support the appellate court’s determination that the County Commission should be enjoined to hold an election on six amendments that had received less than the ten (10) votes. By venturing into the fact finding arena in this way the Fifth District majority was clearly exceeding the scope of its appellate review jurisdiction. *Conner v. Conner, supra*. The County therefore respectfully requests that the Florida Supreme Court issue its writ of prohibition quashing the Fifth District majority opinion. *State ex. rel. B.F. Goodrich Co. v. Trammel*, 140 Fla. 500, 192 So. 175 (1939).

Issue I. B.-C. The County's Answer Containing the August 12, 1998 Verbatim Transcript, at a Minimum, Gave Rise to a Factual Dispute, the Resolution of Which Was Beyond the Appellate Review Jurisdiction of the Fifth District Court of Appeal.

Assuming that the Fifth District majority's venture into the fact finding arena as part of the exercise of appellate review jurisdiction is not deemed sufficient to reinstate Judge Torpy's summary judgment, at a minimum the Fifth District majority should be ordered to remand the case for further proceedings since the appellate court's attempt to enjoin an election on the six (now three) charter amendments was accomplished in the face of a record that demonstrated substantial and unresolved issues of material fact that were acknowledged to exist by all parties to the proceeding, as well as the Fifth District majority.

At page 4 of the original opinion, the Fifth District majority acknowledged that Judge Jackson's September 16, 1998 order had not addressed the legality of the action taken at the August 12, 1998 meeting of the "splinter" group. [Comp. A6: 11/17/00 opinion at p. 4] In the record at the time of Judge Jackson's order was the County's answer with the minutes of the August 12th meeting attached. In its answer the County raised the following defenses:

1. that the six proposed amendments were not lawfully enacted under CRC bylaws or rules adopted by the CRC;

2. that the six amendments were passed at an August 12, 1998 meeting that was not properly noticed; [A2]

The County also pointed out, in its first defense to original complaint, that the CRC was governed by *Roberts Rules of Order*, which rules would have required the “splinter” group to give fair notice of the content of any proposed bylaw changes and that no such bylaw change could be considered at a meeting if notice of the change was first provided at that meeting. [A4]. Therefore, assuming that the Fifth District majority view of the “splinter” group action on August 12th can in some way be characterized as a change to the bylaws, there are obvious unresolved issues of fact relating to the notice and propriety of the “splinter” group’s consideration of that change on August 12th as well as the propriety of the meeting itself.

The Plaintiffs admitted that such factual issues remained open. In a memorandum of law in opposition to the County’s motion for summary judgment [A15 at p. 2], the following admissions are made by Plaintiffs’ counsel:

“The Plaintiffs contend that there is an issue of fact as to the validity of the Commission’s actions in refusing to include the six (6) amendments submitted to the County Commission on August 18, 1998.

The issues arise out of the interpretation of the CRC’s Bylaws and Policies.”

Even the Fifth District majority acknowledged that these defenses remained unresolved in the lower court at the time Judge Torpy entered his January 25, 2000

order finding that the issues raised by those defenses were moot once the 1998 general election had been held. At page 6 of the original opinion, the Fifth District majority makes the following statement:

“The fact that the Commission refused to place six amendments on the ballot because of its concern over the validity of the August 12th meeting, in and of itself, creates a controversy leaving the issue live for review.” [Comp. A6: 11/17/00 opinion at p. 6]

Earlier in the same opinion, the Fifth District had acknowledged that even the Plaintiffs were in doubt as to the propriety of the August 12th meeting.

“Still in doubt about the meeting on August 12th, and with all issues still pending except the validity of the June 19, 1999 meeting, the CRC filed an amended complaint in which it sought a declaration that the County Commission should have accepted the proposals adopted on August 12th, and either adopted the six charter amendments or placed them on the ballot.” [Comp. A6: 11/17/00 opinion at p. 4]

Moreover, in reversing the summary judgment and ordering the entry of an injunction against the County, the Fifth District majority cut off the County’s right to answer the pending amended complaint, which answer is allowed under the Florida Rules of Civil Procedure. *Coral Ridge Properties, Inc. v. Playa Del Mar Assoc., Inc.*, 505 So. 2d 414 (Fla. 1987); Fla. R. Civ. P. 1.510(b).⁵

⁵ For example, the answer would include a defense that one or more of the amendments were unconstitutional and all of the amendments were void as having been adopted in violation of CRC bylaws, without due process and without notice of any purported bylaw changes as is expressly required under *Roberts Rules of Order*,

In the face unresolved issues of material fact raised in the lower court the Fifth District majority exceeded its jurisdiction by ordering the imposition of an injunction. Assuming without conceding that the appellate court’s reversal of Judge Torpy’s summary judgment on mootness grounds was appropriate⁶, the Fifth District majority exceeded its appellate review jurisdiction by rendering a decision based upon the appellate court’s “finding of fact” without support in the record; without a trial on outstanding factual issues acknowledged to exist by the appellate court and by all parties to the proceeding; without allowing the County to answer the amended complaint; and without any Plaintiffs motion for summary on file in the lower court. *Conner v. Conner*, 439 So. 2d 887 (Fla. 1983). Therefore remand, not an order directing the entry of an injunction, was the proper disposition by the appellate court if the portion of that court’s decision reversing Judge Torpy is allowed to stand.

Issue I.D. The Constitutionality of the Amendments

which governed CRC proceedings.

⁶ See, the County’s Brief on Jurisdictional in the companion case in which the County has filed a Notice to Invoke Discretionary Jurisdiction (*Brevard County v. Sterling, et al*, Supreme Court Case No. _____)

The Fifth District majority also knowingly cut off the County’s right to defend on the grounds that one or more of the “splinter” group’s proposals were unconstitutional. It is entirely appropriate for the courts to consider the constitutionality of proposed charter amendments *before* they are placed on the ballot in order to preclude or forestall possible expenditures of substantial sums in the doing of what might be a vain and useless thing. *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512 (Fla. 1958).

In the case at bar, for example, the “splinter” group’s proposed charter amendment No. 37 purports to prohibit any combination of governmental entities from owning tax exempt land that, in the aggregate, represents more than forty-five per cent (45%) of the total land area in Brevard County.⁷ [A1, Ex. G] That amendment is inconsistent and cannot coexist with state laws that place no limit on government ownership of land, much less preemptive federal laws that allow government ownership of land without such limitations. Charter provisions that are inconsistent with state law are unconstitutional under Article VIII, Section 1(g) of the Florida

⁷ Another defense available to the County is that this forty-five per cent (45%) threshold has already been exceeded. Therefore, the proposed amendment, if passed, would be triggered immediately and no government could purchase right-of-way, parks, preservation land, land for sewer or water plants or even land for new schools.

Constitution. *Charlotte County Board of County Commissioners v. Taylor*, 650 So. 2d 146 (Fla. 2d DCA 1995).

Yet the Fifth District majority would have this patently unconstitutional amendment placed before the voters. The result of that decision would be absurd if the amendment passed and the County, at some time in the future, at the cost of County taxpayers, was forced to defend the very amendment that the County Commission opposed on constitutional grounds in the first place. Ironically, the possibility of this absurd result was the basis upon which the circuit court held that Brevard County had standing to challenge the constitutionality of two charter amendments identical to two of the amendments of issue in this case, which amendments had been proposed by a petition filed by a political committee on which Gene Sterling, a Plaintiff in this case, was a member. [A5] Those two amendments were declared to be unconstitutional and kept off of the ballot in *Home Rule Charter Committee, Eugene B. Sterling et. al. v. Brevard County*, Case No. 05-2000-012365-XXXX-XX [A5].

Notably, in a motion to strike filed by the County with the Fifth District Court of Appeal, the County pointed out that the constitutionality of the amendments at issue in this case had already been fairly raised in the lower court and could have been raised again if the County had been permitted to answer the amended complaint, as

contemplated by the rules of civil procedure. [A16] *Coral Ridge Properties, Inc. v. Playa Del Mar Assoc., Inc.*, 505 So. 2d 414 (Fla. 1987); Fla. R. Civ. P. 1.510(b), (c). In the County's motion for rehearing, the Fifth District had also been informed that two of the proposed amendments which had undergone judicial review in the above-referenced circuit court proceeding had been declared unconstitutional by Judge Kahn. [A14] The County suggested that a Fifth District Court of Appeal order directing the entry of an injunction on amendments that were unconstitutional would constitute an abuse of the court's equity powers [A14, p. 3, ¶6]. Likewise, the County asserts, in this petition, that where the unconstitutionality of proposed charter amendments had been or could have been raised in the lower court by the County had it been allowed to answer, the Fifth District majority's mandate to enjoin the County Commission to hold an election before the County was afforded the right to litigate the constitutional issues exceeds the appellate jurisdiction of the Court of Appeal.

Issue I.E. The Retroactive Term Limit Interpretation

Finally, the Fifth District majority's January 19, 2001 modified opinion gratuitously characterizes a term limits charter amendment passed by the Brevard County electorate as "retroactive". [Comp. A6: 1/19/01 opinion at p. 2] The Fifth District majority's order was penned in response to the above-referenced County

motion for rehearing, consolidation, etc. in this case in which the County noted that the term limits amendment had been placed on the ballot following a petition procedure set forth in sections 7.3.2 and 7.3.3 of the County Charter. [A17] Ironically, without ruling on the issue herself, Judge Kahn entered an order in *Home Rule Charter Committee, supra* (the appeal of which the County unsuccessfully sought to consolidate with the *Sterling* case at bar) that criticized the County for purporting to engage in conjecture on how the courts would rule on the issue as to whether the term limits amendment was retroactive or prospective in application. [A5 at pp. 11-12] When the Home Rule Charter Committee dismissed its appeal of Judge Kahn's decision, the Fifth District Court of Appeal refused to retain jurisdiction over the constitutional issues raised by the three amendments (including the term limits amendment) that had been reviewed by Judge Kahn, despite the County's plea to do so, as expressed in a motion filed in the voluntarily dismissed *Home Rule Charter Committee* appeal. [A18]

Yet despite the Fifth District majority's refusal to retain jurisdiction to review these three "petition" amendments, the appellate court entered an order (denying the County's motion to consolidate appeals) reciting "dicta" that characterized the term limits amendment to the charter as "retroactive". [Comp. A6: 1/19/01 opinion at p. 2] By doing so, the Fifth District majority inadvertently created doubt about the

qualifications of sitting County Commissioners to run for re-election. So without argument, briefing or any formal review of the term limits amendment of any kind, the Fifth District majority weighed in on a hotly disputed disagreement over the interpretation of the term limits amendment, even though the appellate court had refused to retain jurisdiction over the review of that amendment. Again, this action exceeded the jurisdiction of the Court of Appeal.

II. THE FIFTH DISTRICT COURT OF APPEAL HAD NO JURISDICTION OR AUTHORITY TO ORDER THAT AN ELECTION BE HELD

In *Williams v. Keyes*, 135 Fla. 769, 186 So. 250 (1939), the Florida Supreme Court held that courts of equity do not have general jurisdiction to order elections to be held in the absence of statutory authority to do so. In *Williams*, unlike the case at bar, the legislature had adopted a special act creating the City of Miami charter and a specific provision of the special act authorized any state court of general jurisdiction to order a recall election should the City Commission fail or refuse to order such an election after compliance with the petition procedures prescribed by the charter. In the case at bar no such statutory authority exists. Neither section 7.4 of the County Charter, which is at issue in this case, nor any statute enacted by the Florida Legislature authorizes a court to order an election on proposed charter amendments.

Contrary to the holding in *Williams* that the courts have no jurisdiction to order elections unless that jurisdiction is statutorily conferred, the Fifth District Court of Appeal majority invoked a non-existent “inherent power to order an election” [Comp. A6: 11/17/00 opinion at p. 7] and proceeded to order the lower court to enjoin the Brevard County Commission to either adopt the amendments or call an election. The County Commission has no statutory or charter authority to adopt CRC proposed amendments without referendum approval [A1, Ex. F] and the Fifth District had no “inherent” authority to order the County to call an election since the District Court is without statutorily granted jurisdiction to do so. Therefore, the Fifth District’s order to the lower court exceeded the court’s jurisdiction under *Williams* and this Court’s writ of prohibition should issue. *State ex. rel. B.F. Goodrich Co. v. Trammel*, 140 Fla. 500, 192 So. 175(1939); *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992).

Moreover, the Plaintiffs sought a remedy in mandamus and the Plaintiffs could demonstrate that the eight member “splinter” group carried the legal authority of the full fifteen member CRC, that remedy would have been available since, if the “splinter” group could legitimately act as the CRC, section 7.4 of the County Charter would bestow upon the County Commission a clear, ministerial duty to place the amendments on the ballot. However, as has been set forth in section I.B above, the

County's answer and defenses to Plaintiffs' original complaint raises factual issues relating to the existence of the "splinter" group's right to act as the CRC and sponsor the six (now three) amendments adopted in that the "splinter" group's actions were taken:

1. in direction contravention of the legal opinion of the CRC attorney that the work of the CRC was complete upon transmittal of four amendments receiving the necessary ten (10) CRC member votes (which amendments were placed on the ballot) and that the CRC could take no further action on amendments;
2. without legally sufficient notice to the *full* CRC; and
3. at an unlawful meeting at which the "splinter" group unlawfully ignored the *full* CRC's ten (10) vote rule and purported to adopt the six new amendments with only eight (8) votes. [A2]

Mandamus is only proper to enforce a right which is clearly and certainly established in the law. *Eastmore v. Stone*, 265 So. 2d 517, 518 (Fla. 1st DCA 1972). The existence of that right, in this case, was a matter of material factual dispute in the lower court at the time Judge Torpy declared the dispute to be moot. The Fifth District majority therefore exceeded its equity jurisdiction by ordering the lower court to enjoin an election since mandamus was the appropriate remedy but no clear legal right had been factually established in the lower court.

Conclusion

For the foregoing reasons, Brevard County respectfully requests that this Honorable Court issue its Writ of Prohibition to the Fifth District Court of Appeal in this case, quashing the majority opinion or, at a minimum, ordering a remand of the case to the circuit court for further proceedings.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was sent by US Mail to the Honorable Robert J. Pleus, Jr., the Honorable Winifred J. Sharp, and the Honorable Jacqueline R. Griffin, 300 South Beach Street, Daytona Beach, Florida, 32114, and Michael Jones, Esquire, Atrium II Building, 301 W. State Road 434, Suite 317, Winter Springs, Florida, 32708, this the ____ day of February, 2001.

Certificate of Compliance

I hereby certify that the foregoing instrument complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

OFFICE OF THE COUNTY ATTORNEY
2725 Judge Fran Jamieson Way
Viera, FL 32940
321/633-2090 321/633-2096 facsimile

By: _____

Scott L. Knox
County Attorney
Florida Bar No.: 211291
Attorney for Petitioner

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Appendix Index

Ex.

1. Complaint for Emergency Declaratory, Injunctive, Mandamus, and Other Equitable Relief, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
2. Answer to Complaint for Emergency Declaratory, Injunctive, Mandamus, and Other Equitable Relief, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
3. Order Granting Summary Judgment dated January 24, 2000, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
4. §56, *Roberts Rules of Order*
5. Order dated October 6, 2000, *Home Rule Charter Committee, Eugene B. Sterling et. al. v. Brevard County*, Case No. 05-2000-012365-XXXX-XX
6. Composite opinions: *Sterling v. Brevard County*, 25 Fla. L. Weekly D2688 (Fla. 5th DCA Nov. 17, 2000), *as modified on reh.* Jan. 19, 2001
7. Brevard County's Motion for Leave to Amend Second Affirmative Defense dated September 9, 1998, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
8. Order dated September 16, 1998, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
9. Brevard County's Motion for Summary Judgment dated October 26, 1998, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
10. Order dated January 7, 1999, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX

11. Amended Complaint for Declaratory, Injunctive and Other Equitable Relief dated January 8, 1999, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
12. Brevard County's Verified Motion to Dismiss Complaint With Prejudice dated January 22, 1999, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
13. Brevard County's Dispositive Motion for Summary Judgment, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
14. Brevard County's Motion For Rehearing, Withdrawal of Opinion, Consolidation of Appeals and for Oral Argument dated November 22, 2000, *Sterling v. Brevard County*, 5DCA Case No. 5D00-00578
15. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment dated January 21, 2000, *Sterling v. Brevard County*, Case No. 05-1998-016014-CA-XXXX-XX
16. Brevard County's Motion to Strike Paragraph 1 and Paragraph 2 of Appellants' Response to Appellee's Motion for Rehearing, Withdrawal of Opinion, Consolidation of Appeals, and for Oral Argument dated December 13, 2000, *Sterling v. Brevard County*, Case No. 5D00-00578
17. Sections 7.3.2 and 7.3.3, Brevard County Home Rule Charter
18. Brevard County's Objection to Notice of Voluntary Dismissal and Motion that Court Exercise Discretion to Retain Jurisdiction and Proceed with Consolidated Appeal dated December 7, 2000, *Home Rule Charter Committee, et al v. Brevard County, Florida, et al*, Case No. 5D00-3334