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MUNICIPAL CHARTERS IN FLORIDA: LAW AND DRAFTING

MANNING J. DAUER AND GEORGE JOHN MILLER

Florida has some three hundred municipal corporations, in which almost two thirds of its three million residents live.[1] Expenditures of these governmental units came to some $122,290,000 on preliminary estimate for 1952, approximately one fifth of the entire amount spent by the state, the counties, the schools, and all local units during that year.[2] Consequently the law of municipal corporations and the maintenance of adequate and efficient local government are matters of importance, financially as well as socially and technically, to the jurist, the political scientist, the taxpayer, and the public in general. In analyzing municipal law, state constitutional provisions are the starting point. This approach is vital in any study of what, in a sense, might be termed the organic law of the municipality, its charter.

This article is designed to sketch the boundaries of the legal area within which the Florida municipality must operate and to point up the major factors that influence the building of a sound and adequate

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[1]The chief difficulty in tabulating is the lack of any system for compelling rescission of the charter of a city that has become inactive; surrender of franchise under FLA. STAT. §165.26 (1951) is optional. The 1950 federal census shows 305 incorporated cities and towns in Florida, although at least two of these had no population. The more active operating municipalities report to the state comptroller and draw their share of the cigarette tax; 277 cities were recognized for this purpose in 1952.

[2]Compilation and estimates are by Wylie Kilpatrick, Research Prof. of Economics, Bur. of Bus. and Econ. Res., U. of Fla. Estimate is made from U. S. Census Bur. and state comptroller partial figures. See also DOVELL, KNOW YOUR STATE AND LOCAL GOVERNMENT IN FLORIDA (1953), U. of Fla. Pub. Adm'n Clearing Serv. Civic Info. Ser. No. 15. The state expenditure used in this comparison includes the substantial special state funds earmarked by statutes as continuing appropriations in addition to funds biennially appropriated by the Legislature. The breakdown by types of units for 1952 is approximately as follows: State government, $227,784,000, excluding aid to counties and cities in order to avoid counting these funds twice; county government, $62,092,000; school districts, $115,989,000, about 2/3 of which was spent on schools within cities and accordingly would be carried in some states as part of city revenues but which is here excluded from city totals inasmuch as cities do not control it in Florida; special districts, $5,340,000; and cities, $122,290,000. The total for all units below the federal level is just over $533,495,000.

charter, without, however, purporting to discuss the myriad ramifications of each factor. Broadly speaking, the draftsman must at the outset determine the available means of establishing a municipality; the type of local government desired; the personnel structure, including qualifications, direct and indirect compensation, and methods of selection involved; the physical boundaries; and those standard general powers needed by every city or town, designated popularly under such broad headings as police power, taxation, fiscal control and capital outlay, right to acquire and construct physical property, public utilities, whether operated publicly or by enfranchising private corporations, and educational and library facilities. He must further consider carefully the special problems that have arisen in recent years in such fields as hospitals, recreation, advertising and public events, airports, seaports, public housing, and motor vehicle parking; the future expansion of boundaries, including annexation; the relations between city and county; and the practicable methods for amending the charter, including initiative and referendum or any other device fostering local control, to the extent that state law permits. Finally, of course, he should not overlook those miscellaneous general provisions covering such matters as discipline, personal interest, public records, oath of office, official bonds, authority to investigate, schedule and succession, effective date, severability, and short title.

The police power alone, constantly expanding as citizens heap more and more burdens on their local government, embraces not only police surveillance in the narrow sense, fire protection, water supply, sewage disposal, common carriers, and public health, but also problems, vital today, in traffic and parking control, zoning, slum clearance, and establishment of minimum standards for goods and services. Yet the city fathers cannot safely assume that everything having a bearing on health, safety and morals can be controlled — let alone operated — under a general catch-all clause.[3] Furthermore, as regards those powers sometimes termed "special," each such power may well be as vital to the healthy growth of a particular city, situated in an atypical area or depending for the income of its citizens on abnormal enterprises and facilities, as is any standard, old-line general power.

At the outset, of course, a practically suitable and legally valid method of promulgating the charter must be selected and eventually followed; and the legal status of the municipality under the organic

[3]*E.g.*, FLA. STAT. §167.21, final clause (1951).

and statutory law of any given state must be analyzed. Accordingly we begin our somewhat more detailed discussion by focusing attention on these basic considerations of municipal status and the procedural methods of attaining it. To facilitate cross-referencing each main heading is numbered in roman and each principal subheading in arabic; footnote cross-references accordingly comprise two numerals only. A table of all headings is appended.

I. Legal Status

A state constitution is a limitation on the otherwise unfettered power of a legislature within the broad field of activity reserved to the states,[4] whereas the Constitution of the United States is a grant of enumerated powers. The municipal charter resembles the latter in this respect. The familiar *McCulloch v. Maryland*[5] doctrine of implied powers reaches even to this level.[6] The municipality in Florida, as in most jurisdictions, enjoys by comparison one important advantage and suffers under what, to those governing, is a disadvantage. The advantage is that it picks up several useful powers granted by the Florida Legislature to municipalities generally. The disadvantage is that the Supreme Court of Florida, like most other state high courts, is inclined to interpret charter provisions as they are written, in line with the long-established canon of construing strictly all public and private charters. It is far less prone than is its federal counterpart to twist phrases out of all bounds in order to promote a preconceived policy of governmental aggrandizement.[7] A presumption of reasonableness obtains as regards the manner of exercising a municipal

[4]*See, e.g.*, the concise summarization by Strum, J., in Amos v. Mathews, 99 Fla. 1, 17, 126 So. 308, 315 (1930).

[5]4 Wheat. 316 (U.S. 1819).

[6]*Compare, e.g.*, Ginsberg v. Daytona Beach, 103 Fla. 168, 137 So. 253 (1931) (power to construct improvement implies power to contract and to execute note in payment), *with* Malone v. City of Quincy, 66 Fla. 62, 62 So. 922 (1913) (authority to regulate earth-closets does not imply power to prohibit completely). See, for a recent statement of the Florida view, Pensacola v. Fillingim, 46 So.2d 876 (Fla. 1950) (holding that Fla. Stat. §210.03 (1951) does not by implication authorize city expenditure of cigarette tax to finance construction of municipal recreational auditorium and pier).

[7]*E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (farmer growing 239 bushels of wheat above federal quota for own use on own farm is nevertheless "in" interstate commerce). Prof. Dauer does not concur in this comparison on the ground that municipal charters are relatively easy to amend but the Federal Constitution is not; thus there is greater need of liberal interpretation as to the Federal Con-

power admittedly possessed, but the municipality bears the burden of establishing in the first place the existence of a power claimed.[8]

Legally, the Florida municipal corporation is a creature of the state.[9] Therefore no municipality may be created except under state authority, nor may it exercise powers other than those granted directly by the Constitution or authorized by valid general or special acts. In this regard Florida follows what is sometimes called "Dillon's Rule" as to the status of municipal corporations, a doctrine also adopted in other states.[10] The Florida Supreme Court has clearly stated:[11]

> "Unlike a county, a municipality is not a subdivision of the State with subordinate attributes of sovereignty in the performance of governmental functions and correlative limited privileges, immunities and exemptions from liability for negligence of its employees . . . . [It] is a legal entity consisting of population and defined area, with such governmental functions and also corporate public improvement authority as may be conferred by law in a charter or other legislative enactment under the Constitution."

II. Methods of Establishment

In general the various states utilize one or more of five methods in establishing and organizing cities and in granting their charters:

stitution. Prof. Miller believes that the federal instrument, in view of the extreme generality of its terms, can be interpreted as written while still allowing ample flexibility, and that "liberal" government means that further federal control should be obtained by grant from the people under the prescribed amending process rather than by the fiat of five out of nine political appointees.

[8]*E.g., compare* State *ex rel.* McAuley v. York, 90 Fla. 625, 106 So. 418 (1925), *with* State *ex rel.* Meredith v. Borman, 138 Fla. 149, 189 So. 669 (1939), *and* Nash v. Vaughn, 133 Fla. 499, 182 So. 827 (1938).

[9]See II, 1 *infra; see, e.g.,* Miami v. Rosen, 151 Fla. 677, 682, 10 So.2d 307, 309 (1942); Tampa v. Easton, 145 Fla. 188, 191, 198 So. 753, 754 (1940).

[10]See Dillon, Municipal Corporations 154, 155 (5th ed. 1911); 2 McQuillin, The Law of Municipal Corporations 592 (3d ed., Smith, 1949).

[11]Tampa v. Easton, 145 Fla. 188, 191, 198 So. 753, 754 (1940). In State *ex rel.* Floyd v. Noel, 124 Fla. 852, 854, 169 So. 549, 550 (1936), the term "powers inherent in municipal corporations" is used, but this reference should be dismissed as merely a careless phrase. It is not doctrine. The general rule is that stated above. For certain purposes a city is "an agent of the state for local administration of governmental affairs," but even in this function it may not exceed the powers granted, Loeb v. Jacksonville, 101 Fla. 429, 437, 134 So. 205, 207 (1931).

(1) general statute; (2) special act; (3) a system of classifying cities according to population; (4) the constitutional municipal home rule system, under which the state constitution prohibits the legislature from enacting local legislation by special act and delegates to each city the power to frame its own charter with the approval of its voters and under limitations of state general law; and (5) the optional charters system, under which the legislature enacts various types of model charters, such as the council-manager form, the mayor-council form and the commission form, and the city selects the form it desires.[12] Florida cities operate primarily under a combination of systems (1) and (2), general law plus special legislation. The system of classified charters was attempted but has never become operative. Florida also offers a statutory system of limited home rule for altering wholly or partially the charters of existing cities and towns in certain designated respects.[13]

1. Florida Constitutional Provisions

Florida is now operating under its fifth Constitution, adopted in 1885 and effective January 1, 1887.[14] Nearly a hundred amendments have been passed since its adoption, including important changes in the organic law relating to municipalities. Without indulging in legal history for the mere joy of academic pursuit we must nevertheless trace the evolution of the major current sections governing creation and abolition of municipalities and amendment of their charters.[15]

[12]The general picture in other states is best given by KNEIER, CITY GOVERNMENT IN THE UNITED STATES c. 4 (rev. ed. 1947); MACDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION (1951). There is a sixth system of state control over cities, known as geographic classification, but this is not widely used and in practice has amounted to special legislation, or system (2) above.

[13]FLA. STAT. c. 166 (1951); see VIII, 2 *infra*.

[14]For a summary of our constitutional evolution see Legis., 3 U. OF FLA. L. REV. 74 (1950).

[15]Landmark opinions on the establishment and legal status of Florida municipalities appear, starting with the earliest, in State *ex rel.* McQuaid v. County Comm'rs of Duval County, 23 Fla. 483, 3 So. 193 (1887); Enterprise v. State *ex rel.* Att'y Gen., 29 Fla. 128, 10 So. 740 (1892); State *ex rel.* Lamar v. Dillon, 32 Fla. 545, 14 So. 383 (1893); Pursley v. Fort Myers, 87 Fla. 428, 100 So. 366 (1924); State *ex rel.* Johnson v. Sarasota, 92 Fla. 563, 109 So. 473 (1926); State *ex rel.* Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929); West v. Lake Placid, 97 Fla. 127, 120 So. 361 (1929); Amos v. Mathews, 99 Fla. 1, 126 So. 308 (1930); State *ex rel.* Att'y Gen. v. Avon Park, 108 Fla. 641, 149 So. 409 (1933); State *ex rel.* Matthews v. Alsop,

The Constitution of 1868, in the municipal field, stressed uniformity. In it are found the current Sections 20, 21 and 24 of Article III in embryo.[16] In 1885, however, the electorate started on another path; it presented the Legislature with virtually a blank check, while at the same time admonishing it to aim at classification and general laws as the ultimate target. Section 24 directed the Legislature to establish a uniform system of county and municipal government, to be applicable except in those instances in which local or special laws inconsistent therewith were enacted. The language of Section 20, enumerating flat prohibitions against special or local laws on certain matters, specifically excepted regulation of municipal officers and courts from its constraint. Section 21 in its original form expressly authorized special or local laws in all fields not listed in Section 20,[17] provided sixty days' notice of intention to apply for any such bill was published in the locality to be affected. Meanwhile, however, a sweeping new section appeared simultaneously:[18]

> "The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors."

Dispute promptly arose in *State* ex rel. *McQuaid v. County Comm'rs of Duval County*.[19] Mr. Justice Raney, in a brilliant piece of analyti-

120 Fla. 628, 163 So. 80 (1935); Winter Haven v. State *ex rel.* Landis, 125 Fla. 390, 170 So. 100 (1936); State *ex rel.* Gibbs v. Couch, 139 Fla. 353, 190 So. 723 (1939); State *ex rel.* Harrington v. Pompano, 136 Fla. 730, 188 So. 610 (1938), *aff'd on rehearing*, 136 Fla. 775, 188 So. 629 (1939); Winter Haven v. A. M. Klemm and Son, 132 Fla. 334, 181 So. 153 (1938), 141 Fla. 75, 192 So. 646 (1939); A. M. Klemm & Son v. Winter Haven, 141 Fla. 60, 192 So. 652 (1939); Tampa v. Easton, 145 Fla. 188, 198 So. 753 (1940).

[16]FLA. CONST. Art. IV, §§17, 18 and 21-22 respectively (1868).

[17]This grant was unnecessary, of course, because the Legislature has inherent power to act in any manner not constitutionally proscribed. *See, e.g.*, State *ex rel.* Johnson v. Sarasota, 92 Fla. 563, 585, 109 So. 473, 480 (1926).

[18]FLA. CONST. Art. VIII, §8. The comma that should appear after "municipalities" is missing in the original. Additional authority to establish municipal courts is contained *id.* Art. V, §34, unaltered by the later amendment to Art. V, §1.

[19]23 Fla. 483, 3 So. 193 (1887). For a recent decision to the same effect as regards the pre-1938 law see, *e.g.*, Demko v. Judge, 58 So.2d 692 (Fla. 1952) (special act abolition in 1933 of municipality with neither notice nor referendum per-

cal reasoning approved by the full Court, reached the conclusion that this new section would be superfluous if governed by the notice proviso of Section 21 of Article III — as indeed it would — and that accordingly the requirement of notice was confined to local legislation dealing with other than municipal matters. For over four decades the law remained unchanged.

In 1928 the notice period in Section 21 was reduced to thirty days and an alternative procedure was authorized, namely, provision in a special or local bill for referendum in the territory affected. In 1934 a new sentence was added to Section 24, banning "special or local laws incorporating cities or towns, providing for their government, jurisdiction, powers, duties and privileges . . . ." The amendment is not self-executing, however, and the Supreme Court cannot feasibly issue a writ of mandamus to the Legislature to enact the prescribed general law; accordingly it has regarded the ban as dormant pending passage of such a statute,[20] especially inasmuch as Article VIII, Section 8 has remained intact since 1885.

The latest significant shift in trend appeared in 1938, when Article III, Section 21 received by amendment the specific clause ". . . nor shall any local or special law establishing or abolishing municipalities, or providing for their government, jurisdiction and powers, or altering or amending the same, be passed," without either publication of notice as prescribed by law or provision in the bill for its approval by referendum as a prerequisite to its becoming effective. The current law governing notice requires either at least one publication, not less than thirty days prior to introduction of the bill, in some newspaper published in the county or counties affected, or posting in "not less than three public places in the county or each of the counties" affected, one of which must be the county courthouse.[21] The Court has accordingly insisted upon notice or referendum as prerequisites to the validity of even special or local municipal acts passed in the 1939 session of the Legislature or thereafter.[22]

missible because occurring prior to 1938 amendment requiring one or the other).

[20]*E.g.*, Bryan v. Miami, 139 Fla. 650, 190 So. 772 (1939).

[21]FLA. STAT. §11.02 (1951); see §11.03 for further particulars on form of notice. Note that posting is illogically yet apparently sufficient, however, even if a newspaper is available, under the odd decision in Chavous v. Goodbred, 158 Fla. 826, 30 So.2d 370 (1947); see, however, the strong and logical dissent by Buford, J. "Goodbred" is misspelled in the official reports; it should be "Goodbread," as in 156 Fla. 599, 23 So.2d 761 (1945).

[22]E.g., Chavous v. Goodbred, 158 Fla. 826, 30 So.2d 370 (1947); State *ex rel.*

The result today is a strict, though not onerous, procedural limitation on the original scope, virtually unlimited, of Article VIII, Section 8, and at the same time an unavoidable implication that a special or local act properly passed is in order for any municipality whenever the Legislature chooses to utilize this method of functioning. The prescribed classification of towns and cities and uniformity in their regulation await the pleasure of the Legislature; from this standpoint Section 24 of Article III is a dead letter. Perhaps it deserves such a fate; attempts in other states at rigid general laws for fixed population brackets have hardly produced scintillating practical results.[23]

2. *Current Florida Statutory Methods*

The Florida statutes today provide two methods of organizing a municipal corporation: general law and special act.

General Law. Under general law the area to be incorporated must contain at least one hundred fifty citizens, male or female, who are freeholders[24] and registered voters.[25] Notice of the time and place

Watson v. Miami, 153 Fla. 653, 15 So.2d 481 (1943). The mandatory vote by freeholders alone on a proposed bond issue, FLA. CONST. Art. IX, §6, satisfies the referendum requirement for this one matter, but not for other items, State v. Port St. Joe, 47 So.2d 584 (Fla. 1950). The related problem arising from passage of a special act in the guise of a general act regulating counties, and the proper use and misuse of population brackets, is outside the scope of this article, but is well illustrated in the contrast between Crandon v. Hazlett, 157 Fla. 574, 26 So.2d 638 (1946), and State v. Dade County, 157 Fla. 859, 27 So.2d 283 (1946).

[23]See A. C. Breckenridge, *The Mockery of Classification,* 36 NAT. MUNIC. REV. 571-573 (1947); as regards Florida see Batchelor, *Population Statutes under the Florida Constitution,* 1 MIAMI L. Q. 97 (1947), especially at 102-104.

[24]FLA. STAT. §165.01 (1951). If the resulting corporation has 300 or more registered voters it is a city; if less, a town, *id.* §165.02. A registered voter owning land in the area is a freeholder under this statute, even though not so listed by the supervisor of registration; the question is one of fact to be determined as of the time of meeting, Coreytown v. State *ex rel.* Ervin, 60 So.2d 482 (Fla. 1952) (containing a thorough and well-reasoned opinion).

[25]FLA. STAT. §165.29 (1951), enacted as Fla. Laws 1947, c. 23615, §1, bars application of this general law procedure to communities in at least one county; and other counties may move in and out of the excluded population bracket of 150,000 through 250,000. It is submitted that there is no excuse whatever for this haphazard, stop-gap type of legislation, especially when, as here, the substantive legislation does not apply unless action is desired and taken. See FLA. CONST. Art. VII, §5, adopted in 1950, re census.

of the organizational meeting must be published "for a period of not less than thirty days" in a newspaper of the county or be posted in three different places "of public resort in the immediate vicinage . . . ."[26] At least two thirds of the freeholders and voters to be incorporated must attend the meeting.[27] They then proceed to elect by majority vote a mayor, from five to nine aldermen, a city clerk, and a marshal. The terms of office of all but the aldermen are one year. These last divide themselves by lot into two groups, as nearly equal in number as possible, one of which serves for one year and the other for two; and thereafter all aldermen are elected for two-year terms. Those attending the meeting are also required to establish the geographic limits of the town and to adopt a name and a corporate seal.

Two steps are then necessary to validate the proceedings. First the mayor, within three days, must go before a judicial officer of the state and take a prescribed oath, which he then administers to the other elected officials. Next the clerk must prepare a complete transcript of the proceedings, including notice of meeting, number of qualified electors present, official name, seal, record of the meeting, boundaries adopted, and names of officers elected. This transcript must bear the corporate seal and attestation of the clerk, be signed by the mayor and aldermen, and be forthwith filed with the clerk of the circuit court for the county. Thereupon the new municipality is an incorporated city or town, as the case may be, endowed with the powers granted by general law.

Special Act. The alternative method of organizing a municipal corporation in Florida is special legislation.[28] The interested citizens, before or during the biennial session of the Legislature, draft an appropriate city charter in consultation with the members of the

[26]FLA. STAT. §165.03 (1951). This paragraph and the following one are a summary of FLA. STAT. §§165.04-165.08 (1951); see note 24 *supra* for distinction between city and town.

[27]FLA. STAT. §165.04 (1951) contains the further clause "and not less than twenty-five," but these words are deliberately omitted from the above summary. Today they are meaningless; 2/3 of 150 is 100, which is now the smallest number possible. The minimum of 150 was substituted for the original 25 in §165.01 by recent amendment. At that time the draftsman obviously forgot to make the change in the corresponding language in §165.04.

[28]The authority and procedural requisites for this procedure are set forth in the Constitution; see II, 1 *supra.*

House and Senate from the county and senatorial district in question.[29] Thereupon, if the one to three members of the House from that county and the senator from that district are in agreement, the proposed special bill is in practice introduced and automatically passed in each house. The legislative rules of each house prescribe a special calendar for local bills, which are not debated in the House unless there is a division of opinion among the members representing the county in which the proposed municipality is located, and which are passed or rejected in the Senate in accordance with the recommendation of the senator from the district involved. These bills are subject to the constitutional requirement of notice or referendum.[30]

III. Types of Municipal Government

The basic form of city government provided by Florida general law is suitable for the small municipality only. Change in a city charter to authorize a different form of government is necessary in many instances; and accordingly it is desirable to consider the possible forms of city government that may be adopted.

1. Mayor-Council

The form provided by general law is the oldest, the mayor-council type. With modifications it is still found in many cities, for instance, Orlando and Tampa. It embodies the doctrine of separation of powers to a considerable extent. The council enacts ordinances and acts as the legislative authority. The mayor, elected directly by the voters, heads the administration, although as the town grows he needs and usually appoints department heads to assist him. The municipal judge is the chief officer of the third branch, and he may be appointed or elected. In some smaller municipalities, however, the mayor performs the judicial function.

This traditional form of city government has its defects. The separation-of-powers doctrine is not well adapted to local administration, especially as regards the legislative and executive functions; city functions, as compared with federal and state, are primarily administrative

[29]Florida's 38 senators, unlike federal senators, are chosen on a population basis, one from each senatorial district. Representatives, Fla. Const. Art. VII, §3, adopted in 1924, now number 3 from each of the 5 most populous counties, 2 from each of the next 18, and 1 each from the other 45. Reapportionment by the Legislature is prescribed for 1925 and every 10 years thereafter, *ibid.*

[30]See II, 1 *supra.*

in that they are normally performed with fewer officials, less formality, a far lower budget, and a desirable interplay among departments. By the turn of the century many municipalities began to regard this form of government as inefficient. Deadlock between mayor and council, as well as ward politics among council members chosen from city districts rather than at large, gave rise to criticism.

2. City Commission

When in 1900 Galveston, Texas, was faced with a crisis following a tidal wave it set up a different form of government, known as the commission type. The voters elect, preferably at large, a city commission consisting of five members in most instances. These commissioners have full legislative power as a body and executive power as individuals. Not only do they enact city ordinances but each commissioner is also the head of a city department; one may head finance, another public works, another public safety, that is, fire and police, and another public recreation and health. One is chosen as mayor, but he is simply the presiding officer when the commission meets. Together they set policies, levy taxes, make up the budget, and coordinate the work of their respective departments.

In some instances this system has worked well. It is simpler than the mayor-council plan, and responsibility is concentrated. But it too suffers from marked weaknesses. There is so much work for each commissioner that proper performance of his duties usually demands his full time. Furthermore there is no guarantee that a person specially skilled in finance will be elected to head that department, and the same random assignment of responsibility occurs in the other departments. As a result still a third form of city government emerged as the commission form began to decline; and today, although the second form still exists in the cities of some states, the last vestige of it in a Florida city of any size is found in Jacksonville. Even there the pure type has been sharply modified into a hybrid of the mayor-council and the commission forms.

3. Council-Manager

The third type of city government, which appeared in Staunton, Virginia, in 1908, is the council-manager form.[31] Like the commission

[31]Sumter, S.C., adopted it in 1912; Dayton, Ohio, in 1913. These two cities, along with Staunton, have a valid claim to being the first to adopt this system in full.

form it concentrates responsibility, although in a decidedly different way. The voters elect a city commission, but it functions in the manner exhibited by the board of directors of a private corporation. It acts as the legislative body of the city, usually meeting weekly to enact ordinances, approve the budget, levy taxes, and decide policy. Preferably its members are elected at large and choose one of their number as mayor to preside over their meetings, but he has no administrative functions. Instead the commission selects a trained city manager, who is normally chosen from among the managers or assistant managers of other cities. His work is strictly administrative, not political; his is a profession. He does not set major policy; the commission determines that. He recommends a budget to the commission, which decides all matters pertaining to it. On the other hand, he selects the heads of city departments, directs and coordinates their work, and has general responsibility for the administration of the city.

The National Municipal League regards this system as the most efficient form of city government in existence today,[32] and many Florida cities now share this view. Prior to the 1953 Legislature fifty-seven Florida cities, including Miami, Miami Beach, Pensacola and St. Petersburg, had the full manager form. Another dozen have a partial version of it, and still others are voting by referendum this year on the issue of adopting it.

Nevertheless even this form is not a cure-all. Citizen interest is necessary to assure election of high-caliber members to the commission, who must in turn select a qualified manager. This quality is not achieved in some cities. If the post is regarded as a political plum, or if the manager is incapable or poorly qualified anyhow, the system will not operate well. There is no magic in any form of government. The most that any good system can do is to blueprint a device that human beings can run well if they will apply themselves; its optimum operation demands elected policy-makers of vision, sound judgment and integrity and appointed administrators with that efficiency born of academic training in the techniques involved and practical training on the job.

Two checks operate in the city manager system to prevent abuses: civil service and the recall election. Virtually all Florida cities of any size have a system of civil service, and the *Model City Charter*

[32]See MODEL CITY CHARTER (5th ed. 1941), obtainable from Nat. Municipal League, 299 Broadway, New York 7, N.Y.; price $1.50.

also includes this provision.[33] This system shields the professional administrator from the political pressures to which he is inevitably subjected. On the other hand, recall can by charter provision or special act be provided to deal with unresponsive policy-makers whenever the voters in requisite percentage sign a petition calling for a special election to remove a particular member of the city commission; and most Florida city charters embodying the city manager system so provide.[34] The recall election is usually held within from twenty to forty days of validation of the petition.

Should the Commission fail to call the election following due filing of a valid petition the circuit court can order one. In *Williams v. Keyes*[35] the Supreme Court affirmed circuit court issuance of a mandatory injunction pursuant to a section in the Miami special act charter expressly providing for judicial enforcement. In view of the tenor of the opinion each municipality should by special act secure such a provision in its charter, even though there is no valid reason for refusing mandamus, as distinct from injunction, under these circumstances. It is unquestionably the proper means of compelling a public official to exercise the ministerial function, that is, performance of a duty prescribed by law and involving no discretion;[36] and the Court has stoutly denied the existence of any authority in

[33]FLA. STAT. c. 174 (1951) provides for adoption, subject to referendum approval, of a civil service system for policemen and firemen in cities of less than 125,000. Most Florida cities cover other employees by special acts, ordinances, and provisions of their charters. The MODEL CITY CHARTER provision is Art. VII; see note 32 *supra* for availability.

[34]*E.g.*, Daytona Beach, Gainesville, Miami. If the petition fails to comply with a legal requirement that the grounds for recall be stated in a preliminary affidavit the election can be permanently enjoined, Richard v. Tomlinson, 49 So.2d 798 (Fla. 1951); *cf.* Williams v. Kelly, 133 Fla. 244, 182 So. 881 (1938) (requisite percentage of registered voters signing petition not established); but if the commissioner attacked announces that he will not contest the proceedings he waives his right to judicial review of procedural technicalities and of the sufficiency of grounds, Long v. Lancaster, 55 So.2d 791 (Fla. 1951).

[35]135 Fla. 769, 186 So. 250 (1938), Buford, J., dissenting on jurisdictional grounds. Brown and Thomas, JJ., dissented as to the power of a circuit court to hold an election, but agreed that it has power to order one, and indicated, *id.* at 802, 186 So. at 263, that mandamus rather than mandatory injunction is the preferable remedy. The election was held and Williams was recalled, *see* Williams v. Miami, 42 So.2d 582 (Fla. 1949). The 1938 opinion quotes excerpts of drafting value from the charter.

[36]This basic characteristic of mandamus is fully discussed by Goodrich and Cone, *Mandamus in Florida*, 4 U. OF FLA. L. REV. 535 (1951).

the Legislature to alter in any degree the constitutionally granted jurisdiction of the Supreme Court and the circuit courts embodied in mandamus and the other four extraordinary writs.[37] The *Williams v. Keyes* dissent, and perhaps the majority opinion, are confusing a commendable desire to keep the judiciary out of politics with the needed enforcement of a substantive right validly conferred. Jurisdiction specified in the Constitution obviously should not require confirmation by either general or special act. Nevertheless the draftsman should play safe, however unfounded the doubt raised by the bench may be from a juristic standpoint.

IV. Initial Boundaries

In the establishment of boundaries neither the citizenry creating a municipality under general law nor the Legislature by special act has authority to incorporate noncontiguous territory[38] or "unsettled lands, or lands rural in character, or farms, citrus groves and forests far removed from the actual boundaries of the village to be incorporated and sparsely settled . . . ."[39] Incorporation of territory with so few inhabitants that the functions of a municipality cannot be exercised is likewise invalid.[40]

Attack on either the existence of a municipal franchise or the legality of an attempted exercise of an admittedly existing franchise should be instituted by writ of quo warranto naming the municipality as defendant.[41] The plaintiff should request the attorney general to

[37]The grant is limited to the Supreme Court (or any justice thereof as regards habeas corpus), the circuit courts, and the Court of Record for Escambia County, Fla. Const. Art. V, §§5, 11, 39. The Court's sturdy defense of its constitutionally granted jurisdiction embodied in the extraordinary writs is analyzed in detail in Adams and Miller, *Origins and Current Florida Status of the Extraordinary Writs,* 4 U. of Fla. L. Rev. 421, 459-462 (1951).

[38]Mahood v. State *ex rel.* Davis, 101 Fla. 1254, 133 So. 90 (1931) (action by residents under general law); State *ex rel.* Davis v. City of Stuart, 97 Fla. 69, 120 So. 355 (1929) (legislative act); *cf.* Ocean Beach Heights, Inc. v. Brown-Crummer Inv. Co., 302 U.S. 614 (1938), *reversing* 87 F.2d 978 (5th Cir. 1937).

[39]State *ex rel.* Landis v. Lake Placid, 121 Fla. 839, 845, 164 So. 531, 533 (1935); *accord,* State *ex rel.* Davis v. City of Stuart, *supra* note 38. For a minor and sensible exception to the contiguity requirement see Hall v. State *ex rel.* Ervin, 46 So.2d 878 (Fla. 1950).

[40]*E.g.,* State *ex rel.* Ervin v. Oakland Park, 42 So.2d 270 (Fla. 1949); State *ex rel.* Davis v. Boynton Beach, 129 Fla. 528, 177 So. 327 (1937); State *ex rel.* Davis v. Lake Placid, 109 Fla. 419, 147 So. 468 (1933).

[41]Fla. Stat. §165.30 (1951), enacted as Fla. Laws 1949, c. 25275, §1. Examples of quo warranto proceedings are: Coreytown v. State *ex rel.* Ervin, 60 So.2d 482

institute such suit, and if he refuses to do so any "person, or persons, association of persons, or corporation" owning land within a city, town or hamlet may then institute the proceedings.[42]

A city cannot function de facto if there was initially no de jure means by which it could have acquired legal existence or jurisdiction over the territory claimed by it.[43] If, however, the state has for years assumed the existence and jurisdiction of a municipality, as evidenced by legislative acts or other indicia of state recognition of the questioned authority, the state is then "estopped" from attacking it unless some organic barrier to such jurisdiction existed from the start;[44] and of course individuals acquiescing by positive action or by continued inaction are either estopped or barred by laches from challenging the jurisdiction.[45]

V. General Powers of Municipalities

As we have previously observed, the Florida municipality has no inherent governmental power; it derives such specific powers as it

(Fla. 1952); State *ex rel.* Ervin v. Oakland Park, *supra* note 40; Ormond v. State *ex rel.* Watson, 152 Fla. 419, 12 So.2d 114 (1943). The *Coreytown* opinion, *supra,* confirms the civil nature of modern quo warranto and the applicability of Fla. C.L.R. 16, 32. For a full discussion of this writ see Ervin and Rhodes, *Quo Warranto in Florida,* 4 U. of Fla. L. Rev. 559 (1951). The masterful opinion of Brown, J., in State *ex rel.* Davis v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929), presents an excellent discussion of procedure.

[42]See note 41 *supra.* This 1949 expansion of an ancient remedy should largely eliminate resort to bill for injunction against imposition of taxes when the attorney general refuses to institute quo warranto proceedings. Farrington v. Flood, 40 So.2d 462 (Fla. 1949), is an example of final resort to equity after refusal of the attorney general to file a quo warranto information under the pre-1949 law. The proper uses of injunction in Florida are explained by Fabisinski and Cowart, *Injunctive Relief in Florida,* 4 U. of Fla. L. Rev. 571 (1951).

[43]Ocean Beach Heights, Inc. v. Brown-Crummer Inv. Co., 302 U.S. 614 (1938). This decision follows and ably summarizes the Florida law. See also note 44 *infra.*

[44]*E.g.,* Winter Haven v. State *ex rel.* Landis, 125 Fla. 392, 170 So. 100 (1936) (late attack based on lack of boundary closure). This principle that the municipal corporation may exist de facto despite some flaw in following the full legal process required to establish it de jure follows Tulare Irrigation Dist. v. Shephard, 185 U.S. 1 (1901) (alternative holding). Whitfield, J., explains the distinction between initial organic barrier and curable defect in form in Winter Haven v. A. M. Klemm & Son, 132 Fla. 334, 374-376, 181 So. 153, 170-171 (1938); *cf.* State *ex rel.* Landis v. Boynton Beach, 129 Fla. 528, 177 So. 327 (1937).

[45]*E.g.,* Heyward v. Hall, 144 Fla. 344, 198 So. 114 (1940) (attack on authority of residents to incorporate initially held too late after long functioning and recognition of town); see also the annexation cases in note 189 *infra.*

has from the Legislature, whether by general law or special act.[46] In rare instances the authority of the Legislature to accord special treatment to a designated municipality springs directly from a special provision of the Florida Constitution.[47] To analyze in comprehensive fashion the scope of powers granted by general law would entail an article of normal length for each major power. Accordingly we confine the discussion at this point to certain basic provisions and relationships that permeate all valid municipal drafting and to an enumeration of those grants of authority that every Florida municipal corporation falls heir to automatically at birth unless its charter contains some limitation.

1. Constant Limitations

The special-act charter is itself a Florida statute, though not a general one. The charter promulgated pursuant to general law is not, strictly speaking, a statute, but it has the potency of one if drafted and passed in the prescribed manner and within constitutional and statutory limitations. Because of its relative rank in the hierarchy of law the legislative output of the municipality, known in its typical form as the ordinance, must always meet several tests. And of course the other types of municipal functioning, whether executive, judicial, or merely administrative, must square with all mandates, express or implied, of senior rank.

The charter and the ordinance, like all other Florida legislative products and the Florida Constitution itself, must not contravene federal law of whatever rank. In particular neither the charter nor the ordinance can run afoul of such safeguards, ever in the background, as the due process clause,[48] the impairment of the obligation of a contract clause,[49] or the commerce clause.[50] There are, of course,

[46]See I *supra*.

[47]*E.g.*, FLA. CONST. Art. VIII, §§9, 10.

[48]U.S. CONST. Amend. XIV, including Amend. 1 concepts; see, *e.g.*, the Notes on sound truck ordinances, 2 U. OF FLA. L. REV. 103, 257 (1949).

[49]*E.g.*, Winter Haven v. A. M. Klemm & Son, 132 Fla. 334, 181 So. 153 (1938) (holding invalid, as violation of both U.S. CONST. Art. I, §10, and FLA. CONST. Decl. of Rights §17, a circuit court decree enjoining continued taxation of complainant's lands, after rendition of judgment of ouster, for purpose of paying bonds issued prior to ouster while city had de facto and apparent de jure jurisdiction over such lands); *cf.* Groves v. Board of Pub. Instr'n of Manatee County, 109 F.2d 522 (5th Cir. 1940) (same principle applied to impairment by reducing county millage to the prejudice of bond payments).

[50]*E.g.*, Henderson v. State *ex rel.* Lee, 65 So.2d 22 (Fla. 1953), following Amal-

many other federal limitations, imposed by the exercise of such powers as those with regard to war, treaties, postal regulation, patents, admiralty, and foreign commerce.

At the state level the charter and the ordinance, like the statute, must remain within the limitations of the Florida Constitution.[51] Furthermore, unless our organic law deals expressly with a particular municipality, all municipal action must follow the dictates of any applicable Florida statutes or judicial decision vesting rights and not collaterally overturned on one of the few permissible grounds.[52] The Legislature gives, within expressed limits, and the Legislature takes away.

2. Rank of General and Special Acts

The foregoing considerations lead quite naturally into the relative rank of various statutes. The landmark Florida opinion on this subject is the brilliant analysis by Mr. Justice Brown in *American Bakeries Co. v. Haines City*.[53] The legislative intent governs; but canons of construction are helpful, and when, as in *American Bakeries,* a poorly drafted statute contradicts itself they are indispensable. Contemporaneous enactments are construed *in pari materia.* Inconsistent provisions among statutes of the same class but different in time of effectivity are reconciled as far as possible, in the absence of a repealing clause in the later; the bench frowns upon repeal by mere implication and strives to give effect to such legislative enactments unless they are expressly or by necessary implication repealed. When two interpretations are possible and one renders the statute unconstitutional, the other interpretation is adopted.

In the event of "repugnancy," or head-on conflict, among statutes

gamated Ass'n v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). The Florida decision was predicted in 5 U. OF FLA. L. REV. 205 (1952). See also, *e.g.,* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[51]*E.g.,* Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla. 1952) (statute plus ordinance), analyzed V, 4 *infra* under Public Housing; Gustafson v. Ocala, 53 So.2d 658 (Fla. 1951), 4 U. OF FLA. L. REV. 403 (1951) (ordinance violating Florida equal protection clause).

[52]*E.g.,* Panama City v. State, 60 So.2d 658 (Fla. 1952) (ordinance violating Constitution and not complying with statute, discussed V, 4 *infra* under Motor Vehicle Parking); State *ex rel.* Warren v. Miami, 153 Fla. 644, 15 So.2d 449 (1943) (ordinance contravening court judgment).

[53]131 Fla. 790, 180 So. 524 (1938), reviewing numerous earlier opinions. See also the analysis in Sullivan v. Tampa, 101 Fla. 298, 134 So. 211 (1931).

the later prevails as a rule. A later general statute supersedes any earlier general statute in conflict with it, as distinct from merely inconsistent, even though the earlier be not expressly repealed. Similarly, a later special act supersedes a conflicting earlier special act and also overrides an earlier or contemporary general statute even to the extent of a mere inconsistency, the theory being that in a special act the Legislature focuses its attention more sharply on the small segment dealt with in isolation.[54]

The serious problem of interpretation involves the effect of a later general statute upon an earlier special act when the two are either inconsistent or in conflict. Wide variance in terminology among the statutes passed upon by the courts impairs formulation of any comprehensive absolute rule; but normally the earlier special act remains in effect unless the later general one repeals it specifically or indicates in clear terms an intent to regulate all Florida municipalities uniformly in the particular respect covered. In any of these last events – and the language of the later general act is determinative in each instance – the earlier special act must yield.[55] Competent draftsmanship would go a long way toward lightening the enormous workload that our bench is carrying today, including many problems of statutory interpretation that should never arise in the first place.

3. Standard General Powers

Every municipality embraced in the category delineated by a statute granting a power either to all cities or to those of a certain

[54]*Compare, e.g.,* Sanders v. City of Coleman, 143 Fla. 455, 196 So. 822 (1940) (inconsistent provisions of earlier general act held superseded by later special), *and* Sanders v. Howell, 73 Fla. 563, 74 So. 802 (1917) (earlier special act held superior to later inconsistent general act), *with* Lake Alfred v. Lawless, 102 Fla. 84, 135 So. 895 (1931) (both general and special statutes applicable as alternatives, there being no inconsistency per se in having two valid methods of issuing bonds), *and* Hallandale v. Broward County Kennel Club, Inc., 152 Fla. 266, 10 So.2d 810 (1942) (later general act held to supersede earlier special because comprehensive intent appeared in it). For priority of special act over conflicting general statute effective same day see State v. Avon Park, 96 Fla. 494, 118 So. 223 (1928) (bonds not issued per special act held invalid).

[55]Compare, *e.g.,* Hallandale v. Broward County Kennel Club, Inc., *supra* note 54, *with* Bryan v. Miami, 139 Fla. 650, 190 So. 772 (1939) (earlier restrictive provision in special act charter held not removed by implication by later general statute). For an illustrative general statute see FLA. STAT. c. 166 (1951) and discussion of statutory municipal home rule, VIII, 2 *infra.*

size is free to exercise it unless a relevant provision in the charter expressly limits the authority of the particular municipality in that respect. As a rule these "general powers" are an addition to charter powers, with the result that the municipality may in its discretion act pursuant to either its charter provision or the general grant unless the charter expressly or by necessary implication confines a certain power within specified limits narrower than those set by general law.[56] Here, incidentally, is one of the many points at which careful preliminary consideration and accurate drafting can save a lot of confusion and eventual litigation.

As a rough generalization one might say that these standard general powers are largely those that one would expect to find in local government if the Florida municipality had inherent powers. They authorize the municipality to provide for the election and fix the compensation of its officers,[57] to take a census,[58] to acquire real or personal property by eminent domain for certain public purposes,[59] to accept voluntary surrender of private property subject to a lien for improvements and to sell those portions of it not needed,[60] to erect and control all necessary public buildings and dispose of them,[61] to construct wharves and docks and to regulate these and also moorings and anchorages,[62] to build bridges and establish ferries,[63] to lay streets, drains and sewers and remove obstructions,[64] to light streets[65] and to beautify these and waterways,[66] to require abutting realty owners

[56]*E.g.*, Herbert v. Daytona Beach, 121 Fla. 212, 215-216, 163 So. 565, 566 (1935) (alternative special act charter method of issuing bonds upheld); Sullivan v. Tampa, 101 Fla. 298, 134 So. 211 (1931) (alternative general act method upheld). *Compare, e.g.*, Lake Alfred v. Lawless, 102 Fla. 84, 135 So. 895 (1931) (nothing in special act charter that would rule out the general law alternative used), *with* State *ex rel.* Davis v. Homestead, 100 Fla. 361, 130 So. 28 (1930) (earlier special act charter held exclusive).

[57]FLA. STAT. §§167.40-167.42 (1951).

[58]FLA. STAT. §§167.58-167.60 (1951).

[59]FLA. STAT. §§167.65-167.66 (1951); see also §167.69 (acquiring land to sell or lease to the United States for defense purposes).

[60]FLA. STAT. §167.15 (1951).

[61]FLA. STAT. §167.21 (1951).

[62]*Ibid.*

[63]*Ibid.*

[64]FLA. STAT. §167.01 (1951); see also §§180.06 (drainage sewers), 357.01 (inspection of railway crossings), 167.75 (permission to continue certain encroachments as they existed on June 16, 1947).

[65]FLA. STAT. §167.21 (1951).

[66]FLA. STAT. §§342.01-342.03 (1951).

to construct and repair sidewalks,[67] to grade, drain and fill vacant lots or require their owners to do so,[68] to lay off and beautify parks,[69] to improve and beautify the public cemetery,[70] to pass zoning regulations,[71] to construct, maintain and operate sanitary sewage disposal systems,[72] to dispose of garbage and other waste,[73] to construct, maintain and operate facilities for domestic and industrial water,[74] gas and electric supply,[75] to grant franchises for furnishing public services[76] and to regulate water,[77] gas and electricity rates,[78] to provide for the support of the poor, infirm or insane,[79] and to establish and maintain public schools[80] and a public library.[81]

From the fiscal standpoint the underlying theory as regards current expenses is pay as you go. The theory on capital improvements, however, is quite the opposite, and the apparent legal limitations on it are essentially a mirage.

The general statute on current expenditures forbids appropriations in excess of permissible tax levies for the year in question, and no municipal officer may issue a warrant for any purpose other than to pay a sum appropriated.[82] Books of account must be kept; and the law further provides that annual financial reports be filed with the state comptroller, who may be directed by the Governor to make an inspection and must be directed to do so whenever twenty percent or more of the taxpaying electors so request. This provision is a dead letter even today, however, and accordingly it is vital that the

[67]FLA. STAT. §167.02 (1951).

[68]FLA. STAT. §§167.07, 167.08 (1951).

[69]FLA. STAT. §§167.09, 167.21 (1951).

[70]FLA. STAT. §167.21 (1951); see also §167.70 (cooperation with Federal Government authorized).

[71]FLA. STAT. c. 176 (1951); see also §167.71 (cooperation with FHA authorized). Florida zoning law is thoroughly analyzed in this issue by Bartley, *Legal Problems in Florida Municipal Zoning.*

[72]FLA. STAT. §§184.03, 180.06 (1951).

[73]FLA. STAT. §180.06 (1951); see also §167.73 (reasonable charge allowed for service).

[74]FLA. STAT. §§180.06, 167.21 (1951).

[75]FLA. STAT. c. 172 (1951).

[76]FLA. STAT. §§167.06, 167.22-167.24 (1951) (includes forfeiture procedure).

[77]FLA. STAT. §167.57 (1951).

[78]FLA. STAT. §180.14 (1951).

[79]FLA. STAT. §167.28 (1951).

[80]*Ibid.*

[81]FLA. STAT. §§167.29-167.39 (1951).

[82]FLA. STAT. §167.48 (1951).

charter require an audit at least annually by disinterested certified public accountants and distribution in printed form to interested citizens.[83]

The municipality is authorized not only to levy taxes on realty, personalty, business, professions, and certain public services but also to make reasonable charges for the use of "any facility designed and intended to render a direct service to the users thereof . . . ."[84] It may invest surplus funds in any "negotiable direct obligation" of the United States or in an obligation guaranteed unconditionally by the United States as to principal and interest; and it may issue revenue certificates to obtain loans and may also issue bonds provided the requisite approval of the freeholders is first obtained and the municipal debt limit, if any, is not exceeded.[85]

Municipal financing in general, an extensive subject in itself, is beyond the scope of this article. Florida does have a general law provision on bonded debt limit, but it is virtually worthless.[86] It ex-

[83]FLA. STAT. §167.61 (1951). This provision is seldom if ever complied with except in so far as cities have to file reports to recapture their share of the cigarette tax. No system of state audit of city books has been instituted yet, probably because of the shortage of personnel allowed the state auditor and because city charters usually require an audit by reputable accountants anyhow.

[84]FLA. STAT. §167.43 (1951). Note the limiting yet sound construction of this type of taxing power in Asbell v. Green, 159 Fla. 702, 32 So.2d 593 (1947) (blanket sales tax embracing isolated transactions is not a tax on occupations). For tax on public services see FLA. STAT. §167.431 (1951) (the "utility tax" levied on purchases of electricity, metered or bottled gas, and water, telephone and telegraph service; seller must collect for city; limit is 10% of purchase price; and Gainesville, in a move almost unique in modern times, actually reduced this tax to 5% on Sept. 21, Gainesville Daily Sun, Sept. 22, 1953, p. 1, col. 6). On authority to charge see FLA. STAT. §167.73 (2) (1951); specifically listed, in addition to the general language quoted above, are: "any system of public recreation, any wharf, dock, yacht basin, airport, golf course, hospital, stadium, parking lot, or tourist camp . . . ."

[85]On investing see FLA. STAT. §§167.74, 665.43 (1951). On bond borrowing see FLA. CONST. Art. IX, §6, quoted in text at end of V *infra;* FLA. STAT. c. 169 (1951). The loose and varying interpretations of these provisions by our Supreme Court and the great expansion of municipal financing by revenue bonds are fully treated in this issue by Patterson, *Legal Aspects of Florida Municipal Bond Financing,* and Rose, *Developments in Revenue Bond Financing.* For an excellent, detailed discussion of municipal debt and Florida municipal financing generally see KILPATRICK, REVENUE AND DEBT OF FLORIDA MUNICIPALITIES AND OVERLYING GOVERNMENTS (1953), a comprehensive joint study by U. of Fla. Bur. of Econ. and Bus. Res. and Pub. Adm'n Clearing Serv.

[86]FLA. STAT. §169.04 (1951).

pressly does not apply to "cities and towns which have special charters from the legislature." Furthermore the Court excludes from the computation all "revenue certificates," even in the erroneous sense that it had ascribed to this term.[87] The general law maximum on bonded debt of a municipality is ten percent of the assessed value of the real and personal property within the corporate limits, a figure that changes with the annual assessments.[88] This figure is a rubber tape, however, for three reasons. First, the homestead tax amendment and other grounds for exemption render approximately one-third in assessed value of all Florida realty immune to payment of its fair share — or indeed of any share at all — of the taxes required to finance the many benefits that its owners demand and receive as a free ride on the backs of their neighbors. Second, assessments vary widely from county to county and municipality to municipality in relation to actual value. Third, Florida tax assessors have never complied with the law commanding assessment at "full cash value," and the Supreme Court has consistently refused to enforce this law.[89]

Even with all these basic flaws in the yardstick prescribed, that yardstick is seldom used. One hundred twenty Florida cities of varying size and general location were recently studied, with the following result as regards debt limit:[90]

70	no limit
3	over 25%
9	21 through 25%
13	16 through 20%
21	11 through 15%
4	10% or under

[87]*E.g.*, Dickey v. Fort Lauderdale, 136 Fla. 241, 186 So. 427 (1939) (true revenue certificates); see also State v. Miami, 150 Fla. 270, 7 So.2d 146 (1942) (contract creating obligation to pay certain current expense annually is not within statutory prohibition if city has annual revenues sufficient to meet this and other current expense). The correct meaning of "revenue certificate" is contrasted with the Florida judicial definition in V, 4 *infra* under the subhead Motor Vehicle Parking.

[88]*E.g.*, Smith v. Milton, 61 Fla. 745, 54 So. 719 (1911).

[89]For a full discussion of FLA. CONST. Art. X, §7 (excluding up to $5,000 of assessed value of homestead realty from all taxation) and the action taken by assessors and the bench in disregard of FLA. STAT. §193.11 (1951) (prescribing assessment "each year" at "full cash value") see Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption: V*, 2 U. OF FLA. L. REV. 346 (1949), especially at 379-386.

[90]See KILPATRICK, *op. cit. supra* note 85, at 96-97.

Bonded debt far in excess of one hundred percent of assessed value is not unknown in Florida municipal history; and as a practical matter the only protection that the citizen has against being "improved" right out of his home is insistence upon a definite and reasonable bonded debt limit in the municipal charter, especially inasmuch as our Supreme Court permits constant diversion of tax revenues from municipal general funds by long-term pledge in the guise of what it has chosen to call "revenue certificates" or "revenue bonds." Even a bonded debt limit is no panacea, of course; the wise and frugal government espoused by Thomas Jefferson rests upon the constant vigilance of the citizens.

To return to the enumeration of standard general powers, every municipality has police power by virtue of a series of provisions encompassing not only police surveillance in the narrow sense, municipal court jurisdiction[91] and fire protection[92] but also numerous other activities within the basically familiar yet vaguely delineated area of health, safety and morals.[93]

4. Special Problems Related to General Powers

Certain special problems as to powers of cities arise in Florida because of the special efforts required of them in providing services for tourists in addition to expanding their functions to meet the increasing demands made on all modern cities. These problems merit specific mention. The powers themselves are frequently referred to as special powers, but they acquired the term "special" simply because they were not common enough to be uniformly enjoyed through-

[91]FLA. STAT. §168.01 (1951) (police); FLA. CONST. Art. V, §§1, 34; FLA. STAT. §§168.02-168.04 (1951) (municipal or "mayor's" court); see Fogle, *Municipal Court Practice,* in this issue.

[92]FLA. STAT. §§167.21 (broad authorization), 167.45 (special annual tax authorized), 167.62-167.64 (2 shifts of firemen prescribed for cities of 15,000 or more) (1951). See also §§167.51-167.56 (steam boiler inspection and licensing of stationary steam engines in cities of over 5,000), 168.06 (power to regulate storage of gunpowder and military and naval stores), 168.10 (power to prohibit sale of fireworks).

[93]FLA. STAT. §167.05 (1951) (power to prevent and abate nuisances and preserve public health); see all of c. 168 (power to establish markets; to inspect and regulate sales of fresh provisions, to license and regulate hotels, bars, theaters, and other houses for public entertainment; to prohibit houses of ill fame and gambling; to impound animals running at large; to prevent water pollution; and to penalize sellers of liquor if city is in "dry" county); §§561.36, 561.44(1) as relating to §§561.26, 561.34, Ragozzino v. Lake Maitland, 54 So.2d 364 (Fla. 1951) (upholding refusal under ordinance to issue municipal retail liquor sale license in excess of quota established, even though applicant had license from state beverage director).

out the United States until recently or perhaps not even now. Once granted by general law they are truly "general" powers in the state granting them. They are here considered under the following headings: hospitals, recreation, advertising and public events, airports, seaports, public housing, and motor vehicle parking.

Hospitals. Since 1935 Florida cities have been empowered by general law to construct, maintain and operate hospitals,[94] and even prior to that date many cities had obtained this authority by special act. A major problem created by this power is overlap with recognized county governmental functions; many counties have established hospitals of their own.

Recreation. Recreational facilities in the form of playgrounds and parks are familiar municipal services. So is the old town band that most of us recall from boyhood days. This function has been largely taken over by primary and secondary schools and by civic and fraternal organizations, with results somewhat less musical, especially in the clarinet and baritone horn sections, but far more educational. The blend is ended but the authority lingers on.[95]

Florida cities usually maintain additional facilities for tourists and residents. The Supreme Court has held that municipal authority to maintain a park carries with it authority to maintain a bathing beach,[96] and since 1935 general law has added golf courses to the list of city activities authorized.[97] The safe rule, however, is to list powers of this type specifically in the charter.[98] Municipalities can make reasonable charges for recreational facilities and other services designed to benefit the user individually and directly.[99]

[94]FLA. STAT. §180.06(7) (1951). Whether there is any significance in the fact that the same powers were granted for golf courses at that time is left to golfing readers.

[95]FLA. STAT. §167.67 (1951) (authorizing tax of not over 2 mills annually). §167.68 wisely permits desubsidization of municipally financed outfits with more enthusiasm than skill.

[96]Ide v. St. Cloud, 150 Fla. 806, 8 So.2d 924 (1942) (imposing tort liability on city for death from drowning in deep hole in park lake maintained as public bathing beach though not owned by city).

[97]See note 94 *supra.*

[98]Several early decisions refused to authorize expenditures for golf courses when the charter had no such provisions, *e.g.,* Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938); Bradentown [*sic;* today spelled "Bradenton"] v. State, 88 Fla. 381, 102 So. 556 (1924).

[99]See note 84 *supra* and text thereat.

Advertising and Public Events. Special acts or special charter provisions permit some cities to expend their funds for advertising and for support of public events.[100] They accordingly purchase advertising in periodicals of national circulation, promote public events such as conventions, and engage in other activities in aid of the tourist industry. Powers of this nature are vital to the nation's playground and should be specified in the charter.

Airports. The Airport Law of 1945,[101] superseding the statute passed sixteen years earlier,[102] empowers our municipalities[103]

> ". . . to acquire property, real or personal, for the purpose of establishing, constructing and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within or without the territorial limits of such municipality and within or without this state . . . ."

The city can lease this property and these facilities, or space or equipment thereon, to private parties, any municipal or state government, the Federal Government, or any of their departments for operation for a term not exceeding thirty years, and can sell any part thereof to any of these public agencies.[104] It can also sell to anyone property so acquired but not needed, and can grant concessions for furnishing goods, facilities and services,[105] including ground transportation of passengers.[106] The authority embraces airports on land or water.[107]

Other statutes provide comprehensive powers and procedural instructions for airport zoning[108] and for airways and emergency landing

[100] *E.g.*, Charter §3 (38), in WEST PALM BEACH CITY CODE (1948, unchanged in Supp. 1951).

[101] FLA. STAT. c. 332 (1951).

[102] Fla. Laws 1929, c. 13569, §§1-4.

[103] FLA. STAT. §332.02 (1951). Property acquired by a municipality pursuant to this chapter is tax exempt, §332.05.

[104] FLA. STAT. §332.08 (1951).

[105] *Ibid.*

[106] FLA. STAT. §§331.14, 331.15 (1951). Any such franchise may be exclusive.

[107] FLA. STAT. §332.10 (1951).

[108] FLA. STAT. c. 333 (1951). See also §330.35 (collaboration with Florida State Improvement Commission in zoning airport hazards).

fields;[109] but municipalities are forbidden ". . . to collect a license or registration fee or tax on any aircraft or glider in this state."[110] As regards the nature of the airport operation function, the Supreme Court has declared it proprietary rather than governmental, at least when the airport is used commercially in whole or in part.[111]

Seaports. Harbor facilities are of obvious importance in most coastal cities; and municipal authorization by general law to construct wharves, quays and docks, to regulate mooring and anchorage of vessels within the corporate limits, and to establish ferries dates at least from 1869.[112] This field of activity also includes authority to construct yacht basins.[113]

Public Housing. Broad authority has been granted to cities of over twenty-five hundred to undertake nonprofit public housing and defense housing projects pursuant to detailed statutory provisions[114] empowering the city to take any real property by eminent domain,[115] to sell, lease or otherwise dispose of any of its property,[116] to enjoy exemption from all nonfederal taxes and even special assessments,[117] to hold all such realty free from execution,[118] to issue tax-free debentures,[119] and to bargain away local control in return for federal

[109]FLA. STAT. c. 331 (1951).

[110]FLA. STAT. §330.17 (1951).

[111]Peavey v. Miami, 146 Fla. 629, 1 So.2d 614 (1941).

[112]Fla. Laws 1869, c. 1688, §15, now FLA. STAT. §167.21 (1951). Oddly enough FLA. CONST. Art. III, §20 forbids special or local laws for establishing ferries.

[113]State v. Clearwater, 135 Fla. 148, 184 So. 790 (1938); see FLA. STAT. §167.73 (2) (1951), enacted in 1943, expressly authorizing a charge for the use thereof.

[114]The Housing Authorities Law (1937, later amended) appears in FLA. STAT. §§421.01-421.26 (1951), the Rural Housing Authorities Law of Florida (1941) in §§421.27-421.36 (for counties only), and the defense housing provisions in §§421.37-421.51. The chapter ends, §421.52, with a 1943 curative provision covering action taken under the first two statutes named above. See also c. 422, the 1937 Housing Cooperation Law, directing each city to appropriate out of its general funds amounts sufficient to meet the administrative expenses and overhead of its housing authority and authorizing it to loan or donate money thereto, and authorizing any state public body to exercise broad cooperative powers with or without consideration.

[115]FLA. STAT. §§421.08 (4), 421.12 (1951).

[116]FLA. STAT. §421.08 (4) (1951). But see notes 123, 124 *infra* and text thereat.

[117]FLA. STAT. §423.02 (1951).

[118]FLA. STAT. §421.20 (1951).

[119]FLA. STAT. §§421.14, 423.03 (1951); see also §§412.15-421.19. These debentures are closely akin to revenue certificates properly so called, although the housing

aid.[120] All city housing projects are subject to its planning, zoning, sanitary and building regulations.[121]

Municipal construction and operation of these projects via a public housing authority has been upheld as a legitimate public function;[122] but *Adams v. Housing Authority of Daytona Beach*[123] has recently branded as unconstitutional the condemnation of private property, as part of a broad slum clearance and public housing plan, for disposition of one area of the project to private owners for exclusively industrial and commercial use and personal profit.[124] The city tied in this slum clearance scheme with low-cost housing by constructing in another area, zoned as residential, a project comprising one hundred dwellings for which fifty-two of the sixty families to be displaced by the challenged clearance would be financially eligible.[125] The area to be condemned was, however, expressly zoned for industry and commerce; residences in it were prohibited. The opinion concedes that construction of low-cost housing is a public purpose justifying the exercise of eminent domain, and that incidental disposition to private persons of small unneeded portions of the property so acquired

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authority can pledge its (not the city's) general funds too.

[120]FLA. STAT. §421.21 (1951).

[121]FLA. STAT. §421.13 (1951).

[122]Lott v. Orlando, 142 Fla. 338, 196 So. 313 (1939) (upholding city construction of low-cost housing for Negro families, outside city limits, with city obligated to furnish housing authority with municipal services, facilities, and streets for tenants without cost to other inhabitants of city); Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938) (upholding city-owned low-cost housing project, exempt from all ad valorem taxation and financed by an issue of 60-year debentures, to be purchased 90% by FHA and 10% by private investors, secured by pledge of rents and other income from project plus small FHA grant; no freeholder vote).

[123]60 So.2d 663 (Fla. 1952). Opinion by Mathews, J., with 4 justices concurring and Terrell, J., dissenting.

[124]Contravening FLA. CONST. Decl. of Rights §1 (equality before law to acquire, possess, and protect property), §12 (due process and just compensation for seizure of private property); Art. IX, §§5, 10 (no municipal tax revenues, appropriations, or pledge of credit for private party); Art. XVI, §29 (no appropriation of private property or right of way to use of any corporation or individual until full compensation, set by jury of 12 men, is made to owner or secured by deposit of money). The Redevelopment Plan under attack authorized determination of fair value by independent appraisals by two qualified local appraisers.

[125]Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 667 (Fla. 1952). The majority quotes this provision and then supplies, from somewhere out of the blue, its own notion that there is no connection between the two projects.

would be permissible.[126] The flaw in the Redevelopment Plan, according to the majority, lay in combining, even though done in accordance with the city general zoning plan, two projects of which one contemplated housing and the other proposed both disposition to private persons and use for purposes exclusively industrial or commercial.[127]

If we accept the premise that the housing under construction had in fact no relation to this second proposed development[128] the propriety of employing the method adopted in order to make the area useful still faces us. On this score the majority obviously fears that the judiciary cannot effectively draw a line if it once sanctions any public seizure for private industrial use, and that abuse of the power will get out of hand.[129]

The opinion fails to consider seizure of property by eminent domain for use at a profit as a privately owned railroad or power plant, but some comparison should be of assistance. One distinction is that these industries have long been recognized in our society as public utilities, as enterprises requiring total or partial monopoly and the power of eminent domain, whereas most other forms of industry and commerce have not been so classified in a type of government based on private enterprise and competition regulated to varying extents.[130] On the other hand, railroads and power plants do not confine their condemnations to slums and blighted areas; they not infrequently take, and unavoidably ruin, good residential or shopping districts.

The majority regards the police power as adequate to cope with the situation; in other words, a combination of zoning mandates prohibiting further residential use, coupled with standard assessments and annual ad valorem taxes, can effectively force either private sale or conversion to the assigned uses, the alternative being heavy and continued financial loss to the current owner.[131] The position of

[126]*Id.* at 665, 667. The statements are not made affirmatively, but the implication is obvious.

[127]*Id.* at 667.

[128]*Id.* at 667, 668; see also note 125 *supra.*

[129]*Id.* at 668, 669.

[130]Businesses "affected with a public interest," even though enjoying none of the advantages of public utilities, can nevertheless be very strictly regulated, *e.g.*, Nebbia v. New York, 291 U.S. 502 (1934). No one has to date stated precisely, however, just what factors "affect" a normal business with a "public interest."

[131]Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 666 (Fla. 1952), citing as an example of police power effectivity the extreme reached in Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950), a highly questionable

Mr. Justice Terrell, dissenting, is that choosing between employment of police power, with its lack of any reimbursement for resulting loss of income, and eminent domain, with its constitutionally prescribed fair compensation, is properly a prerogative of our Legislature, whose finding of public necessity, if it means anything in the one instance, means just as much in the other.[132] He is not convinced that slum clearance, whenever dependent on use by private industry of a substantial area of the property condemned in the overall project, loses its public character and reliance on the power of eminent domain.

The practical effect of the *Adams* decision is that wherever dilapidated residences are town down, pursuant to eminent domain proceedings, either low-cost housing alone must go up or some publicly owned facility must be constructed. Overall zoning plans have suffered a major blow in this almost unique Florida holding.[133] Furthermore the opinion strongly implies that any new housing facilities must be publicly owned, at least from a legal standpoint, and publicly operated.[134]

The majority professes to take up the cudgels in defense of the private enterprise system.[135] The ironic twist is, however, that in practice the result is quite the opposite. As in *Marvin v. Housing Authority of Jacksonville,*[136] a municipality without ready cash — and few if any enjoy large reserve funds — must borrow the money. The prodigal dispenser is the Federal Government, which not only imposes its own controls in lieu of local law as a part of the contract but also gets its funds by means of high taxes, social security payments, and other contributions forced from those very businessmen that *Adams* purports to protect against governmental intrusion into private enterprise.

From another angle, the decision poses a further serious practical problem, namely, is strict circumscription of the power of eminent

2-1 decision permitting the city first to authorize construction of a filling station and, shortly after construction, to change its mind and forbid operation without one cent of compensation to the owner for the substantial loss forced upon it.

[132]Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 671-672 (Fla. 1952).

[133]*Id.* at 672. The great weight of authority on the same constitutional issues is *contra;* see Fordham, *The Challenge of Contemporary Urban Problems* nn. 17-28 and discussion thereat, in the opening article in this issue.

[134]Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 667-668 (Fla. 1952).

[135]*Id.* at 668-669.

[136]Summarized in note 122 *supra.*

domain worth the price set by the Court in Florida? That price, for the city, is continuance of blighted areas that lower values of adjacent property and yet are legally immunized by the Court against all private development, plus heavy loss of tax revenue unless the property is assessed at what its value should be if properly utilized, and in addition the serious crippling if not virtual elimination of intelligent long-range zoning plans. For the individual owners, including the many that desire to join hands in cleaning up filth and slums, the price is heavy-handed wielding of the police power and restriction of all to the pace set by the most backward owner in the area, with substantial loss of income to every owner in it. The police power approach is typically judicial, lengthy and negative rather than positive. No Florida city has as yet felt keenly the stranglehold of expanding slums, but the plight of New York City presents a preview of what can happen here if our bench forces Florida to sit and wait.[137]

[137]The acuteness of the problem is presented in a recent authoritative report by experts in the various fields of knowledge involved. This is ably summarized in N.Y. Herald Tribune, Aug. 31, 1953, p. 1, col. 4, which is accordingly quoted at some length:

> "Frederick H. Allen, president of Harrison, Ballard & Allen, Inc., city planning consultants, a member of the committee, explained that 'middle and upper income groups' means families paying rent of $19 or more a room a month and with an annual income of $4,500 or more.
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> "The statement was signed by Louis Pink, president of the United Housing Foundation and former chairman of Associated Hospital Service; Peter Grimm, board chairman of William A. White Co., realtors; Edwin S. Burdell, president of Cooper Union; Robert W. Dowling, president of City Investing Co.; Paul Windels, former Corporation Counsel of New York; Earl B. Schwulst, president of the Bowery Savings Bank, and Mr. Allen.
>
> "Their report said: 'In the past decade, New York has lost more than half a million persons in the middle and upper income groups. Many of these people have relocated in suburban counties, either commuting to their New York jobs or finding new employment outside of New York City. At the same time, New York has acquired a slightly higher number of newcomers in the lower income brackets. The impact on the economy of the city is obvious, and the racial problems linked to housing have been sharply increased.'
>
> ". . .
>
> "Quarters for housing families dislocated in slum-clearance projects are inadequate, and the city's 50,000 old-law tenements cannot be wiped out and replaced by subsidized modern elevator apartments 'without an unbearable increase' in the tax load.
>
> " 'New York City is competing not only in housing, but in employment opportunity and community living with its suburban areas. Better schools,

Motor Vehicle Parking. The pressing modern problem of automobile parking in downtown areas led in 1951 to general legislation conferring upon any municipality additional powers to construct, equip, maintain and operate parking facilities and install parking meters.[138] Permissible facilities include lots and terminals or other structures, which may be multilevel and above or below surface, as well as waiting rooms and lockers; and the nature of the structures may take into account use by trucks and busses.[139] The municipality can acquire lands and rights for parking facility purposes by eminent domain, can lease them in whole or in part for any term,[140] and can charge for the services rendered.[141] The property is exempt from all taxation within the state and even from assessments.[142]

The project can be financed by "revenue bonds" secured by pledge of parking facility and meter revenues.[143] Indeed, the ordinance authorizing issuance may contain not only regulations regarding use and operation of the facilities but also[144]

> ". . . provisions regulating one-way traffic and limiting or prohibiting the parking of motor vehicles on the streets . . . and such provisions shall be deemed to constitute a part of the contract between the municipality and the holders of bonds . . . and, except as otherwise provided in such ordinance, shall be irrepealable while any of such bonds shall be outstanding and unpaid."

This freezing, by contract with private parties, of municipal authority to control traffic, heretofore traditionally a governmental rather than proprietary function, marks a radical shift in Florida law. So, under

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better playground and recreation facilities, convenient local shopping, ability to use and store private automobiles and a more personal stake in local affairs must be recognized as some of the things people now look for when they seek better housing.'

"No significant progress can be made without encouraging private enterprise to do more in building new and renovating old housing."

138FLA. STAT. c. 183 (1951), enacted as Fla. Laws 1951, c. 26918.

139FLA. STAT. §183.02 (3) (1951).

140FLA. STAT. §183.03 (5), (6) (1951).

141FLA. STAT. §183.03 (3) (1951).

142FLA. STAT. §183.14 (1951).

143FLA. STAT. §§183.04-183.10 (1951).

144FLA. STAT. §183.11 (1951).

the *Adams* decision,[145] will any attempt to lease all the facilities to a private party for his operation and commercial gain.

The July 10 decision in *Gate City Garage, Inc. v. Jacksonville,*[146] validating a city bond issue proposed by ordinance under the authority of special acts[147] similar in many respects to the 1951 general statute here summarized, merits close scrutiny. It confirms the familiar principles that our Legislature is the fountainhead of all municipal power, that traffic regulation is a public function, that government competition with private business is not forbidden by the Florida Constitution if for a purpose declared public by the Legislature with judicial approval, and that the incidental lease to a private party of a portion of a facility not needed or the grant of a concession thereon to serve the public convenience does not vitiate the propriety of eminent domain in acquiring the facility. It also endorses the contentions that off-street parking is a part of such regulation and that on-street and off-street parking are closely related and can be combined in one plan. The opinion points out, however, that ". . . there is no legislative authority to sell the land in question or to lease the entire property to some private individual or corporation for private gain,"[148] and that the language in the ordinance forbidding sale or lease of the parking facility otherwise than as a whole is merely a contractual limitation on partial disposition and does not constitute authority to dispose of the facility at all.

The Court will have difficulty in permitting total or substantial disposition to private parties[149] without reversing the tenor of the *Adams* opinion;[150] in both instances private gain is achieved as the ultimate result by the exercise of eminent domain via the city as

[145]Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla. 1952), discussed V, 4 *supra* under Public Housing.

[146]66 So.2d 653 (Fla. 1953), a 5-2 decision with opinion by Mathews, J., joined by Roberts, C.J., Hobson and Drew, JJ., and Holt, Assc. J., and a well-reasoned dissenting opinion by Parks, Assc. J., joined by Terrell, J. The two circuit judges sat as associates in the places of Thomas and Sebring, JJ.

[147]Fla. Spec. Acts 1947, c. 24611, as amended, Fla. Spec. Acts 1951, c. 27635.

[148]Gate City Garage, Inc. v. Jacksonville, 66 So.2d 653, 659 (Fla. 1953). The quotation obviously refers to the special act alone; it overlooks the additional general law power of every city to lease all or part of its parking facilities for any term, FLA. STAT. §183.03 (6) (1951). The *Adams* decision throws serious doubt on the constitutionality of this provision, however; see notes 123-135 *supra.*

[149]Unless, of course, the public need for the project and its facilities has been removed by obsolescence, change in customs, or some other corresponding factor.

[150]See notes 123-135 *supra.*

straw-man, and certainly housing human beings properly is at least as important as "housing" vehicles. *Adams* can, however, be technically distinguished if the Court later takes a definite position and condemns industrial as distinct from housing use, rather than transfer to new private owners, as the real vice. It can also stress its holdings that in *Adams* the two subdivisions of the Redevelopment Plan were separate and distinct while in *Gate City* a parking lot formed an integral part of existing and future parking meters scattered around the city, although no valid basis for this differentiation has as yet appeared.[151]

The clearest issue in the case is the validity of the pledge of municipal credit without freeholder vote;[152] and any determination of this issue necessarily swings on the nature of the pledge.

In view of the hopeless confusion in the law of Florida as to what a revenue certificate is, some explanation is long overdue. To anyone experienced in finance and familiar with its terminology a revenue certificate is an obligation secured by pledge of the net income of the facility acquired, constructed, enlarged or repaired with the proceeds of the loan. Operating and maintenance expenses are deducted from gross income before the net is reached, and a self-sustaining facility is always contemplated. The security does not include a lien on physical plant and equipment, and a fortiori it does not include a pledge of general credit or tax proceeds, especially when the sources of these are independent of the facility.

The Florida Supreme Court in earlier days recognized these principles.[153] Gradually, however, in a rambling process skillfully

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[151]What the Court overlooks is that parking one's car near the office or the shopping center is not the only or even the primary factor in selecting a place to live. No responsible parent wants to rear his family alongside industrial plants and railroad tracks; and conversely no industrialist welcomes the moral and financial hazards of having uncared for, and in many instances unwanted, youngsters swarming around his machinery and other equipment. All laymen, and most jurists, realize as a matter of common sense that the two do not belong together.

[152]Due process, state and federal, is also an issue, inasmuch as the property of a private party engaged in uncriticized operation of an allegedly needed facility is being seized by the city through eminent domain for the very same purpose and, unless the ordinance is invalid, can be turned over to another private party to operate for his own profit.

[153]*See, e.g.*, the able and correct exposition by Davis, J., in Boykin v. River Junction, 121 Fla. 902, 907-911, 164 So. 558, 560-562 (1935), approving the analysis in State v. Miami, 113 Fla. 280, 288-297, 152 So. 6, 9-12 (1933).

traced by Patterson in this issue,[154] it gravitated through various stages to the unique Florida definition of a revenue certificate as an obligation secured by pledge of tax proceeds along with net income, although this earmarking and siphoning off of the revenues from almost all types of taxes obviously depletes the residue, or general funds, as a matter of elementary economics. As a result the freeholders alone are left to keep the general funds supplied by ad valorem taxes with whatever is necessary to run the municipality for the benefit of those enjoying a free ride. The Constitution specifically forbids any pledge of the freeholders' credit without their consent; and the need for the 1930 amendment is or should be apparent to all that have witnessed the dreaming, scheming and profligate spending on the credit of someone else indulged in during a "boom."[155] In any event, change in this provision, if the people of Florida desire one, should be effected by amendment — not by the bench.

The Court has now reached a new high in *Gate City*;[156] taken at face value this decision means that a municipality can today constitutionally surrender its police power by private contract and can pledge its general funds by covenanting to operate police power facilities after pledging their gross income — all without freeholder vote. The only move remaining in the judicial repeal of Article IX, Section 6 of our Constitution is financially a minor one, namely, the pledging of general funds and ad valorem taxing power in one forthright step rather than in two.

Specifically, the security in *Gate City* consists of the net revenue from the proposed off-street parking facility and the gross revenue from existing and future on-street parking. The city in one breath disclaims any liability out of its general funds and yet in another promises to complete the parking lot construction, to maintain it in good condition and operate it efficiently, and to maintain, operate and charge for the use of its parking meters while diverting every cent of income from them to any extent needed to meet bond amorti-

[154]*Legal Aspects of Florida Municipal Bond Financing.*

[155]FLA. CONST. Art. IX, §6, quoted in text at end of this part V. Note the contemporaneous explanation to this effect given by Brown, J., for a unanimous Court in Sullivan v. Tampa, 101 Fla. 298, 314, 134 So. 211, 217 (1931). For a similar explanation by Mathews, J., only one year before his reversal of position in *Gate City*, see State v. Florida State Imp'vt Comm'n, 60 So.2d 747, 750-752 (1952), especially his condemnation of any "scheme" to transfer money of ad valorem taxpayers to bondholders without freeholder vote, *id.* at 754.

[156]Gate City Garage, Inc. v. Jacksonville, 66 So.2d 653 (Fla. 1953).

zation and any additional construction costs. The special act even authorizes the pledge of city general funds, but the city did not find a direct pledge of these necessary; instead it siphons its general funds, masquerading as parking meter operation and maintenance expenses paid from these funds, into bond security by pledging the gross, not just the net, parking meter revenues.

Furthermore the city freezes its present and future police power, a strictly governmental function, by contract with private individuals. The Court squarely categorizes parking meter operation as an exercise of police power.[157] Only a few months earlier, in *State v. Miami,*[158] it flatly forbade the pledge, without freeholder approval, of general funds accruing from exercise of the city police power in the form of proceeds from municipal court fines and forfeitures, yet it does not expressly overrule that decision in *Gate City.* It flatly ruled in *Panama City v. State,* less than a year before deciding *Gate City,* that[159] ". . . Panama City cannot by contract tie its hands and bind itself in such manner as to relinquish for a long, possibly indefinite, period of time its sovereign right and duty under the police power to regulate traffic." Mr. Justice Mathews, who wrote the *Adams* and *Gate City Garage* opinions, concurred in the opinion by Mr. Justice Hobson, who concurred with Mr. Justice Mathews in the other two cases; and both joined Mr. Justice Terrell in *State v. Miami.* Furthermore, in *Panama City* the invalidated pledge reached only the "excess parking meter revenues."[160] that is, the net rather than the gross. The *Gate City* opinion struggles manfully to get around the *Panama City* decision by holding that increasing the number of lanes and the speed of moving traffic by widening, repairing and otherwise improving

[157] *Id.* at 656-657.

[158] 63 So.2d 333 (Fla. 1953), Sebring and Roberts, JJ., dissenting (holding invalid the proposed pledge of city fine and forfeiture fund to finance construction of a city stockade in aid of police department). Violation of FLA. CONST. Art. IX, §6 was specifically assigned in the opinion by Terrell, J., who quite logically dissented in *Gate City.*

[159] 60 So.2d 658, 660 (Fla. 1952), a 4-1 decision with opinion by Hobson, J., joined by Sebring, C.J., and Thomas and Mathews, JJ., and with dissent by Terrell, J.; *accord,* Chase v. City of Sanford, 54 So.2d 370 (Fla. 1951) (holding invalid the proposed pledge of net port terminal and net parking meter revenues to service issue of bonds for construction and operation of port terminal facilities; no freeholder vote; police power over parking meters frozen by bond contract).

[160] 60 So.2d 658; the annual net amount, as stated at 659, was $27,000. In *Gate City* the Jacksonville annual gross parking meter revenue was approximately $90,000, half of which was consumed for operation and maintenance.

the streets is not a remedy for congestion under the police power but that doing the same thing by moving parked cars off the street and into parking lots does relieve congestion.[161] The distinction is, to say the least, somewhat nebulous.

As a result of these decisions the third and either the first or second of these conclusions is logically inescapable today:

(1) The police power can now be exercised for profit and its future course bargained away irrevocably for many years by private contract.
(2) Parking meter operation is no longer within the police power but is instead a proprietary function, and use of the public thoroughfares warrants a charge as a special service to each user.
(3) General funds can be pledged if the maneuver is adroitly executed in two steps rather than in one; and a carefully drafted limitation clearly expressed in our Constitution stands repealed by a stroke of the judicial pen, specifically the unequivocal mandate that[162] ". . . Municipalities of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such . . . Municipalities shall participate . . . ."

One can confidently predict, of course, that the Court will not openly endorse any of these results. Instead, at least one of these decisions will be distinguished without any difference or will be simply overlooked.[163] The practitioner, however, enjoys neither method of escape. In this particular field our Supreme Court has turned out, from a ratio standpoint, more opinions and less law than in any

[161]Gate City Garage, Inc. v. Jacksonville, 66 So.2d 653, 657 (Fla. 1953). Conversely, the Court stated recently, expressly and unanimously in Chase v. City of Sanford, 54 So.2d 370, 372 (Fla. 1951), that paving streets is related to traffic regulation. The *Panama City* judgment can properly be sustained on one of the grounds given in that opinion, namely, that street improvement is not a revenue-producing undertaking and hence falls outside the statute offered as the source of authority; but the alternative holding advanced in the opinion is the unconstitutionality of freezing police power by contract.

[162]FLA. CONST. Art. IX, §6; see notes 153-156 *supra* and text thereat.

[163]Two illustrations of what this prediction is based on appear in notes 210-214 and 236-241 *infra* and the text thereat.

other. The constitutional or financial lawyer cannot with any confidence advise his clients as to what the law is; he can merely relate, after the next decision, what it was for a time.[164]

VI. Expansion and Annexation

In a rapidly growing state, expansion of urban communities is inevitable. Human interest factors make annexation a highly complicated field from the legal standpoint, especially when this procedure is considered in connection with the numerous types of intercity agreements. The notorious Florida real estate boom, followed by the depression of the late 'twenties and early 'thirties, evoked a veritable bombardment of our judiciary with old and new legal missiles. Adequate analysis of its rulings in this battle of overgrown amoebas demands a lengthy article — yet to be written by someone. Such an undertaking should cover initial boundaries, annexation, and intercity agreements, as well as the niceties of procedure in these areas raised by successful and unsuccessful attempts to resort to quo warranto, injunction, mandamus, and bond validation skirmishes. The task entails tracing the trends gradually forming among several hundred cases, including the running battle between those two giants of Florida municipal law, Armstead Brown and James B. Whitfield.[165]

Two procedures are available for annexation of areas adjacent to Florida cities: (1) favorable vote by residents both of the annexing city and of the area to be annexed;[166] and (2) special legislation, with or without referendum approval. This second procedure, however,

[164]This confused wavering stands out the more because it is not at all typical of the trend-building of the Florida Supreme Court in most fields.

[165]Each served for many years on the Supreme Court, as justice and chief justice. Their struggles extended through the bases of de facto jurisdiction, the grounds for invoking estoppel or laches, the propriety of quo warranto as against injunction, and the legislative power under Fla. Const. Art. VIII, §8 as against powers inherent in the very nature of local government. Crystallization of the law lay at the end of a long and tortuous road, and in some respects the end is not yet in sight.

[166]Fla. Stat. c. 171 (1951). City limits may also be contracted, §§171.01, 171.03; and any landowner or 3/4 of the electors (presumably; the statute is very poorly drafted) in towns of under 150 qualified electors may petition the circuit court for exclusion of their area if the lands are shown to be "virtually or commensurately excluded from the benefits of such municipal organization," §171.02, Ocoee v. West, 102 Fla. 277, 130 So. 9 (1930); *cf.* McCombs v. West, 155 F.2d 601 (5th Cir. 1946). For the decidedly different procedure by resort to quo warranto see notes 41, 42 *supra* and 183 *infra*.

if once used excludes all general law methods; if the boundaries are at any time fixed by special act, then only a later special act or action expressly authorized thereby may change them, and no general law authority to enlarge boundaries is applicable.[167]

The Court has recently clarified the law in the excellent opinion by Mr. Justice Sebring in *Ocoee v. Browness*,[168] overruling conflicting implications. The Legislature can, by special as distinct from general statute, not only redefine boundaries itself, subject to organic limitations, but also authorize the municipality to take such action in a specified manner. The authorization must, however, be "specifically granted."[169] The philosophy is sound; if the Legislature decides that a designated municipality is capable of working out the details of expansion in a specified manner there is no reason why the Legislature should be barred from granting this authority and thereby forced to formulate all details in the statute in order to act at all. The decision still leaves the Legislature free to withdraw any grant by subsequent special act or to nullify de jure its exercise if unsatisfactory; and of course the usual constitutional limitations apply to any purported exercise. As a practical matter this decision marks a significant step towards local determinations for any municipality that by special act secures an amendment of this type to its charter.

1. General Law Annexation by Vote

Four separate types of procedure are recognized by general law for extension of city limits into adjacent territory when general law provisions are applicable at all. The first two relate to expansion into unincorporated tracts; the third relates to annexation of either incorporated or unincorporated territory; and the fourth governs annexation of one municipality by another. The first three hinge on a confused statutory attempt at classification by population.

Tracts with Less than Ten Registered Voters. When the adjacent tract cannot boast even ten registered voters the council of the annex-

[167] *E.g.*, Beaty v. Inlet Beach, Inc., 151 Fla. 495, 9 So.2d 735 (1942); State *ex rel.* Davis v. Homestead, 100 Fla. 354, 130 So. 28, *aff'd on rehearing with opinion*, 100 Fla. 361, 130 So. 32 (1930).

[168] 65 So.2d 7 (Fla. 1953), a 5-2 decision with Thomas and Hobson, JJ., dissenting without opinion. This answers definitely the question recognized but left unanswered as not necessary to the decision in State *ex rel.* Landis v. Hollywood, 130 Fla. 364, 178 So. 412 (1937).

[169] 65 So.2d 7, 11 (Fla. 1953).

ing city enacts an ordinance announcing the annexation, which, failing objection, becomes effective in thirty days. The ordinance must be published once a week for four consecutive weeks in a newspaper published in the town or city, or, if no paper is published, three printed copies must be posted for four consecutive weeks at some conspicuous place in the city or town and at three conspicuous places in the district to be annexed. Ten or more registered voters of the municipality, or two or more realty owners in the district to be annexed, can object by filing in the circuit court a petition setting forth their grounds for objection. Further action is thereupon stayed until hearing, after which the court may approve or disapprove the proposed annexation.[170]

Tracts with Ten through Ten Thousand Registered Voters. If the tract of land to be annexed has from ten through ten thousand registered voters separate elections must follow passage of the ordinance of annexation; the votes in the city and in the territory to be annexed must be counted separately; and two thirds of those actually voting "in said district and in said city or town" must approve.[171]

Cities of Over Ten Thousand Inhabitants. For cities of over ten thousand inhabitants the adjacent territory may be either incorporated or unincorporated, and the requirements for tallying the results are easier to meet; approval of the ordinance requires merely two thirds of the total votes cast in a special election.[172] A common drafting error is well illustrated by these provisions. The character of the bracket jumps from "registered voters" of the tract to be annexed to "inhabitants" of the annexing city. The inconsistency is obvious. Presumably this later statute would govern in the event of conflict, and the few hapless rural landowners wanted as taxpayers by a prodigal municipality would be relegated to the precarious remedy of litigation after being easily outvoted.[173]

Annexation of One Municipality by Another. A municipality desiring to annex another simply passes an ordinance expressing this desire and transmits it to the mayor of the other municipality for

[170]FLA. STAT. §171.04 (1951), enacted as Fla. Laws 1869, c. 1688, and amended in 1879.

[171]*Ibid.*

[172]FLA. STAT. §171.05 (1951), enacted as Fla. Laws 1905, c. 5464.

[173]The Florida judiciary has consistently been solicitous in protecting the interests of bondholders as against ad valorem taxpayers. Proof of no "prospective" benefits is difficult in the extreme.

council acceptance of the proposal. If the reaction is favorable the marriage is consummated by the approval of two thirds of those actually voting in each municipality at separate elections.[174]

2. *Special Act Annexation*

Inasmuch as any extension of boundaries once set or authorized by special act must be pursued in the same manner this procedure is ordinarily employed in Florida. Boundary extension provisions incorporated expressly or by reference in a charter adopted under general law procedure cannot override later or earlier annexation by special act;[175] but authority granted by special act, once it appears in the charter, can be freely exercised as long as the action taken remains within constitutional bounds and the authority is not plainly superseded by a later general or special statute.[176] Referendum is not required in special act procedure if the alternative notice specified in the Constitution is given.[177] An excellent recent illustration of this procedure is the acquisition by Tampa of some eighty thousand new inhabitants pursuant to special act duly advertised in advance of its introduction as a bill.[178] Two earlier attempts by referendum had failed;[179] but the Hillsborough County candidates for the 1953 Legislature openly advocated a third attempt in their election campaigns, so the public was well informed.[180]

3. *Basic Limitations on Annexation*

All annexation is subject to a number of limitations, which resemble rather closely those applicable to establishment of boundaries

[174]FLA. STAT. §171.09 (1951).

[175]Klich v. Miami Land and Devel. Co., 139 Fla. 794, 191 So. 41 (1939); State *ex rel.* Davis v. Homestead, 100 Fla. 354, 130 So. 28, *aff'd on rehearing with opinion,* 100 Fla. 361, 130 So. 32 (1930).

[176]See notes 167-169 *supra.*

[177]State *ex rel.* Davis v. Clearwater, 106 Fla. 761, 139 So. 377 (1931), *reaff'd on rehearing following vacating of original affirmance,* 108 Fla. 635, 146 So. 836 (1933) (Fla. Spec. Acts 1925, c. 10394, having been enacted without referendum); State v. Miami, 103 Fla. 54, 137 So. 261 (1931); *cf.* Nabb v. Andreu, 89 Fla. 414, 104 So. 591 (1925). See II, 1 *supra* in regard to notice today and the evolution of the constitutional mandates.

[178]Passed as Fla. Spec. Acts 1953, c. 29548.

[179]In 1947 and 1951.

[180]See Tampa Morning Tribune, April 28, 1953, p. 1, col. 1. The special bill passed the House and Senate in one day on April 27, and was approved by the Governor on April 28.

initially.[181] The services must of course be available, and the territory annexed must not be so sparsely settled or so extensive as to be unsuited to city services.[182]

The state can attack invalid annexation in quo warranto proceedings if public rights are adversely affected;[183] and landowners in the area can use this remedy today even if the attorney general refuses to join them.[184] Accordingly they should employ it more widely, although in former times they frequently resorted to injunction.[185] Perhaps they can still do so to test the legality of attempted taxation of their property by a purported municipality lacking both de jure and de facto jurisdiction; *Farrington v. Flood*[186] so holds and has not been questioned, although it antedates the latest extension of the use of quo warranto.[187] Logically, of course, quo warranto should lie to check any unauthorized exercise of a municipal franchise, but the Court might still sanction injunctive relief. A more likely use of injunction even today is challenging a tax levy imposed to meet bonded debt incurred during alleged de facto jurisdiction of the municipality prior to its ouster from the land of the complainant.[188]

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[181]See IV *supra.*

[182]*E.g.,* State *ex rel.* Ervin v. Oakland Park, 42 So.2d 270 (Fla. 1949); State *ex rel.* Landis v. Boca Raton, 129 Fla. 673, 177 So. 293 (1937); State *ex rel.* Att'y Gen. v. Avon Park, 108 Fla. 641, 149 So. 409 (1933), *modified on procedural grounds so as to afford relief,* 117 Fla. 565, 158 So. 159 (1934).

[183]State *ex rel.* Landis v. Winter Haven, 114 Fla. 199, 154 So. 700 (1934); State *ex rel.* Davis v. Pompano, 113 Fla. 246, 151 So. 485 (1933). But if no affected landowner complains the attorney general has no standing to file quo warranto by himself, alleging merely that any annexation of rural lands is per se contrary to the public interest, State *ex rel.* Johnson v. Sarasota, 92 Fla. 563, 109 So. 473 (1926). For the federal view see Morin v. City of Stuart, 111 F.2d 773 (5th Cir. 1940); federal courts lack quo warranto jurisdiction and are loath to issue an injunction in view of the confused state of the law in Florida on the propriety of this remedy.

[184]See notes 41, 42 *supra.*

[185]See, *e.g.,* Durham v. Pentucket Groves, 138 Fla. 386, 189 So. 428 (1939); Sarasota v. Skillin, 130 Fla. 724, 178 So. 837 (1937). The dissent of Brown, J., sharpens the issue.

[186]40 So.2d 462 (Fla., May 3, 1949); *accord,* Bass v. Addison, 40 So.2d 466 (Fla., May 3, 1949).

[187]See note 41 *supra.* FLA. STAT. §165.30 (1951), however, specifies challenge to "the validity of the municipal corporation wherein such lands are located, and the legal existence of its corporate franchises." It became law without the Governor's signature on June 13, 1949.

[188]For such use see Winter Haven v. A. M. Klemm & Son, 132 Fla. 334, 181 So. 153 (1938).

The aggrieved landowner cannot safely sleep on his rights, however; long delay, acquiesence, or acceptance of benefits will normally support a defense based on laches, estoppel, or both.[189] The Court has refused to indicate in advance the precise types of factual situations that give rise to laches or estoppel — and rightly so.[190] It has, of course, clearly set forth the basic legal characteristics of estoppel[191] as distinct from laches; but decision patterns cannot feasibly be formalized in areas depending largely on the equities of individual situations involving in each separate instance a dissimilar fact quantum and a relativity of weight that varies widely as the facts vary.[192] In these areas judgments ad hoc, with little assistance from precedents, are to be expected.

Even when expansion is ultimately voided the municipality may have de facto jurisdiction during the period of dispute.[193] In instances of valid expansion the annexing municipality acquires all public property, rights and franchises of the city or territory annexed and in turn becomes liable for all its public debts and obligations.[194]

[189]*E.g.*, General Properties Co. v. Rellim Inv. Co., 151 Fla. 136, 9 So.2d 295 (1942) (15 years' delay in seeking relief held fatal); Lake Maitland v. State *ex rel.* Landis, 127 Fla. 653, 173 So. 677 (1937) (1937 attack on annexation confirmed by Legislature in 1909 held too late); State *ex rel.* Landis v. Coral Gables, 120 Fla. 492, 163 So. 308 (1935) (laches); State *ex rel.* Davis v. Clearwater, 106 Fla. 761, 139 So. 377 (1932) (estoppel by accepting benefits from proceeds of bond issue). But see, for results that appear at first glance to be *contra*, Eagle Lake v. Adams, 146 Fla. 165, 200 So. 367 (1941) (action allowed in 1940 to void 1925 annexation); State *ex rel.* Landis v. Coral Gables, 129 Fla. 834, 177 So. 290 (1937) (delay of almost 10 years not fatal); State *ex rel.* Landis v. Boca Raton, 129 Fla. 673, 177 So. 293 (1937) (long delay not fatal per se if it has not prejudiced others).

[190]The Court has been forced by the nature of the material in question to invite review; as it observed, *e.g.*, in State *ex rel.* Landis v. Boynton Beach, 129 Fla. 528, 533, 177 So. 327, 329 (1937), ". . . each case must stand or fall on its own facts. . . . in some of them we held that delay was fatal in stated periods while in others we refused to do so."

[191]Whitfield, J., presents an excellent summary in New York Life Ins. Co. v. Oates, 141 Fla. 164, 175, 192 So. 637, 642 (1939).

[192]*E.g.*, what facts, and what relative weights, distinguish customary delay and normal human inadvertence from careless inaction and action inexcusably misleading?

[193]*E.g.*, Winter Haven v. A. M. Klemm & Son, 132 Fla. 334, 181 So. 153 (1938); State *ex rel.* Fidelity Life Ass'n v. Cedar Key, 122 Fla. 454, 165 So. 672 (1936); see the thorough analysis of de facto jurisdiction in the concurring opinion of Whitfield, J., in State *ex rel.* Harrington v. Pompano, 136 Fla. 730, 755, 188 So. 610, 620 (1938).

[194]FLA. STAT. §§171.06, 171.10, 171.14 (1951).

Whenever the expansion consists of annexation of one municipality by another the real property in each corporation is equally liable under our general law for the existing debts and obligations of the other[195] unless the expansion involves extension of limits by a city of over ten thousand inhabitants pursuant to Section 171.05 of Florida Statutes 1951, in which event the general law rule is the converse.[196]

Ever in the background is Article VIII, Section 8 of the Florida Constitution. The Legislature not only receives from it a confirmation of its inherent power to create, regulate and abolish municipalities by special act[197] but also is commanded to protect creditors upon abolition. It can, under its plenary power over municipalities, make the annexed territory liable along with the annexing municipality for debts of the latter incurred prior to annexation. In *State* ex rel. *Johnson v. Goodgame*[198] for example, it abolished by special act three towns and created a city comprising their inhabitants and boundaries and succeeding to their rights and liabilities. The two dissenters queried the adequacy of creditor protection as set up in the plan, but all the justices recognized the legislative power to prescribe succession to rights and liabilities, subject of course to organic limitations such as equal protection, geographical uniformity of taxation throughout the city, and due process.[199] The same legislative power that encompasses formulation of liability succession by general law embraces also formulation by special act, especially inasmuch as this latter method of manifesting the legislative will is not only not forbidden but is expressly confirmed.[200]

VII. Relations of City and County

The rapid growth of Florida cities, intensified during and since World War II, has extended considerably the overlap between counties and cities in both functions and officials. The growth of built-up

[195]Fla. Stat. §171.10 (1951). The same rule apparently applies upon consolidation of a city or town and a taxing district under §171.14.

[196]Fla. Stat. §171.06 (1951), governing §171.05 expansion.

[197]Subject in each instance to Fla. Const. Art. III, §21 procedure.

[198]91 Fla. 871, 108 So. 836 (1936); *accord,* State v. West Palm Beach, 127 Fla. 849, 174 So. 334 (1937).

[199]*Compare, e.g.,* State *ex rel.* Harrington v. Pompano, 136 Fla. 730, 188 So. 610 (1939), *aff'd on rehearing,* 136 Fla. 775, 188 So. 629 (1939), *with* Fahs v. Kilgore, 136 Fla. 701, 187 So. 170 (1939).

[200]For the history and ultimate combined effect of Fla. Const. Art. III, §§20, 21, 24, and Art. VIII, §8 see II, 1 *supra.*

areas outside city limits has further complicated local problems. In some instances the remedy has been expansion of city boundaries; in many others, as in Dade and Volusia Counties, the solution attempted has been the creation of satellite communities around the major city.[201] In still other instances county functions have been expanded so as to provide county zoning boards.[202] Finally, some consolidations of city and county functions have been effected, and a few proposals for complete city-county consolidation have been advanced. Having discussed annexation[203] we now turn to functional consolidation and rendition of services by cities outside their limits.

1. Consolidation of Functions

Consolidation of functions has occurred principally in such fields as tax assessment, tax collection, and registration for elections. A 1946 amendment to our Constitution empowered the Legislature to consolidate, in Orange County alone, any county offices not judicial, as well as to provide for county assessment and collection of municipal taxes.[204] Since 1944 several other populous counties have consolidated their city and county tax assessments, their tax collections, or both;[205] and an amendment proposing to consolidate the tax assessment function alone in Monroe County will be voted on in the general election of 1954.[206]

More important still, the 1953 Legislature has proposed for adoption or rejection next year a general amendment authorizing it at future sessions to require by special act that tax collectors or assessors of any county take over the same functions for cities in their respective counties. If this amendment is adopted the Legislature will

[201]The preliminary computation of the United States Bur. of Census for 1950 lists 18 satellite cities around Miami. By 1953 their number had increased to 25.

[202]See BARTLEY AND BOYER, MUNICIPAL ZONING, FLORIDA LAW AND PRACTICE (1950), U. of Fla. Pub. Adm'n Clearing Serv. Studies in Pub. Adm'n Ser. No. 6, as well as Bartley, *supra* note 71.

[203]See VI *supra*.

[204]FLA. CONST. Art. XX, §1; see also notes 207, 208 *infra*.

[205]This note gives the section numbers as corrected by the statutory revisor in the official version of the Constitution, rather than those erroneously assigned by the Legislature in its joint resolutions, and also shows dates of electoral adoption in parentheses: Hillsborough, FLA. CONST. Art. VIII, §§12,13 (1944); St. Lucie, *id.* §§14,15 (1948); Volusia, *id.* §§16,17 (1948); Broward, *id.* §§18,19 (1948); Pinellas, *id.* §§20,21 (1948).

[206]H.J. RES. No. 858, filed, Sec'y of State, June 15, 1953.

again possess beyond a doubt its inherent power[207] to institute functional consolidation of city and county assessments and collections "by general, special or local act," but with the limitation that ". . . no such act, except the provisions thereof for a referendum election, may become effective in any municipality until approved by a majority vote of the electors qualified to vote in such municipality."[208] The amendment is in one sense restrictive; mere notice as to special bills to be introduced pursuant to it will not suffice, inasmuch as referendum is expressly made a prerequisite to their effectivity. Whether the amendment enlarges legislative power substantially is debatable. The Constitution forbids "special or local laws . . . regulating the jurisdiction and duties of any class of officers, except municipal officers . . . ."[209] Nevertheless the Supreme Court has held, in *State* ex rel. *Armstrong v. Morgus*,[210] that municipal functions can be transferred to county officers by statute, leaving the ordinances intact and the old or enlarged boundaries as those of a special municipal district in which county officers execute the municipal functions as officers of the district.

The Court has for years construed the word "officers" in the quoted passage as equivalent to "offices"; the jurisdiction and duties of county offices cannot be changed by special act, but any county officer can be assigned extra noncounty functions.

This reasoning is fully set forth in *State* ex rel. *Landis v. Armstrong*,[211] following earlier decisions in upholding a special act directing the circuit court clerk to perform Pensacola municipal election duties. Later, however, the Court unanimously held in *Vassar v. Arnold*[212] that the St. Lucie County tax assessor could not by special

[207]FLA. CONST. Art. III, §20 forbade, right from the adoption of the present Constitution, special or local legislation on several items, including the jurisdiction and duties of any class of officers other than municipal, and also on assessment and collection of taxes for state and county purposes.

[208]H.J. RES. No. 851, filed, Sec'y of State, June 15, 1953.

[209]See note 207 *supra*.

[210]160 Fla. 215, 34 So.2d 113 (1948). Over objection that the statute violated FLA. CONST. Art. III, §20, mandamus was granted to require the referendum vote provided in Fla. Spec. Acts 1947, c. 24379, authorizing, upon favorable vote, abolition of the existing town of Arcadia and transfer of the duties of its city officials to the DeSoto County officials, who would thereupon function as officers of the Arcadia Municipal District, the successor municipal corporation. The vote on referendum was unfavorable.

[211]103 Fla. 121, 137 So. 140 (1931).

[212]154 Fla. 757, 18 So.2d 906 (1944). The judgment itself is fully sustained, how-

act be made ex officio the Fort Pierce assessor. The previous decisions to the contrary were not even mentioned, let alone overruled; the opinion simply states, as regards legislative imposition of extra administrative duties on state or county officers by special act, ". . . we have never extended this principle to municipalities."[213] This statement was contrary to fact. Less than a year later, in *Cooley v. State* ex rel. *Aldrich*,[214] the Court again executed an about-face and unanimously upheld a special act assigning to the Pinellas County supervisor of registration the duties of registration officer for Clearwater, without overruling or even mentioning *Vassar v. Arnold.*

The decided weight of Florida authority is that an assignment of municipal functions to county officers does not violate the Constitution, but the bench has apparently failed to recognize that it has two diametrically opposed lines of authority, with neither expressly overruled. The interpretation currently in vogue again is not far-fetched when the passage is read in its context;[215] and the result is a practical advantage to all concerned except, perhaps, that rare county official who finds himself saddled with more duties than he can handle.[216]

Just this year the Legislature by statute authorized abolition of the city government of Miami and transfer of its functions to the Dade County officers, subject to local referendum.[217] This time the constitutional question presented in *Morqus* was not raised, probably because of that decision. In any event, the proposal failed by a small margin to carry at the June 9 referendum.[218]

Another type of consolidation, attempted in Florida several times, has met with no success, namely, complete consolidation of cities and counties. Constitutional amendment is definitely necessary to transfer Florida county functions to city officers.[219] In 1934 an amendment

ever, on the ground that the ordinance contravened FLA. CONST. Art. IX, §5 (alternative holding).

[213]*Id.* at 759, 18 So.2d at 907.

[214]155 Fla. 703, 21 So.2d 347 (1945).

[215]The context indicates that this prohibition, like the others in FLA. CONST. Art. III, §20, was designed not primarily to shield state and county "officers" from extra administrative duties but rather to prevent random tinkering with county "offices" and their jurisdiction.

[216]In most instances the additional work entails no more than additional paper and stenographic assistance, which can and certainly should be furnished in view of the economy effected in overall operations.

[217]Fla. Spec. Acts 1953, c. 29280, filed, Sec'y of State, June 14, 1953.

[218]For vote results see Miami Herald, June 10, 1953, p. 1.

[219]See note 207 *supra.*

permitting consolidation of Duval County and Jacksonville was adopted,[220] but the county referendum specified in the amendment resulted in an unfavorable verdict. A similar amendment was adopted for Key West and Monroe County in 1936,[221] but the consolidation has not been put into effect. The question of partial or functional city-county consolidation is also under consideration for Tallahassee and Leon County,[222] and a commission financed by the city and county jointly has been established to consider the matter. The inquiry may lead to some degree of consolidation in at least one Florida county. In other states consolidation of county and city governments have been effected, for example Fulton County and Atlanta, Georgia, but in Florida no such sweeping proposals have succeeded to date.[223]

2. *Increased Rates for Services Outside City Limits*

The picture of problems and relationships between cities and the suburban areas adjacent would be incomplete without mentioning one other type of device or expedient, today in effect in many cities,[224] namely, an increase in utility rates for services supplied outside the city limits. Municipalities often make these extra charges for sewer and water services, and they may also impose higher electricity and gas rates if they serve as distributor. These charges are designed not only to meet in part the cost of added utility trunk lines but also to recover some of the costs of those services, such as fire protection and garbage collection, that are of benefit to suburban dwellers. Frequently the municipality extends its fire mains into adjacent sections, and its trucks go out on call as well. Its library and recreation facilities serve those within and without the city limits.

Despite these increased charges, however, those dwelling inside the city limits still pay more than their share of the costs. These procedures are at best stop-gaps; and pressure to annex suburban areas is building up, especially among citizens of the corporations furnishing the facilities.

220FLA. CONST. Art. VIII, §9.

221FLA. CONST. Art. VIII, §10.

222Fla. Spec. Acts 1953, c. 29244, filed, Sec'y of State, June 15, 1953.

223Organization of county government is not treated here. For consideration of this problem in Florida see DOVELL, FLORIDA'S COUNTY GOVERNMENT (1952), U. of Fla. Pub. Adm'n Clearing Serv. Civic Info. Ser. No. 13; COUNTY REORGANIZATION AND THE FLORIDA CONSTITUTION (June 1953), U. of Fla. Econ. Leaflets.

224See KILPATRICK, *op. cit. supra* note 85.

VIII. Methods of Revising or Amending Charters

Having already reviewed the procedure for the establishment of a city, the forms of government available, and the problems relating to its initial boundaries and powers,[225] we now examine the legal processes by which a city government already in existence can alter its form. Florida offers two: special act and statutory municipal home rule.

1. Special Act

The relative ease with which special legislation can be enacted prompts its use in the overwhelming number of new charters promulgated and in amendments to existing charters.[226] In practice all that is necessary is to secure approval of the change by the senator and the House delegation representing the county involved. Once their approval is obtained they introduce a special bill, passage of which in the House and Senate is automatic.[227] Yet, provided the bill has been duly advertised for thirty days in advance of introduction, inclusion of a referendum provision is optional, not mandatory.[228] A special bill of this type can not only amend partially an existing municipal charter or replace it entirely with another[229] but can also enlarge the territorial boundaries.[230]

2. Statutory Limited Municipal Home Rule

In the second form of procedure for amending partially or completely a Florida municipal charter the citizens of a city do the job themselves, pursuant to authority granted by general law.[231] The delegation of this power to municipalities by general law is consti-

[225]See II-V *supra.*

[226]The details of this special act procedure have already been considered; see II, 2 *supra.*

[227]See notes 178-180 *supra* and text thereat.

[228]Fla. Const. Art. III, §21; see II, 1 *supra.*

[229]State *ex rel.* Gibbs v. Couch, 139 Fla. 353, 190 So. 723 (1939). The Legislature can even abolish an existing municipal corporation, provide a new one, and empower the Governor to appoint the new municipal officials, as was done for Daytona Beach by Fla. Spec. Laws 1939, c. 19768, upheld in the *Gibbs* case, *supra.* When a municipality is abolished, however, provision must be made for protection of its creditors, Fla. Const. Art. VIII, §8; see notes 198, 199 *supra* and text thereat.

[230]See VI, 2, *supra.*

[231]Fla. Stat. c. 166 (1951), enacted as Fla. Laws 1915, c. 6940.

tutional;[232] but the scope of this general law grant is strictly limited by the opening section of the chapter to changes in local governmental structure, election machinery, and the manner of exercising municipal powers already granted. It does not authorize alteration of boundaries fixed by special act;[233] neither does it confer authority to assume by self-grant any powers beyond those conferred by special act[234] or general law. All constitutional limitations apply, of course, just as they do to a statute.

Shortly after the passage in 1915 of the limited municipal home rule general act[235] a city attempted to utilize these provisions to authorize itself by charter amendment to issue bonds for construction of a gas plant and for other improvements. Its charter did not at the time encompass such action. In reversing denial of injunction Mr. Justice Ellis, speaking for a unanimous Court, stated emphatically in commenting on the 1915 statute in *Pursley v. Fort Myers:*[236]

> "The first section of the act contains the grant of power to cities and towns. The remaining sections of the act prescribe the methods or procedure according to which the powers granted in the first section may be made available. A careful analysis of the first section of the act will reveal that the pur-

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[232]State *ex rel.* Brown v. Emerson, 126 Fla. 576, 171 So. 663 (1936), specifically considering the effect of the 1934 amendment to FLA. CONST. Art. III, §24.

[233]FLA. STAT. §166.01 (1951). *E.g.,* Beaty v. Inlet Beach, Inc., 151 Fla. 495, 9 So.2d 735 (1942). Note, however, that boundary expansion by local action authorized by special act charter or amendment thereto prescribing a certain procedure can be pursued until such legislative permission is withdrawn; see notes 168, 169 *supra* and text thereat. For ratification confirming and thereby validating extension by ordinance initially invalid because of procedurally incorrect exercise of existing authority see City of Sebring v. Harder Hall, Inc., 150 Fla. 824, 9 So.2d 350 (1942), distinguishing exercise void and statutorily incurable because of lack of authority or violation of organic law, as appears, *e.g.,* in State *ex rel.* Landis v. Lake Placid, 121 Fla. 839, 164 So. 531 (1935) (on rehearing).

[234]FLA. STAT. §166.01 (1951). For valid enlargement set forth in special act charter, the factor held to be controlling, see State v. Fort Lauderdale, 60 So.2d 32 (Fla. 1952); for valid charter change pursuant to special act authorizing city to change form of charter by referendum without affecting powers of city see Lenfesty Supply Co. v. Tampa, 142 Fla. 611, 195 So. 412 (1940); for special act alteration of city election procedure as superseding all except home rule provisions relating to charter boards see State *ex rel.* Brown v. Emerson, 126 Fla. 576, 171 So. 663 (1936).

[235]See note 231 *supra.*

[236]87 Fla. 428, 430-431, 100 So. 366, 367 (1924).

> pose of the Legislature was to authorize any city or town to change its form of government or method of exercising the jurisdiction and powers already granted to it by legislative enactment. No city or town was authorized by that act to enlarge its corporate powers beyond limitations prescribed by law, as the proviso to the section clearly indicates."

While upholding the constitutionality of this delegation of power by our Legislature to municipalities, to the limited extent specified in the statute, the Court declared nugatory a special act attempting to validate the unauthorized action taken. The underlying philosophy was concisely expressed:[237]

> "But this court has never held that the Legislature can delegate unlimited authority to a municipality to prescribe its own jurisdiction and powers and to alter or amend the same at any time. It cannot surrender the sovereignty of the State to municipalities to the extent of losing control over them. Such a doctrine . . . would be a recognition of a State's independent right of dissolution."

The Court consistently maintained its position until 1951 on the scope of the home rule grant.[238] In *Asbell v. Green*[239] it refused to sanction the imposition, by an amendatory ordinance of a special act charter, of a sales tax embracing isolated transactions, the sole basis advanced by the city to justify this levy being its general law power to raise money "by tax and assessment upon all real and per-

[237]*Id.* at 433, 100 So. at 368.

[238]*E.g.*, Palm Beach v. Vlahos, 153 Fla. 781, 15 So.2d 839 (1943) (holding city not liable for death due to negligent driving of fire chief outside the town limits while taking plaintiff's husband on fishing trip in official car without authorization), *opinion modified on extraordinary rehearing without altering judgment*, 154 Fla. 159, 15 So.2d 848 (1944); Merrell v. St. Petersburg, 91 Fla. 858, 109 So. 315, *judgment changed to reversal on rehearing*, 91 Fla. 870, 109 So. 319 (1926) (invalidating bond issue for failure to publish ordinance as required by special act charter despite contention of city that it was authorized to follow the less exacting procedure prescribed by later charter amendment purportedly adopted under general law home rule provisions). A unanimous opinion states with reference to the earlier special act charter provision, *id.* at 870, 109 So. at 319: "There is no authority authorizing the provisions of a Self-adopted Charter to supersede and entirely nullify the provision contained in the legislative enactment."

[239]159 Fla. 702, 32 So.2d 593 (1947).

sonal property, and by license on professions, business and occupations carried on within the corporation . . . ."[240]

Recently, however, in *Paramount-Gulf Theatres, Inc. v. Pensacola*,[241] the Court first reversed and then on rehearing affirmed a decree validating a proposed issue of so-called revenue certificates to finance construction of a municipal auditorium. These certificates were secured to a very minor extent by pledge of revenues anticipated from the auditorium, but the chief funds relied upon were the proceeds of a tobacco tax and of an amusement tax levied without challenge since 1937. In 1949 the Legislature by special act had ratified the ordinance and all other proceedings relating to this pledge. The per curiam opinion on rehearing construes confirmation of the pledge as tantamount to authorization of the tax, but it does not even mention the real issue. Legislative power to permit an excise levy of this sort has not been questioned; but can a municipality take unauthorized and therefore illegal action and later secure its validation by special act? According to this 1951 decision a municipality can now do so, yet the Court made no real effort to distinguish previous decisions. A clear opinion that will stand for a time is sorely needed.

Meanwhile the true distinction between this line of cases permitting legislative confirmation of unauthorized taxation by ordinance and the *Pursley v. Fort Myers*[242] condemnation of attempted expansion of municipal powers generally by home rule charter amendment may center on the existence of power in the Legislature to authorize in the first place the action taken. At no time can it constitutionally hand municipalities a blank check to expand their powers as they please. It can, however, grant a specific power in addition to those currently enjoyed, and can accordingly ratify specific action taken in excess of municipal jurisdiction in individual instances provided such action has not violated organic law. The *Pursley* line of decisions still stands as regards the scope of home rule, it is submitted; but the *Paramount-Gulf* decision is a standing invitation to every Florida municipality to act beyond its charter and general law powers by promulgating unauthorized ordinances and then to validate its action by rushing a special bill through the Legislature. The soundness of this decision has yet to be demonstrated, needless to say.

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[240]FLA. STAT. §167.43 (1951).

[241]62 So.2d 431 (Fla. 1951), *judgment changed to affirmance on rehearing*, 62 So.2d 434 (Fla. 1952).

[242]See note 236 *supra* and text thereat.

From the standpoint of local procedure in framing and adopting charter amendments by the home rule method the city council or commission can put the machinery in motion by adopting a resolution by majority vote of its members. This resolution sets a date, which must be not less than forty nor more than ninety days after adoption of the resolution, for a special election to choose resident qualified voters as members of a charter board.[243] This board must have five members in municipalities of 5,000 or under, nine in cities ranging from 5,001 through 20,000 and fifteen in all larger ones.[244]

As an alternative first step for calling a charter board election at least twenty percent of the qualified voters of the town or city sign a petition, in which event the council or commission must proceed as already outlined.[245] Upon failure of the council or commission, or of the local election board if any, to call the election, mandamus is available to obtain the prescribed action.[246] The statute gives detailed provisions for holding the special election;[247] and those candidates receiving the highest number of votes constitute the board.[248]

A handy *Guide for Charter Commissions* is published by the National Municipal league.[249] In Florida a charter board established under general law home rule provisions must meet and organize within thirty days after election;[250] and the municipality is required to honor requisitions for expenses signed by the board chairman and secretary.[251] Within ninety days of its election the board must draft amendments to the charter and adopt them by a majority vote.[252] Upon completing its work the board sets a date for a special election, to be held within sixty days of the board's final adjournment, to ap-

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[243]FLA. STAT. §§166.02, 166.04 (1951). This procedure cannot be attempted more than once in every 2 years. If a general election falls within the date limits its date may be chosen for the vote on board members.

[244]FLA. STAT. §166.03 (1951).

[245]FLA. STAT. §166.05 (1951) (containing detailed requirements for form of petition and checking of signatures to determine validity and eligibility to sign).

[246]State *ex rel.* Brown v. Blocks, 128 Fla. 649, 175 So. 232 (1937).

[247]FLA. STAT. §§166.06, 166.07 (1951).

[248]FLA. STAT. §166.07 (1951). The exact number prescribed by law must be elected, of course; see note 244 *supra* and text thereat.

[249]299 Broadway, New York 7, N.Y.; price 50c.

[250]FLA. STAT. §166.08 (1951).

[251]FLA. STAT. §166.09 (1951).

[252]*Ibid.* The amendment may be a complete new charter as regards any or all items specified in FLA. STAT. §166.01 (1951).

prove or reject its proposals.[253] These, together with notice of the election, must be published once a week for four weeks, beginning at least twenty-five days before the election, in a local city newspaper. If the city has none the proposals and notice must be published in a newspaper in the county in the same manner, and in addition must be posted at the city hall and two other conspicuous places in the city for a least twenty-five days before the election.[254]

To conduct the election the statute prescribes a special commission of three members, appointed by the charter board, as well as directions for tabulating the returns; and the amendments become effective ninety days after adoption by a majority of the voters casting ballots in the special election unless a different effective date is set forth in the amendments.[255] The usual succession to property, rights, debts and obligations is provided; and incumbent officers occupy their positions until new ones are elected.[256]

The foregoing procedure has been considered in detail not only because it constitutes an important method of amending city charters, including complete revision of the provisions dealing with those items enumerated in Section 166.01 of Florida Statutes 1951, but also because proposals have been advanced in the past several sessions of the Florida Legislature to amend the Constitution so as to forbid special legislation for cities.[257] Adoption of such an amendment would in effect fully establish what is known as "constitutional municipal home rule," enabling and forcing each city or town to assume the responsibility of enacting or altering its own charter. The Legislature could still, of course, enact general laws regulating cities, but no special legislation affecting municipal corporations would be valid.

This home rule system began in limited form with the Missouri Constitution of 1875. California followed in 1879 by granting limited home rule to all cities; and in 1887 it accorded a greater degree of home rule to cities attaining at any time a population of over ten thousand. Today eighteen states have instituted a program of this type, although judicial interpretation in some of these still permits

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253FLA. STAT. §166.10 (1951).

254FLA. STAT. §166.11 (1951).

255FLA. STAT. §§166.12, 166.13 (1951).

256FLA. STAT. §§166.14, 166.15 (1951).

257Such joint resolutions, which when passed by both houses become proposed constitutional amendments, FLA. CONST. Art. XVII, §1, were introduced in 1949, 1951, and 1953.

state legislative enactment in certain instances by law not general.[258] The National Municipal League has drafted a provision for municipal home rule to be used in state constitutions.[259]

The strongest argument for municipal home rule is the elementary principle that those interested and directly involved appreciate their problems more keenly and are better qualified to fashion their local government and run it. Distance may lend to the view enchantment — but rarely accurate perception.

Another cogent practical factor is the lack of time in the Florida Legislature to consider local bills intelligently, or even with any interest. Our Legislature has been forced to adopt the policy of handling all measures on the local bill calendar by consent unless the local delegation in the House is divided in its opinion.[260] This procedure in turn places a great burden on the senator and representatives from the community concerned by shifting to them a responsibility that should rest with the citizens themselves. In some instances the choice of members of the Legislature may turn on their handling of local bills, yet they should be, and ofttimes are, chosen on issues pertaining to state affairs — the main business of the Legislature. From the standpoint of efficiency in both state and local government state legislators should, individually and as a whole, be relieved of a responsibility that has today become anomalous. The proper place to settle municipal affairs is in local elections; state elections should be fought on state issues, and the legislators should be free to devote their full time to the vital state problems requiring their attention, including those that affect all local units of government and accordingly merit treatment by thoroughly considered general law.

The argument for retaining legislative power to enact local laws for municipalities is of the let-well-enough-alone variety; the gist of it is that the present system does provide for change, is speedy once a special bill is introduced, is fairly flexible, and gives the local folk what they need, even though they rarely know just what is being

[258]See McBAIN, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1916); McDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 82-91 (1951); McGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1933). Constitutional provisions of other states are found in THE NUMBER 1 PROBLEM: HOME RULE (1940), Report of Chicago Law Dep't.

[259]MODEL STATE CONST. Art. VIII, §801 (5th ed. 1948), obtainable from Nat. Municipal League, 299 Broadway, New York 7, N.Y.; price $1.

[260]Only one senator is involved in a representative capacity as regards any one Florida municipality. His unfavorable reaction kills the bill.

done. Most students of the problem, however, including many of the legislators, have reached the conclusion that special legislation is not the preferable system.

IX. Drafting Technique

Good draftsmanship is far more subtle and more difficult to achieve than neophytes in this elusive art realize — regardless of their age and their experience in related fields.[261] It requires firm grounding in the substance of the particular area under consideration, extensive and detailed research, imagination, ability to organize on a broad scale, patience, and meticulosity. It also demands sweat — no intellectual labor is more exhausting physically — and enough self-restraint to curb one's own pride of authorship plus enough tact to head off this tendency in others before a bitter battle develops.

In addition a ready command of the language serving as the medium of expression is essential. For the present the American student must pick this up for himself; the art of rhetoric presupposes mastery of the science of grammar, and the latter has for many years been seldom taught and at times not even displayed in our primary and secondary schools. We should add, however, that several of the leaders in education today are alive to the problem and that the results of their efforts will probably solve it eventually. From the standpoint of future lawyers the need for training of this sort is pressing; and in legal drafting the very simplicity and smoothness of the products of the skilled worker tend to conceal the extensive training and the intensive effort that go into them.

Only a few basic suggestions are appropriate to a summary article of this type, but a blueprint of the technique of drafting a municipal charter can be presented in a few pages. The process breaks rather naturally into five stages: ascertainment of the problem at hand, research, organization of material, polishing, and checking. Effective

[261]This portion of the article cites very little outside authority. It is based on Prof. Dauer's many years of participation in the work of U. of Fla. Pub. Adm'n Clearing Serv. and Prof. Miller's lectures and experience in College of Law Legis. Drafting Seminar, as well as on his early training under such outstanding draftsmen of major corporate and financial instruments as Henry Clay Alexander, now President of J. P. Morgan & Co. Incorporated, George A. Brownell, Ralph M. Carson, Porter R. Chandler, Leighton H. Coleman, Edgar G. Crossman, Thomas O'G. FitzGibbon, Charles M. Spofford, Frederick A. O. Schwarz, and that old maestro of any type of legal work, John W. Davis.

work entails dealing both with books and with people. Conferences are usually necessary at three of these stages, and sometimes at four or all five. The stages themselves are neither mutually exclusive nor always in the above order; complicated projects frequently necessitate return to an earlier stage and even a blend of stages. Finally, as the reader has probably gathered by now, legal drafting is not merely setting pencil to paper. The actual writing of the instrument in final or near-final form, popularly misconceived as the essence of drafting, does not even begin until the bulk of the work has been done. As that master draftsman, Professor Harry W. Jones,[262] has so aptly remarked, "Legal drafting is far more than a mere exercise in grammar." This remark, which seemed shocking to many when made, is by now a truism.

1. Ascertainment of the Problem

The first step is so obvious that the sprinting attorney often hurdles it – only to discover at the end of a brilliant race that he entered the wrong event. Some problems have nothing whatever to do with drafting; the requisite provision may already exist, and the proper execution of it may be all that is needed.

Again, a minor revision, enacted by charter board or special act procedure and formulated as a correction in the light of actual experience, may suffice. In this event the best approach is a short, direct repeal, alteration or addition, usually by special act in Florida. On the other hand the community may be seeking its first charter, or the changes desired in practice may be extensive both in spread and in individual content. In either of these events a complete new instrument is called for, including specific and perhaps sweeping repeal of deadwood.

Even at this stage of the work the procedure to be utilized must be considered to some extent. A schedule of ultimate deadlines on preparation and publication of notice, approval meetings, time of introduction as a bill, and other vital steps should be set up with reference to the specific procedure available and selected.

As in every endeavor in the practice of law the first step is to determine precisely what the client is driving at, what he is complaining

[262]Professor of Law, Columbia University, and Director of the Legislative Drafting Research Fund, the pioneer organization of this type in the United States, with four decades of service to its credit.

of, what he wants. Simple though this step may be at times, it is vital unless counsel has plenty of time to squander on abortive efforts.

2. Research

Only a portion of the total research requires participation by the client. The nature and scope of this stage of the work depends, of course, on the problem under attack, but the first part of this research stage in drafting a municipal charter or an amendment to one can best be undertaken by the draftsman alone. Even in preparing a simple contract in writing the skilled practitioner knows from experience that a "meeting of the minds" presupposes a realization of the issues on which those minds are to meet. Time and again his client has overlooked completely some important item, and as counselor-at-law he focuses his client's attention on it before dispute arises. The same practice should be followed for any instrument; the draftsman is in part a human checklist.

Legal Background. Before any draftsman decides what he should do he has to know what he can do. Three suggestions are offered as regards types of law to be covered. All three are best approached by reading analytical articles, but the source material should later be consulted as the ultimate authority.

First, he should check the relevant constitutional provisions; any error on this score normally proves fatal. Second, he should check the statutes in point, making certain that he has gathered at least the gist of all those that apply. Third, he should read the leading opinions in the area and absorb them as general background.[263] Invariably they bring to light pitfalls not even noticed in a perusal of the constitutional and statutory provisions, and at times they illustrate the familiar adage that words do not mean what they say.[264]

Form Background. Every able attorney uses forms. They save time. They bring to light matters that might be overlooked completely. They also provide examples of skilled or inept drafting. The draftsman should never follow them slavishly, but he should not

[263]For a list of these as regards Florida municipal law background see note 15 *supra*. This list is not exhaustive, but neither are the opinions exhausting.

[264]*E.g.*, FLA. CONST. Art. VIII, §8 when read alone, discussed in II, 1 *supra;* Art. IX, §6, discussed in V, 4 *supra* under Motor Vehicle Parking.

waste time in reproducing, often in an inferior manner, the products of the efforts of others, achieved in many instances after hours of drudgery and perhaps bitter experience.

An excellent starting point is the *Model City Charter*,[265] which in its drafting has consumed thousands of hours since 1900 and which embodies the research and background experience of some of the best minds in the United States in the field of municipal government and law. Though predicated on the home rule concept in state organic law, and though designed primarily for the council-manager type of city government, many of its provisions can be put into effect in Florida by special act and can in large part be adapted to one of the other types of local government. Being a model, it is designedly comprehensive; specific local exigencies may well warrant deletion, alteration or expansion of its content. In any event, however, omissions of the draftsman will spring from choice rather than from ignorance; and a long step toward precision in phraseology in an entire individual charter can be taken without wasted effort. Numerous explanatory footnotes give the reasons underlying certain provisions, and the appendices present optional additions of importance to many cities.

This charter deals specifically with governmental organization, structure, and personnel; nominations and elections; budget, finance, and borrowing for capital improvements; planning, zoning, housing, slum clearance, and blighted areas; initiative and referendum as regards ordinances; and succession in government. It also contains several general provisions and miscellaneous clauses not infrequently overlooked. Desired special powers can readily be added, of course.

Other useful forms for the Florida draftsman are Florida municipal charters, of which there are a variety. He should of course select a few that are relevant to his task. Most Florida municipal charters contain provisions designed to meet problems peculiar to the individual community. Certain charters are worthy of checking, however, if a charter board or some other drafting group desires to establish a similar form of government; and in any event those charters that have been molded gradually and tested in their operation are valuable in preparing a checklist of items to be considered for inclusion.

Miami and St. Petersburg, among larger cities, have this system of municipal government; cities of medium or smaller size include

[265]For availability and price see note 32 *supra*.

Coral Gables, Gainesville, and Vero Beach. A recent charter of this type is that of Opa-Locka, drafted in 1953. The mayor-council form of government is found in Orlando and Tampa, for example, as well as in smaller cities. The commission form is practically nonexistent in Florida. Jacksonville has a combination of this system and the mayor-council form, but no other city has been tempted to follow this curious hybrid.

The draftsman can readily procure copies of Florida municipal charters. First, virtually all are special acts; therefore they may be found by looking up the special acts desired. This method of checking charters is not recommended, however, inasmuch as the original charter is usually amended later and the amendments will probably be overlooked; and yet, since many of these modify or repeal unsatisfactory provisions in the original charter, they may well be even more important than the basic enactment. Second, many cities print their charters in pamphlet form; application for a copy should be addressed to the city clerk. Third, many of the larger cities have codes that are published by lawbook companies, and information on obtaining these can readily be obtained from the city attorney or the city clerk. They are up to date and include ordinances as well as the charter and all its amendments. They may seem somewhat expensive, but the price is reasonable when one considers the labor costs of printers today and the limited number of copies printed and sold.

Fact Background. The acquisition of an adequate fact background, as might be expected, involves discussions with the client, usually several people in the case of municipal charters. At this point the general grounding in this field, which the draftsman should already possess, comes into play. He is not expected to know in advance the facts relating to the individual city, but he should know what types of facts to look for and what questions to ask, systematically and rapidly. He should make brief, accurate notes of all pertinent data, and should dictate a memorandum of the conference from these while the matter is still fresh in his mind. If the client does not know the answers and cannot dig them out the draftsman will do well to advise that an expert in the particular field be consulted and that a careful study be made by a person trained to do the job well.[266]

[266]Specialized fields include, *e.g.*, finance and fiscal policy, personnel, public utilities, libraries, zoning, traffic control, business and industrial factors in relation to special powers, and public relations.

This expert need not, of course, be an outsider. The specialist on the staff of the municipality will in most instances either have the answers already or be able to find them within a short time. A zoning section of the charter should be drafted in consultation with the city planner; provisions for a building code should be checked by the consulting architect and the chief building inspector. The ordinances later enacted must have a sufficiently broad basis in the charter. The point is that the difficulties in drafting a charter vary directly with the increasing complexities of urban life and the expansion of local governmental functions. The draftsman of today profits heavily by an interchange of ideas with the specialists in the functional areas involved; indeed, he cannot do a competent overall job without their active assistance.

The efficiency and dispatch with which the draftsman handles this conference will not only ease his further labors but will also make an impression, good or bad, on the client as to whether he knows what he is doing. Few clients realize the complexity of the task; indeed, many do not even have a clear concept of their problem. This conference enables the draftsman to dispel the fond notion that anyone can dash off a charter, or even an amendment; and a reasonable fee, when presented, will not seem exorbitant. And if the draftsman knows what he is about and does not waste time he can afford to charge a reasonable fee and still pay his landlord, his staff, and the publishers of his tools of the profession.

3. Organization

The organization stage of municipal law drafting, especially when a new charter is wanted, is perhaps the most trying period of all. The draftsman finds that he has a myriad ideas floating about in his head, many of them disconnected, and that certain new pieces of data do not seem to fit in anywhere. At least, however, he will not lose them if he has made a thorough memorandum at the close of the second stage. At this point of intellectual wrestling the subconscious mind is of invaluable aid. Even psychologists do not yet know exactly how it works, but those of us that have used it know that it does work — provided, of course, that it has been fed some raw material. Inspirations do not just pop up, and neither do solutions to drafting problems; they must be pursued. The sit-back-and-wait technique is pure

myth. Accordingly the work of organization must get under way in a deliberate manner.

Simple Draft. The first step in the organization stage is to write a simple, straightforward statement of the proposed solution to the problem, making use of the data already reduced to summary and employing the framework of the procedure selected for actual enactment into law. At this point a stenographer is not only an unnecessary luxury but even an actual nuisance. The equipment needed is a pad and, as Dr. Hasse O. Enwall used to tell us, "a few sharp pencils and several sharp wits."[267]

Style is unimportant; the immediate goal is to set down the content, plainly and bluntly, in rudimentary English. The product of this effort will almost certainly be scrapped later, but the skeleton will justify the labor. If this skeleton resembles no recognizable creature some bones are undoubtedly missing — and the sooner the draftsman discovers these gaps, the better. He can readily hang flesh and a smooth skin onto any respectable skeleton. This skeleton itself and the effort that goes into putting it together seem to stimulate somehow the subconscious, which, we repeat, cannot work on nothing. To the neophyte at drafting, this step may also demonstrate a need for more data and a further conference, so that he can get the answers to what he should have asked in the first conference after the initial ascertainment of the problem posed by his client.

Comprehensive Redraft. The next step in organization is to review all notes, along with any additional data recalled, and to hang this flesh onto the skeleton in appropriate places. Many bits will not fit at first; some will not fit at all. In this event probably the skeleton needs remolding in one or two places. Few skeletons are exactly alike; and the flesh must be proportionate to the bones, whatever the creature may look like when completed. The skin, applied later, will fit any shape and size, fortunately.

The content should be comprehensive and coherent at this point. Before embarking upon his final stages the draftsman should again confer with his client. This is the time, after painstaking sorting and organization of what he believes his client wants, to make sure that he has the substance firmly in hand, that he has included everything

[267]Recalled by both authors from the molder of the department of philosophy at University of Florida, one of the "greats" in the history of the teaching profession.

and has not unwittingly added items not desired. In other words, he wants to get all thoughts clear at this stage, without regard to polished phraseology. He should not feel hurt or be surprised if his client suffers a change of heart; clients are notorious for their bobbing and weaving, if for no other reason than the fact that they are human and consequently do not always know what they really desire when first interviewed. The memorandum of the preliminary conference will at this point assist in persuading both the client and the draftsman that the latter is not losing his mind.

Pride of authorship must be handled with a firm rein here; the draftsman should be prepared to undertake further extensive revision of concepts if his client is not satisfied with the skeleton and flesh presented. The draftsman should always have some practical suggestions to offer, but he should never attempt to dictate policy. There are two reasons for this rule: he is not in most instances competent to evaluate policy, and in any event he as a professional draftsman is underwriting solely the legal, not the practical, efficacy of the product.

Once the content is finally determined the draftsman should retire to his study.

4. Polishing

The stage of applying polish, of arriving at final formulation, is regarded by the layman as the whole of drafting. Nothing could be further from the truth, yet this stage is nonetheless an important one. The draftsman now shifts his emphasis from content to form, from thought to expression. This task demands intense concentration, with no interruptions or distractions, and meticulous attention to detail. The goals to seek are somewhat like those of the short story, but in inverse order and with reader interest assumed. In legal drafting the major goals are accuracy, clarity, conciseness, and readability, with the last two about on a par in importance.

Accuracy. The primary target is accuracy, that is, a full, definite coverage of each thought without conflict or inconsistency among the various thoughts. No item of importance should be left either to the imagination of the judge in the inevitable ensuing dispute or with the fond hope that there may be a general law on it somewhere. At this point the "standard clauses," those covering such items as personal interest disability, repeal of existing law, severability, lib-

eral construction, effective date, and short title, should be carefully considered and, if applicable, inserted.

Precision in phraseology is of course essential. Every concept must be mastered, however balky it may be. The familiar expression, "I know it but I can't say it," is a contradiction in terms. Any definite idea can be definitely expressed; fuzzy wording denotes fuzzy thinking.

Clarity. Clarity is akin to accuracy, but it implies something more, namely, a brand of presentation keyed to simplicity and forthright expression. The average reader of any particular type of document should be able to comprehend its exact meaning readily, without resort to judicial interpretation or even advice of counsel unless the instrument is designed primarily for attorneys. Clarity presupposes organization and logical order in delineating concepts as well as painstaking removal of any ambiguity in each phrase. The instrument should move forward in a coherent sequence of ideas; and no section or clause should throw doubt on the meaning of what has already been said. Whenever ambiguity or inconsistency does crop out probably both passages involved need rephrasing.

Conciseness. Conciseness is not mere brevity, although brevity is an important ingredient. In any legal instrument, and especially in one as basic as a charter, as many words should be used as are necessary to present each concept accurately once—and only once. Stylistic flourishes are taboo; the most skillfully drafted legal instruments are strikingly similar in style in any one language. The desired brevity is never achieved, however, by cutting out essential points or using vague, general terminology, cryptic though it may be, but rather by correct sentence structure and a nice choice of concrete words. The modern lawyer is not paid at so much per word; in fact, conciseness is at a premium in the maze of legislative and administrative jargon hurled at the United States citizen of today.

Readability. A fourth quality, perhaps equally valuable, is readability. The skilled draftsman avoids complex and cumbersome sentences, "hanging clauses," exceptions to exceptions, and provisos piled one upon another.[268] Numbers and letters to highlight parallel concepts are desirable. Only one term should be used to designate a concept, and only one concept should be ascribed to a given term in

[268]FLA. CONST. Art. III, §21 is an illustration of what not to do.

the same instrument. Lengthy repetition should be avoided; but every cross reference should be specific, and the passage referred to should be applicable "as is," without cross-provisos. When, in rare instances, repetition becomes unavoidable the concept should be repeated in exactly the same terms, lest the bench later assume that the change in wording was intended as a change in meaning. Furthermore the draftsman must remember the location of each repetition; any alteration in one place necessitates the same alteration in the others.[269] In complicated or lengthy instruments an opening section of definitions is of great value; the draftsman can then employ the short term there ascribed to a specific concept at perhaps a hundred places in the instrument. He must, however, stick rigidly to his definition in every use of that term.

Format is closely related to readability. The trained eye expects consistency in symbols, and any jumping about when no difference is intended slows the reader down needlessly. Format in legal writing resembles functionally the rules of procedure and evidence in court — the norms of presentation. Specifically, capitalization, spelling, hyphenation, punctuation, and italicization should each adhere to one pattern throughout. The draftsman usually has more than one correct pattern to choose from, but only one choice per instrument is permissible.[270]

5. Checking

When the draftsman is satisfied with his product the final stage of his work begins. This stage is laborious, is boring, and may seem unnecessary; at this point he probably feels that he never wants to see another charter and that he entered the wrong profession. Nevertheless he should force himself to finish the job. The checks to be made can be styled for convenient listing as the front check, the back check, the cross check, and the verbiage check.

The front check indicates whether the draftsman has spoken broadly enough and also whether his language produces a result that is logically and grammatically sound and legally permissible yet practically absurd. The framers of the Constitution of the United States, perhaps the most able group of draftsmen ever assembled, evidently

[269]For illustration of this error see note 27 *supra*.

[270]For exceptionally poor format see FLA. CONST. Then contrast U.S. CONST., written in an old style but faithful to that style throughout.

failed to realize that the electoral college system, when coupled with the provision that the candidate with the greatest number of electoral college votes should be President and the one with the next greatest should be Vice-President, would almost certainly result in placing bitter rivals from opposing political parties in these two important posts.[271] This slip had to be corrected by amendment.[272] If this sort of thing can happen to draftsmen like those it can happen to anyone. True, this type of error is really one of content, but occasionally the practical effect of a concept does not strike home until that concept is put down in black and white and in final form.

The back check is fully as important as the front check. Has the draftsman said too much, that is, included more than his client intended? Those very draftsmen just mentioned made this type of error too. They obviously intended to accord the Supreme Court of the United States original jurisdiction in suits between nation and state, between states, or between a state and a foreign nation. Since a state appears in all three categories, they referred to these cases as "those in which a State shall be Party . . . ."[273] Unwittingly they included a suit by any individual against a state. Another amendment was required to correct this language.[274]

The cross check is designed to ferret out ambiguities. It is ridiculous, for example, to levy a state tax expressly replacing all county and city taxation of a given incidence and then to provide later in the same statute that there is no intent to repeal any tax "now imposed by law and not specifically repealed hereby."[275] Errors of this type are not uncommon, and they frequently come to light for the first time in the final draft. Still more elusive is the inconsistency or ambiguity that falls short of producing head-on conflict.[276] Only

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[271]U.S. CONST., Art. II, §1. The basic reason for this section may well have been the failure to anticipate the formation of political parties on a national scale; see DAUER, THE ADAMS FEDERALISTS 3-5 (1953).

[272]*Id.* Amend. XII.

[273]*Id.* Art. III, §2.

[274]*Id.* Amend. XI.

[275]For this error see the opinion of Brown, J., written with his usual patience and tolerance, in American Bakeries Co. v. Haines City, 131 Fla. 790, 800, 180 So. 524, 528 (1938); see also Thomas, J., in Miller v. Phillips, 157 Fla. 175, 176, 25 So.2d 194 (1946), and his masterpiece of understatement in referring to the jargon of FLA. STAT. §708.08 (1951) as "decidedly interesting . . . ."

[276]See, *e.g.*, the tangled skein presented to the bench in Miami v. South Miami Coach Lines, Inc., 59 So.2d 52 (Fla. 1952).

a careful analysis of the final instrument will bring this type of error into the spotlight.

The verbiage check consists of going through every sentence and ruthlessly cutting out each unneeded word. Detailed discussion of "gobbledegook" requires an article in itself, and accordingly verbiage is merely mentioned here.[277] For illustrations one has only to turn to most of the Florida Constitution and ninety percent of the Florida Statutes. The legal draftsman should have enough consideration for the time and purse of his fellow members of the bar, as well as for his own purse, to make a deliberate effort to minimize useless printing. Legal instruments are not pretty things at best, but they can achieve in some measure the classic beauty of simplicity.

The charter is at last ready and meets all tests. At this point the client will not infrequently announce blandly that he does not really want to make any move on the matter after all — but this gets into another story too poignant for this issue.[278]

CONCLUSION

The municipal charter is a little constitution. Its drafting merits thorough consideration. No constitutional lawyer would undertake to draft a new organic instrument for the government of the United States or of a state without resigning himself to months of arduous labor; and no businessman would embark on a corporate organization without paying close heed to the preparation of appropriate articles of incorporation.

The ideal charter should be as nearly complete within itself as possible. To have all pertinent material assembled in one document is to save valuable time on the part of its administrators. This procedure also tends to focus attention on gaps, conflicts, inconsistencies and ambiguities. Furthermore the draftsman should insert even the standard general powers in the charter. General law grants of power may well be altered or repealed without the consent or even the knowledge of the municipality. In this event the sole reliance for the powers needed is the charter itself, which if enacted by special

[277]Some excellent practical suggestions on this score appear in HENDERSON, DRAFTING LAWS IN FLORIDA 15-17 (1952). Mr. Henderson is director of statutory revision and bill drafting in Florida; his entire pamphlet, distributed by the attorney general, is strongly recommended.

[278][Editor's Note: Or for any other issue of this publication.]

legislative act always survives inconsistency with general statutes and overrides conflict also unless the later general law provision manifests a definite intent to supersede all conflicting laws of any type.[279] In all instances of doubt as to the applicability, meaning or scope of general law the safe move is to spell out the concept in the charter.

No amendment should be made without reviewing the entire charter to see whether the change affects some other existing portion; and any limitation on the nature or extent of powers deserves special attention in its formulation. The draftsman can soundly recommend periodic reappraisal of the charter in the light of local experience, of improvements made by other cities, and of new general statutes or new interpretations of old ones. The charter should grow with its municipality — in content as distinct from bulk.

For the individual undaunted by temporary frustration, imbued with a relish for complicated problems and an enthusiam for language, rigorously disciplined to hew to high standards and to release nothing short of excellent, and blessed with the capacity to seek his satisfaction in a useful job well done rather than in political fanfare or histrionics before a jury, the art of draftsmanship is fascinating. A constant diet of it is too heavy; but the solid feeling that follows the creation of a work accurate, comprehensive yet concise, clear, readable, and apparently simple is at the least as rewarding as any experience enjoyed by the attorney and the political scientist. And there are good fees in it, too.

TABLE OF HEADINGS AND SUBHEADINGS

[279]See the detailed discussion of relative rank in V, 2 *supra*. Existing and future grants of power by general law can, and normally should, be additionally incorporated by reference, of course.