

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 96,384

**FRANKENMUTH MUTUAL INSURANCE
COMPANY, a Michigan Corporation,**

Plaintiff-Appellant,

v.

**ERNIE LEE MAGAHA, as Clerk of Court of Escambia County, Florida and as
Successor to Joe A. Flowers, Comptroller, Escambia County, and ESCAMBIA
COUNTY, FLORIDA,**

Defendants-Appellees,

**ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT (Case Number 98-2962)**

ANSWER BRIEF OF ESCAMBIA COUNTY, FLORIDA

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TABLES OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iv
STATEMENT OF THE FACTS	1
QUESTIONS CERTIFIED TO THE FLORIDA SUPREME COURT BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	5
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. THE NON-SUBSTITUTION CLAUSE AND THE PENALTIES FOR NON- APPROPRIATION CONTAINED IN PARAGRAPH 21 OF THE LEASE TRANSFORM THE LEASE PURCHASE AGREEMENT INTO AN UNCONSTITUTIONAL DEBT, WHICH COULD NEVER BE RATIFIED UNDER FLORIDA LAW, NOR COULD IT BE SEVERED	10
A. The non-substitution clause of paragraph 21 creates debt.	10
B. The cases relied on by Frankenmuth to show the non-substitution clause does not create debt do not apply to situations without a specifically identified non ad valorem revenue source to make debt service.	16

C. The non-substitution clause and the penalties for non-appropriation are not severable because they are essential elements of the price terms and expectancy in the contract. 18

D. The non-appropriation clause itself fails to comply with Florida law. 22

II. ABSENT A FORMAL VOTE ON THE TERMS AND CONDITIONS OF A CONTRACT, COMBINED WITH FULL KNOWLEDGE OF ALL MATERIAL FACTS AND CIRCUMSTANCES, CONDUCT STANDING ALONE IS NOT SUFFICIENT TO CONSTITUTE RATIFICATION OR APPROVAL OF A CONTRACT UNDER §125.031, FLA. STAT.

(1995). 27

A. Introduction. 27

B. Under applicable Florida law and the undisputed evidence, ratification did not occur. 29

1. The County did not have the power to enter this multi year lease purchase agreement without referendum approval. 29

PAGE

2. The alleged ratification did not occur in the manner in which the County would have originally approved the contract. 30

3. The County did not have full knowledge of the terms and conditions of the lease purchase agreement until 1995, when it determined that the lease purchase agreement was not an obligation of the County. 35

C. Public policy of the State of Florida also prohibits ratification by conduct. 38

D. The absence of an express legislative prohibition on non-substitution clauses cannot be construed as an implied authorization for counties to enter lease purchase agreements containing such clauses. 41

CONCLUSION 44

CERTIFICATE OF SERVICE 45

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Bach v. Florida State Board of Dentistry,</u>	
378 So.2d 34 (Fla. 1 st D.C.A. 1979)	28, 35
<u>Ball v. Yates,</u> 158 Fla. 521, 29 So.2d 729 (Fla. 1946) <u>cert. den.</u> 332 U.S. 774, 68 S.Ct.	
66, 92 L.Ed. 359 (1947)	35
<u>Broward County v. La Rosa,</u>	
505 So.2d 422 (Fla. 1987)	41
<u>Brown v. City of St. Petersburg,</u>	
111 Fla. 718; 153 So. 140 (Fla. 1933)	39, 40
<u>Carlile v. Game & Fresh Water Fish Comm'n,</u>	
354 So.2d 362 (Fla. 1977)	42
<u>City of Palatka v. State,</u>	
440 So.2d 1271 (Fla. 1983)	18
<u>City of Panama City v. T & A Utilities Contractors,</u>	
606 So.2d 744 (Fla. 1 st D.C.A. 1992)	28, 40, 41, 44
<u>County of Brevard v. Miorelli Engineering, Inc.,</u>	
703 So.2d 1049 (Fla. 1997)	27, 28, 40, 44

PAGE

County of Okeechobee v. Florida National Bank of Jacksonville,

112 Fla. 309, 150 So. 124 (1933) 30

County of Volusia v. State,

417 So.2d 968 (Fla. 1982) 14, 16, 18, 23, 25

Escambia County v. Flowers,

390 So.2d 386 (Fla. 1st D.C.A. 1980) 12, 13, 32

Hogan v. Supreme Camp of the American Woodmen,

146 Fla. 413; 1 So.2d 256 (1941) 32

Home Development Company of St. Petersburg v. Bursani,

178 So.2d 113 (Fla. 1965) 19

Hoskins v. City of Orlando,

51 F.2d 901 (5th Cir. 1931) 33, 34, 44

Johnson v. Transp. Agency Santa Clara County, California,

480 U.S. 616, 107 S. Ct. 1442, 94 L.Ed. 2d 615 (1987) 43

Local No. 234, etc. v. Henley & Beckwith, Inc.

66 So.2d 818 (Fla. 1953) 19

PAGE

McGhee v. Volusia County,

679 So.2d 729 (Fla. 1996) 42

Munoz v. State,

629 So.2d 90 (Fla. 1993) 41

Murphy v. City of Port St. Lucie,

666 So.2d 879 (Fla. 1995) 18

Naranjo v. County of Rio Arriba,

862 F. Supp. 328 (D.N.M. 1994) 11

Nohrr v. Brevard County Educational Facilities Auth.,

247 So.2d 304 (Fla. 1971) 14

Oxford Lake Line v. First National Bank of Pensacola,

40 Fla. 349, 24 So. 480 (1898) 38

Pan-Am Tobacco Corporation v. Department of Corrections,

471 So.2d 4 (Fla. 1984) 27, 40

Practice Management Associates, Inc. v. Bitet,

654 So.2d 966 (Fla. 2d D.C.A. 1995) 19

Ramsey v. City of Kissimmee,

139 Fla. 107, 190 So. 474 (1939) 28, 30, 31, 34, 40, 44

Sanibel-Captiva Taxpayers' Ass'n v. Lee County,

132 So.2d 334 (Fla. 1961) 17

Smalley Transp. Co. v. Moed's Transfer Co.,

373 So.2d 55 (Fla. 1st D.C.A. 1979) 42

State v. Alachua County

335 So.2d 554 (Fla. 1976) 16, 17, 25

State v. Brevard County,

539 So.2d 461 (Fla. 1989) 15, 16, 26

State v. City of Sunrise,

354 So.2d 1206 (Fla. 1978) 17

State v. School Board of Sarasota County,

561 So.2d 549 (Fla. 1990) 15, 16, 23, 24, 26

Thornbury v. City of Fort Walton Beach,

568 So.2d 914 (Fla. 1990) 42

PAGE

TSI Southeast, Inc. v. Royals,

588 So.2d 309 (Fla. 1st D.C.A. 1991) 38

United States v. Hill,

676 F. Supp. 1158 (N.D. Fla. 1987) 43

Wilderness Country Club v. Groves,

458 So.2d 769 (Fla. 2 D.C.A. 1984) 19

CONSTITUTIONS

Art. I, § 24, Fla. Const. 38

Art. VII, §12, Fla. Const. 5, 6, 12, 15, 41

STATUTES

§ 125.031, Fla. Stat. (1989) 4, 5, 30, 44

§ 125.031, Fla. Stat. (1995) 27

§ 200.65, Fla. Stat. (1995) 3

§ 235.056, Fla. Stat. (1995) 41, 42

§ 286.011 Fla. Stat. (1989) 38, 39

§ 286.011 Fla. Stat. (1993) 38

MISCELLANEOUS

Meeting the equipment needs of State and Local Governments with Tax Exempt Lease Purchase Financings; in Equipment Leasing, §37.04 (Jeffrey Wong, Ed., Matthew Bender, 1999) 28

Op. Att’y Gen. La. 95-342 (1996) 11

Op. Att’y Gen. N.M. 88-67 (1988) 11

Op. Att’y Gen. Or. OP-6007 (1986) 11

Op. Att’y Gen. W. Va. (1991) 11

Op. Att’y Gen. Wis. 10-83 (1983) 11

R. Rhodes, *The Search for Intent: Aids to Statutory Construction in Florida*,
6 Fla. St. U. L. Rev. 383 (1978) 42

Reuven Mark Bisk, Note, State and Municipal Lease-Purchase Agreements: A Reassessment, 7 Harv. J. L. & Pub. Pol’y 521 (1984) 24, 25, 26

2B Norman Singer, Sutherland Statutory Construction
§47.24 (Clark, Boardman, Callaghan 5th Ed. 1992) 43

2B Norman Singer, Sutherland Statutory Construction
§49.10 (Clark, Boardman, Callaghan 5th Ed. 1992) 43

PAGE

2B Norman Singer, Sutherland Statutory Construction

§50.01 (Clark, Boardman, Callaghan 5th Ed. 1992) 41

STATEMENT OF FACTS

The County would add the following to the Statement of Facts set forth in Frankenmuth's Initial Brief:

1. The total amount financed and refinanced by Flowers, including principal and interest was nearly Five Million Dollars over a period of 88 months. (R Exhibit 1- Exhibits "D" and "E"). The lease purchase agreement was never submitted for or approved by voter referendum.

2. Flowers did not obtain the prior approval of the Board of County Commissioners before signing these the lease and payment schedules. (R Exhibit 97-104, lines 14-17, Deposition of Joe A. Flowers dated November 30, 1995). The reason given by Flowers for such an omission was that his attorney told him no such approval was necessary because if the non-appropriation clause was exercised, the lease would be terminated. Id.

The County disagrees with the following Statement of Facts set forth in Frankenmuth's Initial Brief.

1. On page 1, Frankenmuth states: "The suit was a result of the abolition of the Office of the Comptroller for Escambia County, Florida by the Florida legislature."

Escambia County would state that the suit was the result of Frankenmuth's knowledge of the County's intent to non-appropriate the annual lease payment beginning in Fiscal Year 1995-96. (R Exhibit 1-6, ¶ 14); (R Exhibit 1-6, ¶ 16); (R Exhibit 1-8, ¶ 22, 23) Magaha, as the successor to Joe A. Flowers was the County official responsible for requesting yearly appropriations. (R Exhibit 1-8-¶ 2).

2. On page 4, Frankenmuth states: "Although this equipment, which is subject to the lease was retained and used by Magaha and Escambia County, scheduled rental payments under the lease were not made."

Escambia County would state: Not all of the equipment leased by Flowers was used by Flowers, the Board of County Commissioners and Magaha. The equipment leased for the wide area network, which was directly related to the use of the A-11 was never even unboxed. (R Exhibit 121-Transcript from Deposition of Robert Jacobson, pg. 25, lines 1-2 dated December 14, 1995). Following the abolition of the Office of the Comptroller, Magaha did not request the appropriation of annual lease payments for Fiscal Year 1995-96, and the County made no appropriation. (R Exhibit 30-3, ¶ 16). Paragraph 6 of the Equipment Lease Agreement vests title to the equipment in Flowers. Title reverts to the lessor upon termination, pursuant to paragraph 21 of the

lease. (R Exhibit 1-Exhibit “A,” ¶ 6). Frankenmuth refuses to acknowledge that the lease was terminated in 1995 by virtue of non-appropriation.

3. On page 5, Frankenmuth states: “There is no evidence in this case that either Flowers, Escambia County, or Magaha provided appropriate notice to Frankenmuth or any other person or entity with respect to an intent not to appropriate funds under the lease or that any of the equipment was returned.”

Escambia County would state: Under paragraph 21 of the lease, Joe A. Flowers was the party responsible for requesting an annual appropriation for the amount due. In the absence of such a request on the part of Flowers or his successor, Magaha, the County was under no obligation to take any action. (R Exhibit 1-Exhibit “A,” ¶ 21).

In addition, although the County’s fiscal year did not commence until October 1, 1995, Frankenmuth filed suit against the County on September 6, 1995 alleging that Magaha had announced his intention not to request an appropriation for lease purchase agreement after August 1, 1995, and that the County disclaimed the lease purchase agreement as an obligation of the County. (R Exhibit-1) The suit was filed prior to the County’s first budget hearing for fiscal year 1995-96, as held according to the schedule for millage adoption set out in §200.65, Fla. Stat. (1995).

4. The independent auditors advised the County Commissioners of the possibility that officials had entered into lease purchase agreements without Board of County Commissioners approval is violation of § 125.031 Fla. Stat. (R Exhibit 97-111, Deposition of Joseph A. Flowers, November 30, 1995, Exhibit 50 and 51). Those letters do not identify which elected officials have entered into such contracts or which contracts violate this statute.

QUESTIONS CERTIFIED TO THE FLORIDA SUPREME COURT BY
THE UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

(1) Under § 125.031, Fla. Stat. which requires approval of the Board of County Commissioners for certain lease purchase agreements, can a county be held to have approved a contract absent formal resolution and based solely on acts and omissions of the county commission? If so, what standard guides the consideration of whether a county commission has “approved” a contract or agreement?

(2) If the lease purchase agreement has been approved, does the non-substitution clause in the lease purchase agreement that provides for a penalty upon non-appropriation and explicitly disclaims use of revenues from ad valorem taxation violate Article VII, § 12, of the Florida Constitution?

SUMMARY OF ARGUMENT

Paragraph 21, of the equipment lease violates Art. VII, § 12, Fla. Const. The lease purchase agreement created a debt of almost five million dollars, payable over eighty eight months from County taxes or local taxes and was not approved by referendum. Neither Flowers, nor Magaha nor the Board of County Commissioners could enter into such an unconstitutional agreement.

The non-substitution clause of paragraph 21 of the lease compels future appropriation beyond the current budget year because of the inability of the lessee to carry on an essential government function.

The non-substitution clause cannot be severed. Frankenmuth purchased a multi-year stream of revenue. The guarantee (or elimination of investment risk) of future year's appropriations created by the non-substitution clause was an integral part of the price term of the contract. The price term of a contract is an essential, non-severable part of the contract; the non-substitution clause cannot be severed.

The cases relied on by Frankenmuth to show the lease purchase agreement does not pledge the County's general taxing power are all distinguishable because each and every one deals with a situation where a specific non ad valorem revenue source was been identified as the primary source of repayment of the debt in question. In the

instant case, no such limitation is formed on the source of repayment of the lease purchase agreement.

The non-appropriation clause of paragraph 21 also creates unconstitutional debt. Frankenmuth claims that the County “improperly” non-appropriated brought this law suit on that basis. That indicates that the County was not free to choose to non-appropriate funds without further obligation. Such budgetary flexibility has been determined by this Court to be necessary to distinguish a lease purchase agreement from an unconstitutional debt.

It is undisputed that the County never signed or authorized Joe A. Flowers to sign the lease purchase agreement. An action against the County based on waiver, estoppel or an implied contract (ratification by conduct) is barred by sovereign immunity. But even assuming this action is not barred by sovereign immunity, Florida law suggests a three prong test to determine whether a County has ratified a contract.

First, the contract must be one which the County has the power to enter. Second, the contract must be ratified in the same manner in which it might have been entered originally. Third, the ratification must be made with full knowledge of all material facts including the terms and conditions of the contract.

The first prong of the test was not satisfied inasmuch as the County did not have the power to enter this lease purchase agreement. The illegal debt created by the lease purchase agreement is beyond the authority of the County absent voter referendum.

The second prong was not satisfied because the County did not ratify the lease purchase agreement in the manner in which it could originally have approved it. The record shows no vote to approve the terms and conditions of the lease purchase agreement was ever taken by the County.

The third prong was also not satisfied because the County never had before it the terms and conditions of the lease purchase agreement until 1995 at which time it determined the contract to be void and thereafter decided not to appropriate funds to pay for the lease purchase agreement. Constructive knowledge of the terms and conditions is insufficient under Florida law to support ratification. The most that can be said for the events which Frankenmuth claims give rise to ratification is that they show constructive knowledge and not actual knowledge.

Public policy also speaks against ratification under these circumstances. Finding ratification through constructive knowledge and the adoption of a budget funding such a payment would allow unscrupulous public officials to obligate million of taxpayers dollars unlawfully. Moreover, ratification under these circumstances would circumvent

Florida's government in the sunshine law and open a "back door" for vendors to avoid doing business with the public in the sunshine.

This Court should therefore find that paragraph 21 of the lease purchase agreement creates debt in violation of the state constitution. Alternatively, this Court may adopt the three prong test set out above to provide guidance as to when ratification of a contract by a local government has occurred. In applying the three prong test to this case, the Court should determine that no ratification took place.

ARGUMENT

I. THE NON-SUBSTITUTION CLAUSE AND THE PENALTIES FOR NON-APPROPRIATION CONTAINED IN PARAGRAPH 21 OF THE LEASE TRANSFORM THE LEASE PURCHASE AGREEMENT INTO AN UNCONSTITUTIONAL DEBT, WHICH COULD NEVER BE RATIFIED UNDER FLORIDA LAW, NOR COULD IT BE SEVERED.

A. The non-substitution clause of paragraph 21 creates debt.

The Lease's non substitution clause coerces future appropriations and exercise of the County's general taxing power, in violation of the Florida Constitution. The non-substitution clause of paragraph 21 of the lease penalizes the County's exercise of its right to non appropriate funds thus:

If the provisions of this Paragraph 21 are utilized by Lessee, Lessee agrees not to purchase, lease, or rent equipment performing functions similar to those performed through the use of the Equipment, or to obtain from any source the services or information which the equipment was to perform or provide, for the balance of the appropriation period following Lessee's exercise of its termination rights hereunder and the entirety of the next applicable appropriation period following such termination. (R Exhibit 1-Exhibit "A" p. 3, ¶21).

According to Appellant's expert witness, this clause is specifically designed as an economic disincentive against the termination of the lease, and non appropriation of

funds (R Exhibit 94-4, ¶18, Affidavit of Charles Gregory H. Eden dated May 1, 1996). Attorneys General in at least five states have opined that non substitution clauses create debt, are illegal as against public policy, or pledge future year appropriations. Op. Att’y Gen. La. 95-342 (February 7, 1996) (1996 WL 109528 (La.A.G.)); Op. Att’y Gen. W. Va. July 9, 1991 (1991 WL 628008 (W.Va.A.G.)); Op. Att’y Gen. N. M. 88-67 (October 31, 1988) (1988 WL 407470 (N.M.A.G.)); Op. Att’y Gen. Or. OP-6007 (August 7, 1986) (1986 WL 228252 (Or.A.G.)); and Op. Att’y Gen. Wis. 10-83 (March 3, 1983) (1983 WL 180860 (Wis.A.G.)). A federal court in New Mexico relied on the above cited opinion of that state’s Attorney General in determining that a lease purchase agreement which included sanctions for non-appropriation, including a non-substitution clause, was unenforceable under New Mexico law. Naranjo v. County of Rio Arriba, 862 F. Supp. 328 (D.N.M. 1994). It is this clause which renders illusory any language limiting the lease payments to current year appropriations or disclaiming any right to compel the levy of taxes.

To enforce the non substitution clause, Lessor would either require the County to do without the computer equipment for between one and two years (the balance of the appropriation period plus the entire next appropriation period), severely impacting essential governmental functions, or compel the County to appropriate funds to make

the lease payments and not lose the use of computers. (R Exhibit 97-66, Deposition of Joe A. Flowers dated November 30, 1995). The threat of enforcement of the non substitution clause in the event of non-appropriation has the effect of coercing future appropriations (R Exhibit 95-58, Deposition of C. Parkhill Mays dated April 2, 1996).

Art. VII, §12, Fla. Const. requires a referendum whenever the ad valorem taxing power of a local government is pledged to pay an obligation longer than twelve (12) months. The former Comptroller pledged that lease payments would come from “county taxes” and “local taxes,” without distinction (R Exhibit-97, Deposition of Joe A. Flowers dated November 30, 1995-Exhibit 49). The former Comptroller had the right to compel the County to appropriate funds sufficient to meet the needs of his office, enforceable, if necessary, through mandamus. Escambia County v. Flowers, 390 So.2d 386 (Fla. 1st D.C.A. 1980). The record reflects that the Comptroller was aware that the County funded his requests from ad valorem taxes. (R Exhibit 97-93, 94, 116, Deposition of Joe A. Flowers dated November 30, 1995). He did not distinguish what source the County funds to operate his office came from, so long as the County approved his budget. Id.

Frankenmuth has nowhere shown that the only funds from which lease payments were to be made were from non ad valorem sources. Amended Paragraph 3 of the

lease purchase agreement purports to disclaim any right to compel the levy of ad valorem taxes to make payments under this lease purchase agreement. Such a clause is illusory. Flowers pledged that the source of funds to make payments under the lease purchase agreement for the current year was “county taxes” and for the future years of the lease purchase agreement “local taxes.” (R Exhibit 97-Deposition of Joe A. Flowers, dated November 30, 1995-Exhibit-49). He defined these taxes as ad valorem, municipal service taxing units, and municipal services benefit units. Moreover, he had no way to distinguish revenues he received from ad valorem sources from those he received from other sources. (R Exhibit 97-114, Deposition of Joe A. Flowers dated November 30, 1995).

If the lessor did not have the right to compel budget appropriation, Flowers did. Escambia County v. Flowers, 390 So.2d at 386. The combination of Flowers’ pledge of taxes to make the payments on the lease purchase agreement, his right to compel funding of his budget, and the non-substitution clause would require the exercise of the County’s general taxing power to make the lease payments. This is confirmed by Frankenmuth’s efforts to compel the County to make the future lease payments without regard to the source of the funding. The disclaimer masks an indirect pledge of the

County's general taxing power. See, County of Volusia v. State, 417 So.2d 968, 971 (Fla. 1982). It is therefore illusory.

The threat of penalties to coerce future appropriations without regard to the source of repayment transforms the lease into a debt requiring a referendum. See, Nohrr v. Brevard County Educational Facilities Auth., 247 So.2d 304, 310-11 (Fla. 1971). In Nohrr, this Court invalidated a provision of an otherwise valid bond indenture which gave a right of foreclosure to creditors as to property owned by the Florida Institute of Technology. The Court reasoned that even though the County did not own the facilities in question, it would feel morally compelled to levy taxes or to appropriate funds to prevent the loss of the properties through foreclosure.¹ Id. at 311. The County Commission would be compelled to appropriate funds from revenues generated by ad valorem taxes. Similarly in the instant case, to avoid the consequences of enforcement of the non-substitution clause, the County would be compelled to make future appropriations. The non-substitution clause in the instant lease places this contract squarely within the invalid pledges of future year appropriations discussed in

¹Paragraph 6 of the Lease (R Exhibit-1-"A") vests title of the equipment in the Lessee at the time the lease schedules are entered into, subject to reverter. The issue of whether this "lease" is a rental or an installment contract was not addressed below. Under Nohrr, this has created an impermissible de facto security interest in the equipment.

State v. Brevard County, 539 So.2d 461 (Fla. 1989), a bond validation proceeding in which the State challenged Brevard County's lease purchase agreement for certain equipment. The State argued the lease purchase violated Art. VII, § 12, Fla. Const., which prohibits counties from pledging ad valorem taxes for obligations in excess of twelve months without a referendum election. The State specifically alleged that the lease purchase imposed a moral compulsion on the County to appropriate funds for the lease. Id. at 463.

This Court disagreed, specifically noting the absence of the unconstitutional non substitution clause in that lease. Id. at 463. Brevard County was free to secure replacement equipment in the event it failed to appropriate lease payments; therefore, there was no moral compulsion to appropriate. In addition, unlike the instant lease, the lease in Brevard County was secured by non ad valorem revenues which were not otherwise pledged. Id.

Similarly, in State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990) this Court validated a lease purchase agreement for real property under which, in the event the School Board failed to appropriate funds for the lease, the School Board was free of any further obligation. The Court noted that if the Board failed to appropriate funds in any given year, “the board’s obligations terminate without penalty

and it cannot be compelled to make payments.” Id. at 551. The Court observed that in such event, the School Board could buy the property, or even substitute other facilities for those surrendered. Id. at 551.

The very right to coerce future appropriations, the absence of which led this Court to validate the transactions in Brevard County and in Sarasota County, is the same right the Lessor attempts to enforce in the instant litigation. The net effect of the interrelated promises of taxes and non substitution is to pledge the general taxing power of the County to support the lease payments. Absent a referendum, this is illegal and unenforceable.

B. The cases relied on by Frankenmuth to show the non-substitution clause does not create debt do not apply to situations without a specifically identified non ad valorem revenue source to make debt service.

Frankenmuth first relies on State v. Alachua County, 335 So.2d 554 (Fla. 1976) to distinguish County of Volusia and to suggest non-substitution clauses do not implicate ad valorem taxing power. Frankenmuth’s reliance is misplaced. Alachua County arose from a proceeding to validate revenue and special obligation bonds. Id. at 555. Unlike the instant lease, the bonds in Alachua County could be paid only from Revenue Sharing Funds and from Race Track proceeds. Alachua County had pledged

other non ad valorem revenues to be used only after these specified revenue sources were encumbered. Id. The incidental effect on ad valorem taxes discussed in Alachua County occurred when the identified revenue sources were diverted to debt service. Id. at 558. The Court reasoned that any revenue bond would have the effect of diverting from general governmental purposes the identified revenue stream with some effect on ad valorem taxation. Sanibel-Captiva Taxpayers' Ass'n v. Lee County, 132 So.2d 334 (Fla. 1961) is similarly inapposite. Lee County observed that the revenue bonds in question were not supported by the general taxing power. Id. at 339. Otherwise, the bonds would be invalid. Id. Nevertheless, like Alachua County, Lee County is inapposite. Significantly, Frankenmuth has so far identified no non ad valorem source from which it expects payment to be made.

Following Frankenmuth's reasoning, a Court would need to ascertain validity of local debt not by considering what revenue is pledged to repay it, but only by considering whether such debt could affect ad valorem tax rates. This "slippery slope" created by Frankenmuth's reasoning would require judicial review of the fiscal feasibility of every proposed financing. The Florida Supreme Court has eschewed this approach. State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978).

Indeed, every case Frankenmuth cites to distinguish the instant lease from the rule laid down in County of Volusia is distinguishable because the debt in each of those cases was initially secured by specifically identified non ad valorem revenue sources and not the general taxing power of the local government.² In the instant case, by contrast, no non ad valorem revenue source to pay the debt service on the lease was ever specified, except for “county taxes” and “local taxes.” When this lease was created, Flowers knew that his budget was funded by both ad valorem and non-ad valorem revenues and that the debt service would be supported by the general taxing power of the County. (R Exhibit 97-93,94, 116 Deposition of Joe A. Flowers dated November 30, 1995.) Unisys prepared the document identifying the payment source as “county taxes” or “local taxes” which Flowers signed (R Exhibit 97-Deposition of Joe A. Flowers dated November 30, 1995.)

C. The non-substitution clause and the penalties for non-appropriation are not severable because they are essential elements of the price terms and expectancy in the contract.

This Court has defined what makes a contract “entire” or “divisible.” Local No. 234, etc. v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953). This Court observed,

²City of Palatka v. State, 440 So.2d 1271 (Fla. 1983); and Murphy v. City of Port St. Lucie, 666 So.2d 879 (Fla. 1995).

[A] contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement.

66 So.2d at 819. More recently, the Second District Court of Appeal observed, “Generally, the price term in a contract is vital; severing the price term eliminates the essence of the contracting parties’ agreement.” Wilderness Country Club v. Groves, 458 So.2d 769 (Fla. 2 D.C.A. 1984). See also, Practice Management Associates, Inc. v. Bitet, 654 So.2d 966 (Fla. 2d D.C.A. 1995).

The price term in the lease purchase agreement is the money which would be total amounts due under the lease purchase agreement. The price Frankenmuth paid for its interest in the contract is a direct effect of the non-substitution clause. Severing the non-substitution clause effectively severs the price term of the contract. This Court cannot create a “new” price term under the guise of construing this contract. Home Development Company of St. Petersburg v. Bursani, 178 So.2d 113 (Fla. 1965), error for a court to reconstruct price term different from that in contract.

Frankenmuth purchased from Chicorp, by assignment, the future revenue stream from the payments to be made on the lease purchase agreement. (R Exhibit 1-Exhibits “I” and “J”). The annual payment on the lease purchase agreement was \$120,000 for the equipment described in Schedule 02 and \$419,008 for the equipment described in

Schedule 03 (Id). Frankenmuth’s purchase was therefore worth over 4 million dollars which would have been paid during the many years of the lease purchase agreement. The essence of the contract which catapults its value from one year’s annual appropriation (approximately \$539,000.00) to more than \$4,000,000 is found in the sanctions imposed by the non-substitution clause and the additional hurdles imposed prior to non-appropriation.

Frankenmuth’s expert testified in his affidavit that the non-substitution clause created assurance to the leasing company that non-appropriation would only occur for “legitimate reasons;” (R Exhibit 94-3-4, ¶ 18, Affidavit of Charles Gregory H. Eden dated May 17, 1996). Whatever “legitimate reasons” are, they were not to be determined by the legislative body tasked with funding the payments³. He testified that this imposed “economic disincentives” to local governments to keep them from early terminations of the lease. According to Eden, this is to reduce the risk to investors of non-appropriation.

The economic disincentive to non-appropriation is therefore an integral part of the consideration. It creates a future expectancy of a multi-year revenue stream which,

³This also raises the issue, discussed in the County’s initial brief filed with the Eleventh Circuit Court of Appeals, of whether these contracts interfere with the ability of local governments to maintain budgetary flexibility, and whether a local government can contract away its decision-making power.

while not only creating debt (on the part of the municipality) also creates value in the lease purchase agreement beyond one year's appropriation. In the instant case, this clause is worth literally millions of dollars to Frankenmuth.

Morall Claramount, Executive Vice President and Secretary of Frankenmuth Mutual Insurance Company, testified that Frankenmuth purchased the entire future revenue stream as set out in the lease purchase agreement. (R Exhibit 111, Affidavit of Morall M. Claramount dated June 5, 1996). Thus, Frankenmuth's bargained for expectancy was full tender of all lease payments, years into the future.

But according to Frankenmuth's expert Eden, without the non-substitution clause, there is an investment risk. So, by including the economic disincentive to early termination, the investment risk was reduced and the indenture created Frankenmuth's long term expectancy. The non-substitution clause effectively "locks in" years of revenue. Since the price Frankenmuth paid for the assignment was determined by the non-substitution clause, the non-substitution clause is an integral part of the price term. The lease purchase agreement thus becomes entire and not divisible. As a result, the entire lease purchase agreement must fail, and become nugatory.

D. The non-appropriation clause itself fails to comply with Florida law.

Even in the absence of the non-substitution clause, the non-appropriation language of paragraph 21 is constitutionally infirm because non-appropriation could not be accomplished without penalty. Paragraph 21 of the lease purchase agreement provides in pertinent part:

“21. Non-appropriation: If Lessee periodically requests from its legislative body or funding authority funds to be paid to Lessor under this Lease and notwithstanding the making in good faith of such request in accordance with appropriate procedures and with the exercise of reasonable care and diligence such legislative body or funding authority does not approve funds to be paid to Lessor for the Equipment. Lessee may, *upon prior written notice to Lessor effective 60 days after the giving of such notice or upon the exhaustion of the funding authorized for the current appropriation period, whichever is later*, return the Equipment to Lessor at Lessee’s expense and thereupon be released of its obligation to make all rental payments to Lessor due thereafter, *provided: (i) no funds from any source or by any means whatsoever exist for payment for the Equipment or other amounts due under the Lease, (ii) the Equipment is returned to Lessor in the same condition as when delivered to Lessee, reasonable wear and tear resulting solely from authorized use thereof excepted, (iii) the foregoing notice states the failure of the legislative body or funding authority to appropriate the necessary funds as reason for cancellation, and (iv) the notice is accompanied by payment of all amounts then due to Lessor under this Lease...*” (e.s.)

The certification required under paragraph 21 (i) is the equivalent to the pledge of “all available non ad valorem revenues” struck down in County of Volusia. This

court has previously considered the requisites to make a lease purchase agreement a current expense and avoid implicating constitutional debt limitations. In State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990) this Court upheld a financing plan with a non-appropriation mechanism under which if the school board decided not to appropriate funds in a given year, the board's obligation would "terminate without penalty." Id. at 551.

In its briefs to the United States Circuit Court of Appeal for the Eleventh Circuit, Frankenmuth has alleged the County did not "properly" non-appropriate. According to Frankenmuth, the County's alleged failure to comply with notice and finding requirements of paragraph 21 of the lease purchase agreement does not terminate the County's obligation under the lease purchase agreement. This is so notwithstanding the undisputed fact of non-appropriation, the allegation of non-appropriation in Frankenmuth's complaint which was admitted by the County in its answer (R Exhibit 1-6, ¶ 14); (R Exhibit 33-3, ¶ 14). Frankenmuth has vowed to pursue damages for the full amount of the lease payments against the County for the alleged improper non-appropriation, pledging to execute the judgment it plans to obtain against generally available assets of the County, "regardless of whether Frankenmuth can force Escambia County to appropriate funds either to make lease payments or to satisfy a judgment."

(Frankenmuth's Answer Brief Appeal No. 98-2962, filed with U.S. Court of Appeals for the Eleventh Circuit, pages 12, 15).

Exposing the County's assets to a judgment creditor is not, perhaps, what this Court meant when it discussed a governing body's obligation terminating without penalty in the event of non-appropriation. Certainly that exposure is contrary to the test set out in Reuven Mark Bisk, Note, State and Municipal Lease-Purchase Agreements: A Reassessment, 7 Harv. J. L. & Pub. Pol'y 521, 544-545, (1984), which this Court found useful in Sarasota County, 561 So.2d at 551, n. 4. Under the Bisk test, the constitutional debt limitation applies if any of the following questions is answered in the affirmative:

- Does there exist an unconditional obligation extending beyond the current fiscal year?
- Does failure to appropriate funds in the future subject the government entity to suit?
- Are other government assets ultimately subject to claim?

Where a valid non-appropriation mechanism is present, the answer to all of the above questions is negative, no debt is created. Bisk at 545.

Paragraph 21, non-appropriation does not comport with these requirements. It is no defense to the unquestionable invalidity of the lease's non-appropriation clause that there is no specific pledge of ad valorem revenues or that the lease disclaims the pledge of such revenues. The direct pledge of ad valorem revenues was not the issue in County of Volusia, and it is not the issue in this case. The issue there was the *indirect* pledge of ad valorem revenues. Volusia County pledged all available non ad valorem revenues and promised to do all things necessary to continue receiving the various revenues thus distinguishing that case from Alachua County.

The second prong of this test has likewise not been met here. Frankenmuth seeks to obligate the County for payments far beyond one year's appropriations, because the County did not "properly" non-appropriation. In addition, the third prong likewise is not satisfied, since Frankenmuth now asserts its ability to seize generally available assets of the County. (Frankenmuth Answer Brief, Appeal No. 98-2962, filed with United States Court of Appeals for the Eleventh Circuit, pages 12-15.)

The non-appropriation clause itself creates debt because it imposes obligations on the County Commission which exceed merely not appropriating funds. The conditions imposed in paragraph 21, as to non-appropriation, fail to meet this Court's test as established in State v. Brevard County and State v. School Board of Sarasota

County. The key to these decisions is budgeting flexibility. State v. Brevard County, 539 So.2d at 464. Without such budgeting flexibility a contingent expenditure becomes an unconditional debt obligation. Bisk at 527. Like the non-substitution clause, this clause goes to the essence of the contract (avoiding constitutional debt limitations). Without it, a major purpose of the contract fails. It cannot be severed, and, like the non-substitution clause, renders the contract nugatory.

II. ABSENT A FORMAL VOTE ON THE TERMS AND CONDITIONS OF A CONTRACT, COMBINED WITH FULL KNOWLEDGE OF ALL MATERIAL FACTS AND CIRCUMSTANCES, CONDUCT STANDING ALONE IS NOT SUFFICIENT TO CONSTITUTE RATIFICATION OR APPROVAL OF A CONTRACT UNDER §125.031, FLA. STAT. (1995).

A. Introduction.

Frankenmuth seeks to impose liability on the County under the lease purchase agreement under either a theory of implied contract, estoppel or an apparent agency between the former Comptroller Flowers and the County. Each theory must fail.

This Court has determined that the legislature has not waived sovereign immunity for actions on implied contracts against political subdivisions. County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997). Absent a written agreement between Frankenmuth and the County, Miorelli bans an action based on a theory that an appropriation, without more, creates an implied contract subjecting the County to suit. See also, Pan-Am Tobacco Corporation v. Department of Corrections, 471 So.2d 4 (Fla. 1984). Unlike Pan-Am, however, there is no written agreement here between Frankenmuth or its predecessors under the lease, and the party against whom

performance is pursued, Escambia County. Because this case would impose on the County liability from an implied contract, this action is barred under Miorelli.

Flowers stated under oath that he was not acting as an agent for the County when he entered into the equipment lease. (R Exhibit 97-60, lines 7-14, Deposition of Joe A. Flowers date November 30, 1995.) And as to ratifying contracts entered into by putative agents, the following three prong test to determine whether a local government has ratified a contract can be inferred from Florida cases such as Ramsey v. City of Kissimmee, 139 Fla. 107, 190 So. 474 (Fla. 1939), Bach v. Florida State Board of Dentistry, 378 So.2d 34 (Fla. 1st D.C.A. 1979), and City of Panama City v. T & A Utilities Contractors, 606 So.2d 744 (Fla. 1st D.C.A. 1992). At least one national commentator has set out a similar test for original approval of equipment lease purchase agreements. Thomas Ingoldsby and Gary Hoffman, *Meeting the equipment needs of State and Local Governments with Tax Exempt Lease Purchase Financings*; in Equipment Leasing, §37.04 (Jeffrey Wong, Ed., Matthew Bender, 1999).

First, the local government must have the power to enter the contract. Second, the contract must be ratified in the same manner in which it could have been entered in the first place. Implicit in the second prong is the opportunity to not ratify a contract.

Third, this ratification must be made with full knowledge of all material facts relative to the contract.

As a practical matter, these requirements mandate a formal vote by the governing body of a local government on the terms and conditions of the contract to be ratified. None of these prongs is satisfied in the instant case.

B. Under applicable Florida law and the undisputed evidence, ratification did not occur.

1. The County did not have the power to enter this multi year lease purchase agreement without referendum approval.

As argued previously, the lease purchase agreement created an unconstitutional debt, and could not be ratified without a referendum. Because the offending provision was such an integral part of the contract, it could not be severed. The illegality of the underlying contract is an initial block to ratification. The first prong of the test for ratification has not been satisfied.

Frankenmuth argues to this Court that the County has the home rule power to enter this contract. Despite the broad home rule powers counties possess, they have not yet been given the home rule power to enter contracts which violate constitutional

limitations on the powers of government. The County did not, therefore have authority to enter this contract without referendum approval.

2. The alleged ratification did not occur in the manner in which the County would have originally approved the contract.

The facts on which Frankenmuth relies to show the County ratified the lease purchase agreement are insufficient to establish ratification. Frankenmuth argues that the fact the County funded the budget of the former Comptroller and that it was aware of and acknowledged the existence of the computer system purchased by the Comptroller constitutes ratification. This argument fails for several reasons.

To ratify this lease, the county must have approved it in the same manner in which the lease might have been originally approved. Ramsey v. City of Kissimmee, 139 Fla. 107, 190 So. 474 (1939). County Commissioners may only enter into a contract when acting in a regular or special meeting of the board. County of Okeechobee v. Florida National Bank of Jacksonville, 112 Fla. 309, 150 So. 124 (1933).

Ramsey provides guidance as to what would constitute “ratification” at common law and thus “approval” under § 125.031, Fla. Stat. (1989). The Ramsey court noted (1) the absence of any authority on the part of the mayor-commissioner to bind the city

council; (2) the city council took no vote on the adoption of the contract, even though the contract was actually presented to the commission; (3) there was no evidence of any formal, after the fact ratification by the city council of the mayor's signature. These three factors, despite payment on the contract, led this Court to conclude the contract had not been ratified.

These same three factors are absent in the instant case. The record shows that Flowers did not have, or claim to have, authority to bind the County Commission (R Exhibit 97-60, lines 7-14, Deposition of Joe A. Flowers dated November 30, 1995); the Comptroller never advised the Commission of the terms and conditions of the lease purchase agreement. (R Exhibit 97-71, lines 2-4, Deposition of Joe A. Flowers dated November 30, 1995); that the County Commission took no vote on the contract itself (R Exhibit 97, Affidavit of Marilyn Gingrey dated May 15, 1996); unlike Ramsey (where the contract had actually been before the city council), the lease purchase agreement had never been presented to the County Commission (R Exhibit 97-99, lines 22-25, Deposition of Joe A. Flowers dated January 30, 1996); and finally, there was never an after the fact vote to approve the contract. Following Ramsey, id., as a matter of law, no ratification occurred in the instant case.

In addition, because of the relationship between the County and the Comptroller, annual appropriation of the Comptroller's budget was a legal duty. Prior to 1995, the County never had the opportunity to *not* ratify the contract. Once the Comptroller had determined that a certain sum of money was necessary to reasonably fund the operations of his office, the County Commission was under a duty to fund the budget at that level. Escambia County v. Flowers, 390 So.2d 386 (Fla. 1st D.C.A. 1980).

The trial court in Flowers, issued a peremptory writ of mandamus against the County requiring the County to fund Flowers' budget at the requested level. The County appealed the order. Although affirming the trial court in every other regard, the District Court of Appeal did not affirm the peremptory writ only because, in its words,

We have no reason to believe, on the record, that the Board on remand will ignore a judicial order that the Comptroller's budget, as presently allocated will not allow him to carry out the constitutional duties of his office.

Id. at 389. In light of this decision, funding the Comptroller's budget was in essence a ministerial act. The Commission cannot be said to have ratified something over which it had no discretionary authority. Performing a duty otherwise required by law is not consideration for a contract. See, Hogan v. Supreme Camp of the American Woodmen, 146 Fla. 413; 1 So.2d 256 (1941). Frankenmuth cannot rely on the funding of the Comptroller's budget to show ratification.

The Fifth Circuit Court of Appeals also considered a partial payment case in Hoskins v. City of Orlando, 51 F.2d 901 (5th Cir. 1931). The Mayor of Orlando, Florida at the direction of the city council, executed a contract for the purchase of real property. Instead of acquiring the fee title to the parcel in question as directed by the council, the Mayor executed a contract purchasing the owner's share of a lease purchase agreement and reversionary interest in the real property. The owner's interest, as Lessee, was acquired by the city along with the obligation to comply with other covenants and mortgages. Partial payments were made by the city to the Lessor. The city subsequently denied the validity of the contract.

The Lessor contended, as here, that by making partial payments the city had ratified the agreement. The court rejected the argument. The court reasoned that the City Council had no actual knowledge of the terms and conditions of the contract. A separate vote was needed to ratify the contract. Id. at 906. Here, Frankenmuth does not even allege the County made any payments, only that the County complied with the law and approved the former Comptroller's budget.

Nor does Frankenmuth allege that the terms and conditions of the lease purchase agreement were ever put to the County Commission. Although Frankenmuth claims that the memorandum of understanding between Magaha and the County of July 24,

1995 evidences ratification because it allocates computer equipment between the County and Magaha, that agreement fails to address the lease purchase agreement.

The omission is significant. Frankenmuth alleged in its complaint that Magaha evidenced an intent as of August 1, 1995 not to request any appropriations for the lease purchase agreement. Magaha's actions like the County's were inconsistent with ratification.

Paragraph 18 of Frankenmuth's complaint alleges that the County has advised Frankenmuth that it does not consider the contract valid and does not intend to appropriate funds for it in the coming budget year (1995-1996) (R Exhibit 1). That was the first opportunity the County had to not ratify the contract, and to disclaim it. The County took the opportunity to do so.

Both Ramsey and Hoskins thus require some formal action on the specific terms and conditions of the contract to support ratification. The instant record shows this condition was not met.

3. The County did not have full knowledge of the terms and conditions of the lease purchase agreement until 1995, when it determined that the lease purchase agreement was not an obligation of the County.

The third prong of the test for ratification requires full knowledge of the terms and conditions of the lease purchase agreement. Ball v. Yates, 158 Fla. 521, 29 So.2d 729 (Fla. 1946) cert. den. 332 U.S. 774, 68 S.Ct. 66, 92 L.Ed. 359 (1947). Constructive knowledge and duty to inquire do not establish ratification at common law. The First District Court of Appeal has stated the rule thus:

It is generally the rule that the doctrine of constructive knowledge does not apply to bring about ratification. The principal is charged only upon a showing of full knowledge, and not because he had notice which should have caused him to make inquiry, which in turn would have brought to his attention the knowledge of the unauthorized act of the employee.

Bach v. Florida State Board of Dentistry, 378 So.2d 34 (Fla. 1st D.C.A. 1979). The most that can be said for the auditors' letters discussed by the Federal Appeals Court is that they might have imposed a limited duty to inquire. These letters did not identify which elected officials had entered any illegal contracts, nor which contracts violated the law. The letters spoke only of "needed property and equipment for the efficient operations of their respective offices." Such generality does not support ratification.

Frankenmuth cites two letters from the Comptroller to the County in support of its argument for ratification (Letter dated August 3, 1993, to Steve Del Gallo and letter dated May 26, 1992, to D. M. "Mike" Whitehead, R Exhibit 97, Deposition of Joe A.

Flowers dated November 30, 1995, Exhibit 41,42 respectively). In each the Comptroller announced to the Board of County Commissioners his own independent actions relative to the equipment without even suggesting he sought the County's approval. Neither letter mentions the costs of the system, or the terms and conditions under which the Comptroller acquired the computer equipment and invited the County Commission to coordinate its own technology plan with his system.

Next Frankenmuth relies on the County Administrator's report to the County Commission of June 14, 1994 (R Exhibit 1, Complaint of Frankenmuth Mutual Insurance Company, Exhibit "O"). This also omits any discussion of the Comptroller's contract. Indeed, the budgetary impact section is totally silent about the cost of the Comptroller's computer equipment, and the budgetary impact is estimated to be far less than even one annual payment on the lease purchase agreement. This report indicates that the Comptroller's system was separate from the County's and that financing of the Comptroller's system was not even a consideration for the County.

As to the February 23, 1995 (R Exhibit 93-App. 6), Board of County Commissioners meeting, the County timely disavowed any obligation under the Comptroller's lease purchase agreement and did not appropriate funds to pay at the first available opportunity namely the budget for the 1995-96 fiscal year. Indeed,

Frankenmuth had sued the County alleging non-appropriation prior to the final adoption of the budget for fiscal year 1995-1996 which did not provide for payment of the equipment.

Finally, Frankenmuth relies on the memorandum of understanding between Magaha and the County dated July 27, 1995 (R Exhibit 93-App. 7), which was also silent as to the lease purchase agreement.

Not only was the lease purchase agreement itself never presented to the County Commissioners, the Comptroller withheld it from them. (R Exhibit 97-51, Deposition of Joe A. Flowers dated November 30, 1995). In 1991, months before executing the lease purchase agreement, the Comptroller promised the Auditor General of Florida that “in the future, all leave [sic] purchase agreements will be submitted to the Board of County Commissioners for approval.” (R Exhibit 97-Exhibit 51 attachment to letter dated November 12, 1991 from Joe A. Flowers to Sidney H. Torbit, State of Florida, Office of the Auditor General.) It is undisputed that the Comptroller never fulfilled this promise.

If material facts are withheld from the principal, such as the terms and conditions of the underlying contract here, any ratification is invalid as founded on

mistake or fraud. Oxford Lake Line v. First National Bank of Pensacola, 40 Fla. 349, 24 So. 480 (Fla. 1898).

C. Public policy of the State of Florida also prohibits ratification by conduct.

Ratification of a public contract without some formal action on the contract violates the open government provisions of the Florida Constitution and statute. Art. I, § 24, Fla. Const. requires that all official acts be made in public in “the sunshine.” § 286.011, Fla. Stat. (1993) implements this provision and requires that such acts occur at a publically noticed meeting, that the public be allowed to attend, and that there be minutes creating a record of the board action so that the public has an opportunity to know what their elected officials are doing.

The First District Court of Appeal invalidated a contract because it was not approved at a meeting held in compliance with § 286.011, Fla. Stat (1989). TSI Southeast, Inc. v. Royals, 588 So.2d 309 (Fla. 1st DCA 1991). There the Hamilton County Development Authority and a private buyer entered a contract for the purchase and sale of real property. However, the meeting at which the contract was approved did not meet the requirements of § 286.011, Fla. Stat. (1989). The contract was invalidated on that basis. This statute will not permit Frankenmuth to impose a

contractual obligation of millions of dollars on the County without the County Commission ever having voted on the contract, at a public meeting.

Approval or ratification under these conditions, while not only departing from established precedent would also open the door for violation of the government in the sunshine law in the whole field of government contracting. Subterfuge would be rewarded because the mere act of adopting its annual budget would subject the County to liability under a theory of ratification by appropriation regardless of the sunshine law. No Court could countenance such a result.

The second public policy which would be defeated is the protection of the taxpayer from unscrupulous officials. Over 65 years ago, this Court refused to find the existence of a contract where a city manager had attempted to create one in violation of the city charter. Brown v. City of St. Petersburg, 111 Fla. 718; 153 So. 140 (1933). This Court worried that to allow such a contract would enable an official, on his own and without “let or hindrance,” to pledge the credit of the municipality. Brown, 153 So. at 144.

This Court reiterated this concern in County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049, 1051. This Court declared:

“We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the

contract. Otherwise, the requirement of *Pan Am* that there first be an express written contract before there can be a waiver of sovereign immunity would be an empty one. An unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability.”

703 So.2d at 1051.

An excellent discussion of this policy is found in City of Panama City v. T & A Utilities Contractors, 606 So.2d 744 (Fla. 1st D.C.A. 1992). The Court explained the public policy concerns underlying Ramsey in this way:

Ramsey establishes a rule for cases where an attempt is being made to hold a municipality to the terms of a contract, for the benefit of the other party to the contract... It seems clear to us that the policy justification underlying the Ramsey decision is that taxpayers should not be accountable on a contract unless the contract has been entered into according to the strict letter of the law. Otherwise, corrupt (or merely inept) public officials could subject the public to untold financial liability.

606 So.2d at 747 (Fla. 1st D.C.A. 1992). Frankenmuth urges this Court to allow the very result which such decisions have thus far avoided.

D. The absence of an express legislative prohibition on non-substitution clauses cannot be construed as an implied authorization for counties to enter lease purchase agreements containing such clauses.

Frankenmuth argues that §235.056, Fla. Stat. (1995), which prohibits school districts from entering lease agreements which contain non-substitution clauses, implies that the Legislature permits Counties to enter such agreements. This argument, based on the maxim of statutory construction “expressio unius est exclusio alterius”, fails for several reasons.

First, the legislature cannot enact laws which violate the constitution. Munoz v. State, 629 So.2d 90,98 (Fla. 1993); Broward County v. La Rosa, 505 So.2d 422 (Fla. 1987). What the legislature cannot do directly, it certainly cannot do by implication.

Second, every statute is to be construed in light of existing common law, in this case, the interpretation of the requirements of Art. VII, § 12, Fla. Const. by the Florida Supreme Court. 2B Norman Singer, Sutherland Statutory Construction § 50.01 (Clark, Boardman, Callaghan 5th Ed. 1992). No change in the common law is intended unless the statute either speaks plainly in this regard or cannot otherwise be given effect. McGhee v. Volusia County, 679 So.2d 729 (Fla. 1996). A statute designed to change the common law rule must speak in clear, unequivocal terms for the presumption is that no change in the common law is intended unless the statute is explicit in this regard. Carlile v. Game & Fresh Water Fish Comm’n, 354 So.2d 362 (Fla. 1977).

There is no indication that §235.056, Fla. Stat. (1995), is intended to replace the common law. Absent such intent, this statute must be presumed to be cumulative to existing common law unless it is so repugnant to the common law that the two cannot exist. Thornbury v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990).

Third, Frankenmuth misapplies this principle of statutory construction. Such a rule is an “intrinsic aid” to statutory construction. R. Rhodes, *the Search for Intent: Aids to Statutory Construction in Florida*, 6 Fla. St. U. L. Rev. 383 (1978). An intrinsic aid is one which looks only to the four corners of the statute in question. Id. “Expression unius est exclusio alteris” is not a rule of law. Smalley Transp. Co. v. Moed’s Transfer Co., 373 So.2d 55 (Fla. 1st D.C.A. 1979). Quoting the Florida Supreme Court, the Court in Smalley noted, this maxim is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents.” Id. at 57. Indeed, it has been disregarded at times to make particular statutes cumulative with the common law. 2B Norman Singer, Sutherland Statutory Construction § 47.24 (Clark, Boardman, Callahan 5th Ed. 1992).

As an intrinsic aid, the maxim does not even apply to two different statutory enactments. Every case cited by Frankenmuth involved construction of two parts of the same statute. Frankenmuth cites no case discussing a statute’s relationship to the

common law. Thus, every case cited by Frankenmuth for this principle is simply inapplicable to the instant case.

Fourth, Frankenmuth would have the judicial branch legislate where the legislature has been silent. Frankenmuth tries to infer legislative intent from legislative silence. Legislative inaction has been called a “weak reed on which to lean” and a “poor beacon to follow.” 2B Norman Singer, Sutherland Statutory Construction § 49.10 (Clark, Boardman, Callahan 5th Ed. 1992). United States v. Hill, 676 F. Supp. 1158, 1167 n.12 (N.D. Fla. 1987). The reasons are set forth in Johnson v. Transp. Agency Santa Clara County, California, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (Scalia, J., dissenting, at 107 S. Ct. 1472-1473) (1987).

CONCLUSION

The two certified questions presented to this Court by the United States Circuit Court of Appeal for the Eleventh Circuit should be answered as follows:

Under § 125.031, Fla. Stat., Joe A. Flowers was required to obtain the approval of the Board of County Commissioner prior to entering into the multi year lease purchase agreement. Neither the undisputed facts nor the law supports Frankenmuth contention that the County ratified the lease purchase agreement by conduct. Although § 125.031, Fla. Stat. does not require a resolution, it requires formal action on the part of the County. The standards which guide the Courts is considering whether a county commission has “approved” a contract are found in Ramsey, Miorelli, Hoskins, T & A Utilities Contractors, and the other cases cited in this brief.

But even if this Court were to depart from these authorities and hold that the County’s conduct constituted approval of the lease purchase agreement, the presence of the non-substitution clause and the other obstacles to non-appropriation of funds are non-severable and render the agreement void ab initio. The contract disclaimer of the lessor’s right to compel the levy of ad valorem taxes to make lease payments is insufficient to cure these constitutional infirmities.

Respectfully submitted this _____ day of October 1999.

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CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of this brief were served on the Clerk for the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, Via Federal Express #3776741080, and a copy of this brief was served on Paula G. Drummond, Esquire, 120 S. Alcaniz Street, Pensacola, Florida 32501 and on J. Lofton Westmoreland, Esquire, Moore, Hill, Westmoreland, Hook & Bolton, P.A., Post Office Box 13290, Pensacola, Florida 32591-3290 by U. S. Mail, this 5th day of October, 1999.

David G. Tucker, Attorney for
Escambia County