

MISTAKES HAPPEN: FIXING THEM THROUGH CURATIVE LEGISLATION

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*We often discover what will do, by finding out what will not do; and probably he who never made a mistake never made a discovery.*¹

We all make mistakes. Often, once we become aware of our mistakes, we are able to fix them. We retrace our steps, and the second time around, we do correctly what we could have done and should have done in the first place. It is common knowledge that local governments also make mistakes. Less well-known is that governments have the opportunity under Florida law to fix certain mistakes through legislation enacted after the fact for an express, curative purpose. Like any person, a government may be permitted to retrace its steps and correct its mistakes.

There are, however, a few caveats. Not all governmental mistakes can be as easily fixed as our own. And, unlike the rest of us, a government must be careful not to enact legislation that works retroactively to deprive its citizens of their vested rights.

This Article explores the ability of local governments within Florida to enact legislation to cure defects in flawed governmental actions. Surprisingly, curative legislation may be valid even if it is enacted only in response to a lawsuit initiated by unhappy citizens who have sued their government to challenge its mistake.

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1. Samuel Smiles, *Self Help: With Illustrations of Conduct and Perseverance* 339 (Cosimo Classics 2005) (emphasis in original).

I. CURATIVE LEGISLATION: AN EXAMPLE

The case of *Jasinski v. City of Miami*² is illustrative. *Jasinski* involved a citizens' challenge to the City of Miami's twenty-five dollar administrative charge for nonconsensual towing of privately owned vehicles.³

Florida Statutes Section 125.0103(1) requires counties to establish maximum towing rates in cases where vehicles must be towed from private property or from an accident scene.⁴ The statute also authorizes municipalities to exempt themselves from county jurisdiction if they so choose and to set their own maximum rates—by “*ordinance*.”⁵

In 1999, the City of Miami passed a *resolution* (not an *ordinance*) authorizing the City Manager to issue a Request for Qualifications (RFQ) for the purpose of selecting qualified businesses to provide towing and wrecker services.⁶ The RFQ set out the maximum rates that the City could charge and it included the twenty-five dollar administrative charge.⁷

Thereafter, *Jasinski* and other similarly situated citizens were charged these fees and paid them.⁸ Contending that the fees were invalid, the *Jasinski* plaintiffs initiated suit against the City. Three years after the adoption of the resolution, and following the commencement of the federal court challenge, the City passed a curative *ordinance* amending the City Code to ratify and validate the twenty-five dollar administrative fee.⁹

2. 269 F. Supp. 2d 1341 (S.D. Fla. 2003), *aff'd* 99 Fed. Appx. 887 (2004).

3. *Id.* at 1343.

4. Fla. Stat. § 125.0103(1)(c) (1999).

5. *Id.* (emphasis added).

6. *Jasinski*, 269 F. Supp. 2d at 1344. In February 1999, Miami-Dade's county commissioners passed a resolution establishing maximum rates for the towing, recovery, and storage of vehicles and authorized an administrative fee of up to thirty dollars. *Id.* at 1344–1345. In accordance with Florida Statutes Section 125.0103, the City of Miami could establish its own maximum towing rates and administrative fee by *ordinance*. *Id.* at 1344 n. 4. Because the city passed a resolution instead of an ordinance as mandated by Florida Statutes Section 125.0103, the plaintiffs in *Jasinski* argued that they were entitled to a refund of the unauthorized twenty-five dollar administrative fee. *Id.* at 1347.

7. *Id.* at 1345.

8. *Id.* at 1344.

9. *Id.* at 1345. The ordinance expressly declared “the administrative fee to be legal and valid” and recited that its purpose was “to ratify, validate and confirm in all respects the administrative fees imposed prior to the adoption of [the] ordinance.” *Id.* at 1346.

The *Jasinski* plaintiffs then contended that the curative ordinance was invalid.¹⁰ They complained that the City could not retroactively apply the ordinance to support the imposition of the City's prior administrative charge.¹¹ The court disagreed and granted the City's motion for summary judgment on this very point.¹²

Encapsulating the law regarding curative legislation and its retroactive application, the *Jasinski* court explained that

[w]hen a legislative body, in good faith, enacts a curative law to ratify, validate and confirm any act that it could have authorized in the first place, . . . it would contravene public policy to award plaintiffs a windfall for asserting a cause of action that the legislative body may constitutionally eliminate by curing any defects in the law.¹³

II. ENACTMENT OF CURATIVE LEGISLATION

There is a long history in Florida of legislative enactments ratifying or validating previous governmental actions that, when undertaken, were in some sense invalid.¹⁴ Several of these cases

10. The *Jasinski* plaintiffs challenged the city administrative fee on three bases. First, they alleged that the administrative charge was improper because when they paid the charge, it was not authorized by any statute or ordinance. *Id.* at 1345. Second, they claimed that the retroactive application of the city's curative ordinance violated their due process rights. *Id.* Third, they contended that the charge was improper since, as they argued, it was outside the scope of Florida's towing-lien statute. *Id.*

11. *Id.* at 1346.

12. The court indicated that an ordinance may be applied retroactively when (1) there is clear evidence that the legislature intended to apply the law retroactively, and (2) such application is constitutionally permissible because it does not "create new obligations, impose new penalties, or impair vested rights." *Id.* (citing *Metro. Dade Co. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla. 1999)). The court determined that the curative ordinance satisfied the clear legislative intent requirement because it expressly declared the city's intent to ratify the administrative fee. *Id.* The court then determined that the second prong of the test was satisfied, reasoning that the ordinance did not create new obligations or impose new penalties because it merely authorized a fee the plaintiffs had previously paid and the plaintiffs were not required to pay any new fees. *Id.* at 1347. The court also reasoned that the curative ordinance did not impair any vested rights because "legislative bodies may retroactively enact curative laws to ratify, validate and confirm any act that they could have authorized in the first place." *Id.* (citing *Coon v. Bd. of Pub. Instr. of Okaloosa Co.*, 203 So. 2d 497, 498 (Fla. 1967)).

13. *Id.*

14. See e.g. *Co. of Palm Beach v. State*, 342 So. 2d 56, 56 (Fla. 1976) (approving curative legislation forgiving the failure of Palm Beach County to publish proper notice of a

deal with flaws in an election process; this type of case well illustrates the framework within which the validity of curative legislation is assessed.¹⁵

In *Sullivan v. Volusia County Canvassing Board*,¹⁶ voters challenged a referendum-election process that created the City of Deltona, contending that the process was defective because of alleged notice and ballot irregularities.¹⁷ The voters lost their case at the trial court level, and while the appeal was pending before the Fifth District Court of Appeal, the Florida Legislature stepped in and enacted legislation declaring the election valid.¹⁸ Noting that the Legislature had the constitutional power to create municipalities under Article VIII, section 2 of the Florida Constitution, the *Sullivan* court found the legislative cure valid.¹⁹

To reach this result, the *Sullivan* court looked back to the 1900 case of *Middleton v. City of St. Augustine*.²⁰ Though the language is out of date, the *Middleton* court captured the gist of the law regarding curative legislation as follows:

If the thing wanting, or which failed to be done, and *which constitutes the defects in the proceeding*, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legisla-

bond election); *Coon*, 203 So. 2d at 497 (withdrawing a previous opinion which invalidated an election to issue school bonds because a curative statute had been passed during the application for rehearing that sanctioned the process); *State v. Co. of Sarasota*, 155 So. 2d 543, 546 (Fla. 1963) (holding that a house bill cured “any and all defects in the publication of notice” in a special bond election); *State v. Haines City*, 188 So. 831, 834 (Fla. 1939) (finding a statute passed for the sole purpose of validating the result of a bond election “within the legislative power”); *Smith Bros., Inc. v. Williams*, 131 So. 335, 335 (Fla. 1930) (labeling defects in drainage-assessment proceedings cured by statute); *Camp v. State*, 72 So. 483, 485 (Fla. 1916) (recognizing that courts must take judicial notice of a valid enactment of the legislature that serves as a curative statute to eliminate defects in a bond election); *Sullivan v. Volusia Co. Canvassing Bd.*, 679 So. 2d 1206, 1207 (Fla. 5th Dist. App. 1996) (affirming judgment which validated the election process that created the City of Deltona after curative legislation repaired notice and ballot irregularities in the election).

15. For explanations of specific cases dealing with flaws in the election process, review *supra* note 14.

16. 679 So. 2d 1206.

17. *Id.* at 1206.

18. *Id.* at 1206–1207.

19. *Id.* at 1207. The Court’s succinct reasoning was “what the legislature could have authorized, it can ratify.” *Id.*

20. 29 So. 421 (Fla. 1900).

ture to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, *which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.*²¹

Stated in more modern terminology, the validity of curative legislation has the following two important components:

- (1) The legislative body enacting the curative legislation must have had the authority to enact the legislation at the time of the act that the legislation is designed to cure;²² and
- (2) the irregular act addressed by the curative legislation must be procedural in nature and in other respects legally valid.²³

These two features were found in the case of *Coon v. Board of Public Instruction of Okaloosa County*.²⁴ There, the Florida Supreme Court considered a challenge to a bond issue, where the Florida Legislature had enacted new legislation to retroactively cure procedural defects relating to the manner in which a local school district bond had been approved.²⁵

In *Coon*, a petition had been filed with the local school board requesting the creation of a high school-tax area.²⁶ Following a public hearing as required by law, the school board determined that it was necessary to call a special election.²⁷ This special election was held but failed for lack of voter participation.²⁸ Without the benefit of another petition, the school board adopted a second

21. *Id.* at 431 (emphasis added).

22. *Coon*, 203 So. 2d at 498 (stating that the Legislature may use curative legislation to “ratify, validate and confirm” any action it could have authorized in the first place).

23. *Id.* (reasoning that although the government failed to comply with applicable petition requirements to put a bond issuance to a vote of electors, the election was valid because the defects in the election “were merely procedural”).

24. 203 So. 2d 497.

25. *Id.* at 498.

26. *Id.* at 497. The petition was filed with the school board on January 11, 1966, and it also requested the issuance of bonds in order to raise money for the school board. *Id.*

27. *Id.*

28. *Id.*

resolution calling for a second election, and this time the requisite number of voters approved the tax area and the bond issue.²⁹

As it turned out, the population of voters of Okaloosa County had increased dramatically from the time of the initial petition to the date of the second election.³⁰ Existing state legislation required the election petition to have contained the names of ten percent of the qualified voters.³¹ Owing to the population growth, the original petition did not contain a sufficient number of names to support the second election.³² During the course of a lawsuit challenging the bond issue on these grounds, the Florida Legislature stepped in and revised the state legislation, the effect of which was to validate the second election.³³

The Florida Supreme Court held that the new state legislation was a valid, curative law.³⁴ It reached this result on the basis of the two components described above—the procedural nature of the irregularity and the authority of the legislative body enacting the curative law to address the subject matter through the legislation.³⁵ The *Coon* court stated the following:

The defects which initially afflicted the proposed bond issue *were merely procedural*. The Legislature could have dispensed with those procedural requirements in their entirety. By a curative statute the Legislature has the power to ratify, validate and confirm any act or proceeding *which it could have authorized in the first place*.³⁶

29. *Id.* at 497–498.

30. The number of registered freeholders grew from 4,059 in January 1966 to 8,590 by November of the same year. *Id.* at 498.

31. *Id.*

32. When the petition was originally filed in January 1966, there were 4,059 registered freeholders in the tax area. *Id.* at 497. The petitioners gathered 739 signatures, or around 18% of the registered voters. *Id.* By the time the school board adopted the resolution calling for a second election, there were 7,881 freeholders in the tax area. *Id.* at 498. Therefore, the petitioners needed about 788 signatures to validly adopt the second resolution to vote on the taxing area and bond issuance. *Id.* The petitioners were about forty-nine votes short.

33. *Id.*

34. *Id.* at 499.

35. *Id.* at 498.

36. *Id.* at 497 (emphasis added).

Predictably, not all irregularities are “merely procedural.” In *State v. Town of Belleair*,³⁷ the Florida Supreme Court overturned a decision validating the issuance of refunding bonds because the original bond issue was constitutionally invalid.³⁸

Originally, Belleair had issued bonds for the construction of various public works in the amount of \$300,000.³⁹ As it happened, instead of using the money from the bonds for public works, the town used most of it to enhance the value of private property, specifically, to improve the waterfront adjacent to the property of a certain hotel.⁴⁰ Worse, two of the three town commission members owned the hotel, the third commission member was a hotel employee, and the original bond issue had been “validated” in an election in which only ten persons voted, all of whom were hotel employees.⁴¹

The *Belleair* Court declared the original bond issue constitutionally infirm pursuant to Article IX, section 7 of the Florida Constitution, which prohibits the levy of taxes to benefit any private enterprise.⁴² As such, the Court held that the infirmity was not “merely procedural” and, accordingly, could not be cured.⁴³

III. RETROACTIVE APPLICATION OF CURATIVE LEGISLATION

Return to the *Jasinski* plaintiffs and their challenge to the City of Miami’s administrative towing fee,⁴⁴ as in the voter-challenge cases just described, the City of Miami initially had the authority under Florida Statutes Section 125.0103(1) to assess the administrative fees at issue.⁴⁵ The City had simply made a

37. 170 So. 434 (Fla. 1936).

38. *Id.* at 437–438.

39. *Id.* at 436.

40. *Id.* at 435–436.

41. *Id.* at 436.

42. *Id.* at 437. In contrast to the initial profiting of a private enterprise, as was found in *Belleair*, the Court discussed an exception where a bond issue would not be in violation of Article IX, section 7 of the Florida Constitution if the benefit was merely incidental in pursuit of a lawful municipal purpose. *Id.*

43. *Id.* at 438–439; see also *Smith Bros., Inc.*, 131 So. at 335 (stating that “[w]here legislation is invalid because in its enactment or in its terms it violates organic law, such invalid legislation may not be rendered valid by a subsequent legislative act.”).

44. *Supra* nn. 2–13 and accompanying text.

45. *Jasinski*, 269 F. Supp. 2d at 1346.

procedural mistake. Instead of establishing the right to assess the fees by ordinance, as required under Florida Statutes Section 125.0103(1), the City had mistakenly done so by resolution.⁴⁶

The *Jasinski* court recognized that the City of Miami could retrace its steps and do correctly the second time around what it could have done and should have done in the first place—enact an ordinance providing for the assessment of the towing fees.⁴⁷ In fact, the *Jasinski* plaintiffs conceded this point.⁴⁸

Therefore, the focus of *Jasinski* lay with the validity of the rate ordinance's retroactive application.⁴⁹ As the plaintiffs argued, the City had required them to pay administrative fees under the authority of an invalid and ineffective resolution.⁵⁰ The curative ordinance was enacted only after assessment and payment.⁵¹ Accordingly, the *Jasinski* plaintiffs contended that the City could not retroactively apply the new ordinance to support a prior administrative charge.⁵² In their view, they were entitled to a refund.⁵³

In rejecting the plaintiffs' arguments, the *Jasinski* court applied Florida's two-prong test for determining whether an ordinance may be applied retroactively.⁵⁴ First, a court must assess whether there is clear evidence that the legislature intended the legislation in question to apply retroactively.⁵⁵ If so, a court must then determine whether the legislation is constitutionally permis-

46. *Id.* at 1344 n. 4.

47. *Id.* at 1346.

48. *Id.*

49. *Id.* (stating that to apply an ordinance retroactively courts must look at the legislative history and whether it is constitutionally permissible).

50. *Id.* at 1345.

51. *Id.* at 1344. The court declared that Florida Statutes Section 125.0103(1)(c) allows counties to establish maximum towing rates that may be charged; however, if the city chooses to establish an ordinance, then the county's ordinance shall not apply within the municipality. *Id.* at 1344 n. 4.

52. *Id.* at 1346.

53. *Id.* at 1345.

54. *Id.* at 1346–1348; see *Metro. Dade Co.*, 737 So. 2d at 499 (outlining the two-prong test for retroactive application); *Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 696 (Fla. 5th Dist. App. 2002) (holding that a statutory amendment to the comparative fault statute did not meet the requirements of the two-prong test and thus did not apply retroactively); *Campus Commun., Inc. v. Earnhardt*, 821 So. 2d 388, 395–396 (Fla. 5th Dist. App. 2002) (applying the two-prong test for retroactive application to a statute exempting autopsy photographs from the Florida Public Records Act).

55. *Jasinski*, 269 F. Supp. 2d at 1346.

sible, as follows: The new legislation must not create new obligations, impose new penalties, or impair vested rights.⁵⁶

A. Retroactive Intent

The first prong of the test calls for application of what may prove an obstacle to retroactive application. In the absence of clear legislative intent to the contrary, legislation affecting substantive rights is presumed to apply only prospectively.⁵⁷ In this regard, the law considers the legislature itself, and not the judiciary, best suited to determine the legislation's backward reach.⁵⁸

Courts are therefore charged with determining legislative intent from the terms of the legislation itself.⁵⁹ The issue is easily resolved if the legislation contains language expressly stating that it shall apply retroactively.⁶⁰ This was the case in *Jasinski*, where the ordinance expressly declared “the administrative fee to be legal and valid and to ratify, validate and confirm in all respects the administrative fees imposed prior to the adoption of this ordinance”⁶¹

B. Constitutionally Permissible

The *Jasinski* court then turned to consider whether the curative ordinance was constitutionally permissible.⁶² To meet this requirement, as explained, a retroactive law must “not create new obligations, impose new penalties, or impair vested rights.”⁶³

First, the *Jasinski* court determined that the ordinance did not create any new obligations or impose any new penalties.⁶⁴ The ordinance imposed towing charges identical to the charges im-

56. *Id.*

57. *Earnhardt*, 821 So. 2d at 395.

58. *See Fleeman v. Case*, 342 So. 2d 815, 817–818 (Fla. 1976) (stating that the judiciary should be limited to assessing whether or not to apply a statute retroactively will trigger any constitutional issues).

59. *Earnhardt*, 821 So. 2d at 395.

60. “Of course, where the language of a statute contains an express command that the statute is retroactive, there is no need to resort to . . . canons of statutory construction.” *Metro. Dade Co.*, 737 So. 2d at 500.

61. 269 F. Supp. 2d at 1346.

62. *Id.*

63. *Id.* (citing *Metro. Dade Co.*, 737 So. 2d at 499).

64. *Id.* at 1347.

posed prior to the ordinance's enactment.⁶⁵ Also, as applied in this particular case, the plaintiffs had already paid the twenty-five dollar administration fee and were not required to pay any additional fees.⁶⁶

The *Jasinski* court next went on to consider whether the City's rate ordinance impaired any vested rights.⁶⁷ "Vested rights" are somewhat of an elusive concept. As the court in *Campus Communications, Inc. v. Earnhardt*⁶⁸ explained, "[t]he courts have been loath to formulate a definition of 'vested right' that can be applied in all cases with precision and certainty."⁶⁹ However, the *Earnhardt* court settled on a general definition, which the *Jasinski* court adopted.⁷⁰ A vested right is "an immediate, fixed right of present or future enjoyment."⁷¹

The *Jasinski* plaintiffs had argued that the curative ordinance destroyed their vested right to a refund of the administrative charge that they had paid.⁷² The court rejected this argument, stating that "to be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law*; it must have become a title, legal or equitable, to the present or future enforcement of a demand."⁷³ The plaintiffs' claim was nothing more than a mere expectation that the state of the law prior to the rate ordinance's enactment would continue.⁷⁴ Even though the initial resolution was invalid, no entitlement to a refund ever existed because the City always possessed the authority to enact the curative ordinance.⁷⁵

65. *Id.*

66. *Id.* The court determined that the plaintiffs could not establish that the ordinance placed any new obligations or penalties on them because they paid the charge prior to the ordinance's enactment. *Id.*

67. *Id.*

68. 821 So. 2d 388.

69. *Id.* at 398.

70. *Jasinski*, 269 F. Supp. 2d at 1347 (quoting *Earnhardt*, 821 So. 2d at 398).

71. *Id.*; see also *Div. of Workers' Comp. v. Brevda*, 420 So. 2d 887, 891 (Fla. 1st Dist. App. 1982) (adopting a similar definition of a "vested right"); *In re Will of Martell*, 457 So. 2d 1064, 1068 (Fla. 2d Dist. App. 1984) (stating that "[t]o be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law . . .").

72. 269 F. Supp. 2d at 1347.

73. *Earnhardt*, 821 So. 2d at 398 (emphasis in original) (internal quotations omitted).

74. *Jasinski*, 269 F. Supp. 2d at 1347.

75. *Id.*

Taking its analysis a step further, the *Jasinski* court recognized that what the plaintiffs were seeking amounted to a wind-fall that was against public policy.⁷⁶ The *Jasinski* plaintiffs claimed a vested right, but in fact, their claim arose only from a defect in the City's original action—its mistaken adoption of the administrative fee by resolution rather than by ordinance.⁷⁷ The City's intent was to lawfully impose the fee pursuant to its authority to do so under Florida Statutes Section 125.0103(1).⁷⁸ To award the plaintiffs a refund would place the individuals' interest in benefiting from the City's mistake before the public interest in the government's proper administration.⁷⁹

IV. CONCLUSION

At first blush, it may be a surprising realization that curative legislation can fix flawed governmental actions after the fact. Like us, however, local governments can in some cases retrace their steps and correct their mistakes. Provided the legislative body had the authority to enact the legislation in the first place, and the defect is procedural, such curative legislation will be considered valid. Further, retroactive application of curative legislation will likewise be considered valid as long as the legislation expressly recites its retroactive purpose, and its application is otherwise constitutionally sound.

76. *Id.*

77. *Id.*

78. *Id.*

79. See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 705–706 (1960) (discussing public policy concerns regarding retroactive legislation).