OA 9-4-84

IN THE SUPREME COURT OF FLORIDA

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J. ROBERT ROWE, Appellant, vs. PINELLAS SPORTS AUTHORITY, et al., Appellee.	:	CASE NO. 65,322
PINELLAS RESORT ORGANIZATION, INC., et al., Appellant, vs. PINELLAS SPORTS AUTHORITY, et al., Appellee.	:	CASE NO. 65,420

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellee P.S.A. Group's Answer Brief is a "Brief of Unanswered Questions". Although announcing the laudable goal of meeting Appellant P.R.O. Group's challenges "head on", the P.S.A. Group then spends its entire Brief avoiding the fundamental issues, sidestepping each point. Appellees obviously cannot respond "head on" to the issues and errors demonstrated by Appellants.

Before reviewing each of Appellees responses it is important to define what this appeal is not. First, it is not an appeal about baseball as Appellee's nostalgic description of that sport in early Florida in 1914 implies. Baseball was not on trial nor is it appropriate for Appellees to try to wrap themselves in some sort of "apple pie" cloak to hide the deficiences of their responses on the issues of this case. This is not an appeal about a stadium. Rather it is a multi-issue appeal concerning the use of the Tourist Development Tax funds of the people of Pinellas County and constitutional challenges to the tax itself. Oddly the PSA Group announces that the "threshold issue" of this case is whether bond funding of a stadium to accomodate baseball is "tourist promotion", then never substantively addresses this issue and it is not the threshold issue in this case, but is only one argument relating to one of many principal points.

Lastly this case is not only an appeal from a bond validation proceeding [Answer Brief p. 8] which somehow has "preemptive status over the other case". [Answer Brief p. 35]. No doubt exists why Appellees ignore the issues of the initially filed Declaratory Relief action. They cannot respond to them. However this case was first a Declaratory Relief action, filed before even the bond documents were finished, and certainly before the filing of the bond validation case. Indeed the bond validation case was the one consolidated into this "other" case. No order, no case, no rule and no logic supports the preposterous assertion

that the bond case somehow by consolidation preempted the Declaratory action case. Ignoring these issues can not make them disappear.

ARGUMENT

A myriad of errors occurred in the various legislative and local actions which form the basis of the several independent issues raised by this appeal. Scrutinized, they are "clarion clear" - not because of a singularity of nature, but of result: the misuse of public tax funds. Appellees responses are discussed separately by principal issue below.

I. Pinellas Ordinance 78-20 and the Referendum Adopting It are Invalid.

Three principal bases of the invalidity of Pinellas Ordinance 78-20, which originally imposed the Tourist Development Tax in Pinellas County, were set forth in Appellants' Brief. Appellees responded not at all to two and sidestepped the principal basis of the third.

A. Ordinance 78-20 is invalid because it does not comply with the statutory requirements for a Tourist Development Plan.

As prescribed in Florida Statute § 125.0104(b) and (c) the ordinance levying this tax must include 5 requisites: (1) 60 days or more before enactment of the ordinance, the County must adopt a resolution establishing a County Tourist Development Council; (2) preparation of a County Tourist Development Plan by the Council and submission of that plan to the Coiunty Board for approval; (3) the plan shall set forth the net tourist development tax revenue for the next twenty-four (24) month period; (4) the plan shall include a list in order of priority of the propoesd uses of the revenue by specific project or use; (5) the plan shall include

the approximate cost for each specific use. Of these Pinellas Ordinance 78-20 contains only the third, the estimate of tax revenues. That Ordinance provides:

> Section 2. The tax revenues received pursuant to this ordinance shall be used to fund the Pinellas County Tourist Development Plan, which is hereby adopted as follows:
>
> TOURIST DEVELOPMENT PLAN
>
> The anticipated annual revenue for a two percent (2%) tourist development tax for all of Pinellas County over a 24 month period is $4.8 million, less costs of administration as retained by the Department of Revenue, State of Florida. The tourist development tax for Pinellas County is to strengthen our local economy and increase employment by investing the total receipts of the tourist development tax into a trust fund to be used exclusively for tourist advertising and promotion for Pinellas County and its communities. [Emphasis added].

Where is the required "list in order of priority" of revenue uses and the "approximate cost" of such delineated projects? This is the first unanswered question of Appellees Brief. Not only does the P.S.A. Group fail to direct this Court's attention to any such priority list of projects or cost estimates, they admit that "none were" set forth in the Ordinance. Thus the Ordinance levying the tax is facially defective, clearly not in compliance with the Statutue authorizing it.

How does the sole authorized use of tax revenues under this Ordinance, "tourist advertising and promotion" encompass either a stadium bond issue or a stadium study? Despite its so called "threshold" nature, Appellees do not discuss this issue either, thereby forming the second unanswered question of their Brief. If "advertising and promotion" is a single authorized use of these tax funds and somehow includes a stadium, why do not the Appellees point to that language or any supporting testimony? If "promotion" is a separate second use of the revenue, (different from "advertising") and includes a stadium, why do Appellees not

demonstrate this? How can this Ordinance contain two separate uses of the funds, ("advertising" and "promotion") without the statutorily mandated list of priorities and cost estimates for each use? No answers are given.

Appellees label minutes of a County Commission meeting of December 6, 1977 the "Resolution" required to precede the Ordinance by Fla. Stat. § 125.0104(4)(b). They do not suggest why this label is appropriate. These minutes are not in the form of a resolution, nor do they indicate the intention of the County to consider enactment of the tax, nor specify the term of appointment of the council members, all as required by Fla. Stat. § 125.0104(4)(e). The third unanswered question is where is the required "resolution"?

B. Section 3 of Ordinance 78-20 is impermissibly vague and in irreconcilable conflict with Section 2 of the Ordinance.

Section 3 of Ordinance 78-20 includes the only reference to a sports stadium in that law. The P.S.A. Group implies that the stadium project had its genesis in this portion of the Ordinance. If so it is in direct conflict with Section 2 of the same Ordinance. Appellees do not substantively address this conflict. Section 3 is specifically not part of the "tourist development plan". Clearly it contains no list in order of priority of projects nor any cost estimates. Section 2 of Ordinance 78-20 limits the use of revenues "exclusively" to tourist "advertising and promotion". Section 3 permits use of revenues to be pledged, inter alia, for construction of a sports complex. They are in direct and irreconcilable conflict. The Ordinance or at least Section 3 is invalid as a matter of law. The voters cannot on one hand restrict use of the monies to the specific "exclusive" use of "advertising and promotion" and simultaneously on the other hand authorize a pledge of the same monies for construction of a sports complex. Common sense says they could not. The fact is, in the referendum, they did not.

The fourth unanswered question of the Appellees Brief is if Section 3 authorizes a stadium project, is it not then in conflict with Section 2 of the same ordinance which "exclusively" limits the tax funds to tourist "advertising and promotion"?

C. The Referendum was invalid because the ballot question on the Tourist Tax Referendum never apprised the voters of the substance of Ordinance 78-20 or that it could be altered without voter approval.

The PSA Group's Brief obliquely discusses this premier issue, but sidesteps the basic question about the wording of the referendum ballot. The PSA makes the preposterous assertion that "there could have been no question in the minds of Pinellas County voters in 1978 that the proposed ordinance contemplated the possibility of a subsequent pledge of tourist development tax revenues to stadium construction". [Answer Brief p. 12]. No revelation of the method of such mindreading is provided, nor is any reference to such evidence in the record below.

Next Appellees assert that the referendum ballot was "exactly as required by the Act". Again they sidestep the principal issue, whether the ballot description sufficiently apprised the voters of what they were voting upon. The issue is not whether the ballot had properly listed the places to vote "for" or "against" the tax, but whether the ballot description was sufficient. Because of an explicit explanation of the Tourist Development Tax this Court approved the Dade County ballot in the Miami Dolphins v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). There the Supreme Court affirmed the District Court which had held "the ballot question contained an essential although not exhaustive, description of the tourist tax ordinance and its purposes." Metropolitan Dade County v. Shiver, 365 So.2d 210, 213 (3d DCA Fla. 1978). Compare the Pinellas County ballot

description with Dade County's and the deficiencies of the Pinellas ballot are obvious.

PINELLAS COUNTY

> Shall Pinellas County Ordinance No. 78-20 be approved? This ordinance levies and imposes a countywide two (2%) percent tourist development tax on each whole or major fraction of each dollar of the total rental charge for the lease or rental of any tourist accommodations or living quarters for a term of six (6) months or less. Such tax shall be used to promote and develop the tourist industry in Pinellas County.

DADE COUNTY

> The Board of County Commissioners of Dade County, Florida, has adopted Ordinance No. 78-62 levying and imposing a Tourist Room Tax at the rate of two percent (2%) on hotel, motel, and similar accommodations rented for a term of six (6) months or less. Said ordinance further provides the following plan for the expenditure of the tax revenues received:
>
> 1. To fund a Tourist and Convention bureau. $437,900 (10 percent).
>
> 2. To promote and advertise Dade County tourism within domestic and international markets. $2,189,500 (50 percent).
>
> 3. To promote Dade County tourism by sponsoring tourist-oriented cultural and special events such as visual and performing arts including theater, concerts, recitals, opera, dance, art exhibitions, festivals and other tourist-related activities. $875,800 (20 percent).
>
> 4. To modernize and improve the present Orange Bowl Football Stadium including chairback seats, additional food and beverage concessions, additional and improved parking facilities and additional restrooms and construction. $875,800 (20 percent).

Note that the Dade ballot included a list of specific projects with both the percentage of tax revenues and estimated cost of each project delineated for

the voter to understand. Even the ballot in Dade County was more thorough than the entire Tourist Development Plan was in Pinellas County. Where on the Pinellas ballot is there even a hint that a stadium project could be the subject of either the expenditure or pledge of tourist development tax revenues? It is simply not there. Also absent is any reference that the Tourist Development Plan adopted by Ordinance 78-20 could be amended completely by the County Board after the referendum approving it.

These are material omissions from the ballot description, are misleading, and have effectively deprived the voters of Pinellas County of an opportunity to be a apprised of the proposition upon which they were asked to make a decision as to expenditure of their tax dollars. This ballot is not valid under Florida law. Hill v. Milander, 72 So.2d 796 (Fla. 1954); Christensen v. Commercial Fisherman's Ass'n, 187 So.Rptr. 699 (Fla. 1939); Miami Dolphins v. Metropolitan Dade County, supra; Metropolitan Dade County v. Shiver, supra. Thus, the fifth unanswered question of the Appellee's brief is where on the ballot description are the voters of Pinellas County apprised that their tourist development tax revenues could be used for a stadium?

Appellees suggested no proof was made of improper expenditures under the 1978 Plan. This is not true. Ordinance 78-20 includes no reference to monies being spent on a study for a stadium. Monies improperly spent for the stadium studies over the years were set forth in the PSA's "Recap of Funding 1977-1984", Defendants' Exhibit 9 at trial, as well as set out in memoranda from the County Attorney to the PSA Defendants' Exhibits 11, 12 and 13. All tourist tax monies expended for a stadium study and on a stadium project have been illegally spent and should be ordered returned by the PSA to the trust fund.

II. Pinellas Amended Ordinance 82-19 is Invalid Because It Does Not Comply With the Statutory Mandates of Florida Statutues § 125.0104.

In another sidestep the PSA Group did not discuss the principal issue of this point. That is, whether the amended Tourist Development Plan of Pinellas Ordinance 82-19 meets the requirements for such a plan contained in Fla. Stat. § 125.0104(4)(c). Quite clearly it does not. The amendment contains no "list in order of priority of the proposed uses of the tax revenue by specific project or special use" nor the "approximate cost or expense allocation of each such specific project or special use". Appellees do not even argue that the amendment contains these. Neither do they argue that the amendment is not required to contain such basic elements. They ignore the issue — and thus concede it. The sixth unanswered question of the Appellees' Brief is where in the amended Tourist Development Plan of Ordinance 82-19 is the statutorily mandated list in order of priority of the uses of the tax revenue and the approximate cost allocation for each such use? Alternatively, what provision of the Statute or other legal authority excuses such compliance?

Since the Statute contains a provision for amendment of the tourist development plan which literally could occur the day after a referendum approving the initial plan, can there be any question that amendments must include the same basic requisites set forth in the Statute for an original plan? If not, the Statute would be meaningless. Certainly the statutory requirement for a list of specific projects in order of priority with estimates for their cost is not an onerous one. Since Ordinance 82-19 clearly does not comport with the Statute, it should have been declared invalid by the trial court.

By parroting the generally authorized uses of funds under the Statute the word "stadium" does appear in Ordinance 82-19. However, the construction of

a stadium is not listed as a specific project nor is any cost estimate associated therewith provided. Neither Ordinance 78-20 nor Ordinance 82-19 anywhere authorizes studies for stadium. Appellees again duck the issue by becoming almost indignant at the idea that one could build a stadium without a study first. Indeed that is likely true, but irrelevant. What is in issue here is not whether a stadium study is a good idea, assuming one wishes to construct a stadium (with no team), but whether such a study is authorized to be financed by tourist tax revenues. It is not. The PSA Group never points to one word in either the Statute, Ordinance 78-20 or 82-19 which even hints otherwise. The seventh unanswered question of Appellees' Brief is where is authorization for expenditure of these revenues for a stadium study?

The final sidestep of this point occurs with regard to no referendum being held as to the amendment of 82-19. Appellees merely assert the Legislature did not include a referendum right. True, but how does that make the amendment process constitutional? If the County Board can absolutely change the whole character of the tourist development plan on day one following a voters referendum, what good is the referendum right of the people? This is a clear inequity and denial of the fundamental rights of the citizens granted by the Statute's referendum provisions initially as well as due process of law.

III. The County's Tourist Development Tax Funds May Not Be Lawfully Pledged To Payoff Bonds Issued By Another Entity, The Pinellas Sports Authority.

Pinellas County is not authorized by the Statute, Ordinance 78-20 nor Amended Ordinance 82-19 to pledge Tourist Development Tax funds to bonds issued by the Pinellas Sports Authority. Florida Statute § 125.0104(5)(b) provides:

> (b) . . . the revenues to be derived from the tourist development tax may be pledged to secure

> and liquidate revenue bonds issued by the county for the purposes set forth in subparagraph a1. [Emphasis added].

The PSA Group baldly asserts that the "plain meaning" of this language "refutes the contention that the pledging of tourist development tax revenues restricted the county bonds" [Answer Brief p. 18-19]. Appellees never enlighten us as to how "bonds issued by the county" in the Statute plainly means something other than "bonds issued by the county".

Appellees next recite an incredibly weak argument that in essence says the Legislature deliberately chose to contradict itself less than three weeks after it enacted Sect. 125.0104 by approving Chapter 77-635, the P.S.A. Charter. No legislative history or fact, inside or outside the record below, is cited to support this notion of simultaneous deliberate contradiction.

Oddly Appellees mention not a single word about either Ordinance 78-20 or 82-19. Both Ordinance 78-20 and 82-19 restrict the pledge of these tax revenues to bonds issued by the county, not another entity. Section 3 of Ordinance 78-20, not altered by 82-19 provides:

> All or any portion of the revenues raised by the tax hereby levied may be pledged by the Board of County Commissioners to secure and liquidate revenue bonds issued by the county for the acquisition, construction, . . . [of a] sports stadium . . . .

Having found no authority for the pledge of these County revenues to the PSA bonds in the Statute nor the Ordinances, Appellees add a little magic to their approach. "Abracadabra" they redefine the PSA bonds to "constitute revenue bonds issued by the County" [Answer Brief p. 21]. This leap from one extreme (the County is authorized to pay another agency's bonds) to the polar opposite (these are County issued bonds) is also unsupported by fact or logic. The only legal authority cited, State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983) is

completely inapposite. That case did not concern the pledge of county revenues under Sect. 125.0104. County issued bonds had already been validated and were not in issue. Rather this Court narrowly held:

> There is no legislative limitation or direction that this type of interlocal agreement must be included in the initial validation proceeding in order for the agreement to be a part of the fiscal support for the bonds-funded capital project.

Id. at 982.

The eighth unanswered question of Appellees' Brief is where is any authority that Pinellas Tourist Development tax revenues may be pledged for bonds issued by an agency other than Pinellas County? There is none.

IV. Florida Statute 125.0104 Is Unconstitutional Because It Denies Equal Protection Of The Laws.

Appellees never identify a rational basis for the classifications drawn as to imposition of the Tourist Development Tax. They cannot even decide whether to argue that cooperatives are subject to the tax and no distinction exists, or that they are not taxed and the distinction is rational. Appellees have no such dilemma as to the differential treatment under the Statute accorded single family homes when rented for the same shorter duration. They just ignore it altogether.

Appellees state that Section 125.0104 previously withstood constitutional attack in the case of Miami Dolphins, Ltd. v. Metropolitan Dade County, supra. They omit that, unlike the instant case the Dolphins case did not involve any attack as to statutory classifications concerning imposition of the tax (nor could it since the Dolphins were not in the accommodation rental business for purposes of standing). Likewise citation of Gaulden v. Kirk, 47 So.2d 567 (Fla. 195) which approved exclusion of a certain number (2 or less) not type of rental units from a different tax is unrelated to the challenged here.

Never identifying any rational basis upon which this Statute imposes the tax on rentals of condominiums and other types of units, but not upon cooperatives or single family houses, Appellees next rely upon an argument, in essence, that the Department of Revenue administratively eliminated the Statute's distinction between condominiums and cooperatives. No citation of authority is provided to support such legislative changes by the Department. Appellees attempt to justify this supposed administrative elimination of the distinction with a convoluted reference to Chapter 212, Florida Statutes. The core of this argument appears to be that both "cooperatives" and "condominiums" are encompassed by the term "apartment house" in Chapter 212. This is very misleading because "apartment house" was not the term chosen by the Legislature in imposing the tax of Chapter 125.0104. This tax is levied upon the rental for 6 months or less of "accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, rooming house, tourist or trailer camp or condominium." Fla. Stat. § 125.0104(3)(a). The term "apartment house" from Fla. Stat. §212.01(6)(b) might well arguably encompass several of the accommodations also taxed by Sect. 125.0104(3)(a), but was not used by the Legislature. Had it been, the term "condominium" would have been excluded as superfluous. Thayer v. State, 335 So.2d 815 (Fla. 1976); Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 1976). Its use and the omission of "cooperative" were intentional and created an unconstitutional distinction as to levy of this tax.

Appellees cannot demonstrate a rational basis for the classifications drawn by the Statute as to imposition of this tax. The ninth unanswered question of Appellee's Brief is as to imposition of a Tourist Development Tax what rational basis exits for including certain types of accommodations but excluding others such as cooperatives and single family houses?

Undisputed expert testimony at trial (A. 132-138) demonstrated there is no substantive basis for the distinction created by this Statute. It has no basis in fact nor in law and is an unconstitutional denial of due process.

V. Actions Of The Pinellas Sports Authority, Pinellas County And The City Of St. Petersburg Regarding The Stadium Project Are Invalid Because Of Violations Of The Florida Sunshine Law.

The P.S.A. Group never addresses the fundamental issue of this point concerning the application of the Florida Sunshine Act to the various closed door meetings set forth in the record regarding this stadium project. Why should not meetings among members of public agencies concerning an intergovernmental project such as this stadium be open to the public? No logic suggests that discussions concerning critical public matters, such as financing of this stadium, should be sanctioned to occur in private where three public bodies are involved, when they clearly would have to be "in the sunshine" if only one agency were engaged in the same undertaking.

Appellees make several misstatements in answering this point on appeal. No question exists that each public body which is party to the Interlocal Agreement is subject to the Sunshine law. Appellees imply that status vanishes when they act together pursuant to agreement unless some new public body is formed thereby. The logic of this is neither obvious nor explained. Flat misstatements of the record also occur on page 31 of the Answer Brief concerning meetings of the members of these agencies. Not only did meetings occur with two or more "individuals with decision making capacity", the individuals were voting members of the public bodies. Two critical private meetings occurred at the home of then County Chairman Todd just prior to adoption of the financing plan and Resolution 83-598 and the Interlocal Agreement. Councilman Bond and Todd, both

members of the Tourist Development Council, also thereby in reality wiped out most of the funds available to the TDC for its projects in the future.

The Sunshine Act covers "any gathering" where "foreseeable action" will be taken. Board of Public Instruction of Broward v. Doran, 224 So.2d 693 (Fla. 1969). The type of secret meeting which occurred in Chairman Todd's home was specifically condemned by Chief Justice Adkins in Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974):

> "Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. (emphasis added).

Based upon this Court's consistent, clear and absolute prohibition of meetings which hide the process of government's action from the public eye, any exception must be justified with the most solid of logic and circumstance. Appellees offer none. The tenth unanswered question of their Answer Brief is why should the public not have the right to be present at meetings of representatives of more than one public body when discussions occur about a joint intergovernmental project?

VI. The Trial Court committed error in the Final Judgment by omitting findings of fact and law as to numerous issues raised in the Declaratory Relief Action and as Defenses in the Bond Validation Proceeding.

Appellees baldly assert that "further argument on the form of judgment entered is superfluous". Why? Because the bond validation judgment is like no other they have seen. With this brush off the PSA Group sidesteps this entire point on appeal. What happened to the Declaratory Action case? By being filed first and having the bond validation case added to it, did it disappear? Appellees would have this Court believe so. This is nonsense. The PRO Group filed their Declaratory

Action because they were "in doubt of their rights" as to certain laws and agreements. Chapter 86 of the Florida Statutes grants the right of these people to have those rights declared, not ignored. The trial court made no findings at all on a plethora of basic questions raised and argued. It did not rule on the Declaratory action case. The parties who authored the Final Judgment signed by the Court apparently hoped the tough issues would go away by being buried under pages of words about matters of little consequence at the trial. The same parties now struggle to ignore the same issues on appeal.

Appellants' Brief on pages 44-47 lists the myriad of issues on which the trial court made no findings, one way or the other and the issues it failed to rule upon. Appellees have not pointed to a single finding or ruling which disputes this. The eleventh unanswered question of Appellees Brief is what happened to findings and rulings on the fundamental issues of the Declaratory Action?

CONCLUSION

The Trial Court should be reversed because the use of Tourist Tax Revenues for this stadium project is illegal. The Trial Court's judgment is in error for not finding the referendum ballot insufficient, the Ordinances illegal and the Statute unconstitutional.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Reply Brief was mailed this 31 day of July, 1984, to: Julian Clarkson, Esq., Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302; George H. Bailey, Jones & Foster, P.A., Attorneys for J. Robert Rowe, 601 Flagler Drive Court, P.O. Drawer E, West Palm Beach, FL 33402; W. Gary Dunlap, Esq., Attorneys for Pinellas Sports Authority and Pinellas County, 315 Haven Street, Clearwater, FL 33515; Michael S. Davis, Esq., Attorneys for City of St. Petersburg, 175 5th Street North, Room 210, St. Petersburg, FL 33731; C. Lawrence Stagg, Esq., Co-Counsel for Pinellas Sports Authority and Pinellas County, Holland & Knight, P.O. Box 1288, Tampa, FL 33601; J. Terrell Williams, Assistant Attorney General, Attorney for Department of Revenue, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

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