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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,690

CITY OF SUNRISE, FLORIDA, a municipal corporation,

Appellant,

vs.

TOWN OF DAVIE, FLORIDA, a political subdivision of the State of Florida, THE STATE OF FLORIDA, and the taxpayers, property owners and citizens of the Town of Davie, Florida, including non-residents owning property or subject to taxation therein and all others having or claiming any right, title or interest in the property to be affected by the issuance of the Bonds, herein described, or to be affected thereby,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 85-000727 CY

* * *

# REPLY BRIEF OF APPELLANT

* * *

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<u>PREFACE</u>

This Reply Brief shall use the following abbreviations and reference forms:

"(A.____)" for references to the Appendix to this Reply Brief;

"Davie" for the Appellee, Town of Davie; and

"Sunrise" for the Appellant, City of Sunrise.

# ARGUMENT

## POINT I

THE CIRCUIT COURT IMPROPERLY DENIED THE CITY OF SUNRISE'S MOTION TO INTERVENE IN THE TOWN OF DAVIE'S BOND VALIDATION PROCEEDING, SINCE SUNRISE CLEARLY HAD STANDING TO INTERVENE UNDER SECTION 75 OF THE FLORIDA STATUTES.

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Appellee asserts the apparent basis for the Circuit Court's determination was that Sunrise lacked standing to intervene in this bond validation proceeding. This is not apparent from the record. In fact, rather than make any formal motion or direct argument to that issue, Davie asserted it after Sunrise's argument had ended and thereupon, the Court gave no opportunity to respond.

It may be regarded as a general rule of appellate review that questions not timely raised and ruled upon in the trial Court will not be considered on appeal. This rule is founded on considerations of practical necessity and fairness to the trial Court and the opposite party. Lake Worth v. First National Bank, 93 So2d. 49 (Fla. 1957); Hartford Fire Insurance Company v. Hollis, So. 985 (1909). It has been the declared policy of the appellate courts to confine the parties to the points raised and determined in the courts below, not to permit the presentation of points, grounds or objections for the first time in the appellate court. Jaffe v. Endura Lifetime Awning Sales, Inc., 98 So2d. 77 (Fla. 1957). This Honorable Court has itself stated

that the Supreme Court, on review of an order of the Circuit Court, should confine itself to consideration of only those matters in question that were before the lower court and should not go beyond the record made and appearing in the lower court. Jacques v. Wellington Corporation, 134 Fla. 211, 183 So. 718 (1938). The rule has applied both to questions regarding procedural irregularities that do not go to the merits of the cause, as well as claimed error regarding matters that may be dispositive of the issues, such as the sufficiency of the pleadings, or the propriety of the nature of the action brought, or questions as to the proper law to be applied. South Dade Farms, Inc. v. Peters, 107 So.2d 30 (Fla. 1958); Meyers v. Board of Public Assistance, 163 So.2d 289 (Fla. 1964); Florida Livestock Board v. Highgrade Food Products Corporation, 141 So.2d 6 (Fla. 1st DCA 1962). The rule operates to prevent a party from complaining on appeal of errors that the trial court was given no opportinity to correct or obviate. Walker v. Hampton, 235 So.2d 325 (Fla. 1st DCA 1970). In this case, Sunrise has been foreclosed from advancing any other propositions sustaining its right to intervene under the Statute. While the Statute clearly gives this right to Sunrise upon the matters presented in its Motion to Intervene, the City of Sunrise may well have been able to defend against these allegations by proffering proof of its numerous pumping stations and other physical plants owned and operated within the municipal boundaries of Davie, utilizing the utility systems provided by Davie and paying such user fees, special assessments, and public service taxes as may be levied as a result of the bond issue.

Davie assumes for purposes of argument that Sunrise relies upon its status as a "person" to establish its standing to have become a party to Davie's bond validation proceeding. This assumption is somewhat misplaced, for while Florida Statute 75.07 speaks directly to the intervention proceeding, Florida Statute 75.05 invites "...others having or claiming any right, title or interest in property to be affected by the issuance of bonds or certificates, or to be affected thereby...to appear at a designated time and place...and show why the Complaint should not be granted...", and Florida Statute 75.06 makes "...others having or claiming any right, title or interest in the county, municipality, or district, or the taxable property therein" parties defendant to the action and gives the Court "jurisdiction of them to the same extent as if named as defendants in the Complaint and personally served with process."

Regarding the standing of Sunrise as a "person", Davie correctly summarizes the status of the test involved in determining whether the word "person" means and includes municipal corporations as being one which "must be resolved by taking into account the totality of the circumstances surrounding the enactment of the particular Statute involved." Village of El Portal v. City of Miami Shores, 362 So2d. 275 (Fla. 1978).

In looking to the totality of the circumstances surrounding the enactment of Chapter 75, Florida Statutes, one must conclude that the legislature was concerned not with the status of the defendants in a bond validation proceeding, but rather with their relationship to the validating authority.

Upon review of the act, it is evident that the term "persons" includes municipalities for several reasons. First, the purpose of a validation proceeding is to demonstrate to the world at large and the potential investors in particular the capability of the bonds being sold and retired without successful claims invalidating them at a later date. There is broad statutory language speaking to all who have or claim "any right, title or interest". Chapter 75.05 speaks to the initial issuance of an order directed to "...others having or claiming any right, title or interest", Chapter 75.06, dealing with notice and hearing, invites "...others having or claiming any right, title or interest in the county, municipality or district" to participate and be made a party defendant, and Chapter 75.09, dealing with the effect of final judgment, operates to forever conclude all matters adjudicated against "all parties affected thereby, including ...all others having or claiming any right, title or interest...or to be affected in any way thereby." As such, it should be apparent that the nature of the bond validation proceeding is to unify into one action any claims which may ultimately affect the validity of the bonds and thereby provide security for the investors. To say that the Court will entertain any valid claims by any group whatsoever, save municipalities, does a grave disservice to those who wish to invest securely in such bonds.

Davie raises several reasons against extending this logical avenue to a municipal corporation. These can be distinguished rather easily. While the legislature does, in fact, employ the words "municipality", "political district", and "political subdivision" throughout Chapter 75, the legislature

uses those words only in referring to the validating authority, which presumably would not be a private corporation or individual. Throughout Chapter 75, when speaking of those entities which may have a valid claim against a bond validation, the legislature seems to bend over backwards to provide a sweeping invitation to enable a court of competent jurisdiction to hear and fully determine those claims.

Next, Davie seeks to impose its interpretation of the Statute upon the Court. While Sunrise would suggest the pleadings, as well as the proceedings in the trial court, substantiate its interest, it should be pointed out that Chapter 75 is also concerned with the legality and enactment of the bonds themselves. Chapter 75.07 specifically provides that "the court shall determine all questions of law and fact and make such orders that will enable it to properly try and determine the action and render a final judgment...". Beyond the issues raised in Sunrise's pleadings, the proceedings themselves reveal a last minute attempt by Davie to circumvent the concerns of Sunrise through an emergency resolution which had the stated purpose of amending its bond validation ordinance. In the denial of its status as an intervenor, Sunrise was unable to point out the illegality of such an action under Davie's charter and laws. Sunrise's interest in challenging the Davie bond validation is direct, demonstrating that Davie's bond issue may not be legal, on the one hand, and incapable of being retired through the revenues of the utility system as proposed within the bond issue. While the Statute speaks to "any right, title or interest in property to be affected by the issuance of bonds

or certificates, or to be affected thereby", and speaks to "claiming any right, title or interest in property to be affected...or to be affected in any way thereby...", there is no decisional law construing these provisions. However, in the somewhat analogous situation concerning municipal annexation, Chapter 171, Florida Statutes, requires that a complainant "be a party affected" and allege "that he will suffer material injury by reason of the failure of the municipal governing body to comply with the procedures...or to meet the requirements established for annexation...as they apply to his property." Thus, standing is determined to extend to a "party affected." Section 171.031 (5), Florida Statutes, defines "parties affected" as "any...owing property in, or residing in, either a municipality proposing annexation...or owning property that is proposed for annexation...". The analogy extends to the concept of "property". In both Chapter 75 and Chapter 171, the legislature has sought to limit intrusion into the governmental process to those who have some form of "property right". In construing the term "property", the First District Court of Appeal construed an exclusive franchise for hauling garbage as a property right. SCA Services of Florida, Inc. v. City of Tallahassee, 418 So2d. 1148 (Fla. 1st DCA 1982). In our case, an exclusive right to supply water and sewer is likewise a property right which is to be affected by the bond issue.

Lastly, Davie sets up a strawman by suggesting that any interpretation of Chapter 75 contrary to its own would be to invite cities from around the State to intervene in local bond validation proceedings. This comical

analogy forgets the remaining statutory criteria with respect to the requirement of a claim of "right, title or interest." Conversely, Sunrise would maintain that having demonstrated its "right, title and interest," the true absurdity would be to preclude its intervention merely by virtue of its being a municipal corporation.

Accordingly, the trial court's ruling should be overturned and the case remanded for a fair, full and impartial hearing as to the issues raised.

## POINT II

THE CIRCUIT COURT IMPROPERLY DENIED THE CITY OF SUNRISE'S MOTION TO INTERVENE, BECAUSE THE ISSUES THEREON WERE ESSENTIAL TO THIS BOND VALIDATION PROCEEDING.

It is apparent from the record made at the bond validation hearing that the Court did not consider the merits of the City of Sunrise's position. (A. 39) In fact, the Court only accepted Sunrise's Motions and Exhibits as a proffer after it had made its ruling.

While Appellee insists the failure of the Court to cite any specific grounds for denying Sunrise's Motion to Intervene means that the Circuit Court apparently determined that the issues raised in Sunrise's Motion were beyond the proper scope of the proceeding, it should be apparent from a full reading of the record that not only was this the first time this particular Circuit Court Judge had been faced with a bond validation hearing, but the hearing itself was not in any way a full determination of the issues. In fact, the record reveals that the examination by the trial court is cursory at best. The main purpose of a validation proceeding is to create in the mind of the bond buyer a sense of security, in that there could be no further attack upon the validity of the bond issue. State v. Citrus County, 116 Fla. 676, 157 So. 4 (1934). The Supreme Court has held that if the validity or status of municipal bonds depends on the validity of assessments, such assessments could be attacked in proceedings to validate bonds. City of Ft. Myers v. State, 95 Fla. 704, 117 So. 97 (1928); Folkes v. Marion County, 121 Fla. 17, 163 So. 298 (1935); 64 Am.Jur.2d; Public Securities

and Obligations, §472, Page 496. Under the circumstances in this case, the validity of the utility system is not a collateral issue to the bond validation proceeding. The lack of diligence in disposing of this matter by ignoring the issue concerning the structure of the utility program will result in much further delay and will prejudice the bond holders.

As stated earlier, Davie recognized the validity of Sunrise's concern and attempted a last minute Resolution purportedly limiting the scope of its water and sewer project by the exclusion of those areas subject to Sunrise's service area. (A. 49-50) Unfortunately, that portion of the project which Davie attempted to delete by its Resolution formed an integral portion of the system from which the revenues earmarked for retirement of the bonds must derive. (A. 45-48) (In particular, subsection 6 of the "Initial Project" described at Page 8 of the Ordinance.) (A. 47) Sunrise did not have the advantage of this Resolution prior to the hearing and did not have an opportunity to amend its Motion to Intervene to reflect the facts surrounding the Motion. (A. 5) In reviewing the Resolution, it became apparent the Resolution had been passed without the statutory prerequisites for an ordinance pursuant to Florida Statute 166. These prerequisites would be required because a resolution cannot amend an ordinance. Sunrise raised this issue before the trial court. It was raised in a timely fashion considering Sunrise was not apprised of Davie's passage of the Resolution until the hearing itself. (A. 33). In response to this, counsel for Davie indicated the Ordinance itself provided for its amendment by resolution. Again, Sunrise would stress that this is impermissible. Not only is it impermissible, even a cursory reading of the Ordinance will reveal that that is not the case. (A. 45-48) Additionally,

Sunrise attempted to demonstrate to the Court that the engineering projects compiled to show the desirability and feasibility of this project were predicated upon the intrusion into Sunrise's service area and neither the deletion of the portion of the project nor the underlying engineering studies were put to the people of the Town of Davie at any public forum. (A. 34)

In support of this appeal, Appellant cites Rianhard v. Port of Palm Beach District, 186 So2d. 503 (Fla. 1966). In Rianhard, supra, the Supreme Court of Florida determined that it is appropriate and necessary to allow intervention in a bond validation proceeding to settle issues of law as to the validity of the bonds. Appellee maintains that Rianhard, supra, stands for the proposition that it is within the sound discretion of the lower court to allow an intervenor the opportunity to present evidence in opposition to the validation proceeding. This, we would maintain, is an attempt to mislead the Court. The Rianhard, supra, ruling specifically contemplates the opportunity to present evidence in opposition to a validation proceeding. The entire thrust of Chapter 75 is to protect the public and allow interested parties to escape from the effects of an improper validation. In Rianhard, supra, unfortunately, the intervenors were not prepared to go forward. This is, by contrast, a starkly different situation than that faced by Sunrise. In the proceedings below, Sunrise's proffer was not even accepted by the Court until after a ruling had been made. All the issues raised were preserved and Sunrise attempted to go forward with evidence. In particular, Sunrise was faced with issues that arose at the very beginning of the hearing due to an emergency Resolution passed by Davie at the ninth hour of the proceeding.

Although this last minute maneuver was a surprise, Sunrise did not request a continuance, as did the Appellant in Rianhard, supra. Sunrise attempted to go forward on the issue, but the significance of the issue was apparently lost on the lower court.

Next, in its brief, the Town of Davie maintains that Sunrise's Motion to Intervene should have been denied because the issues raised were incapable of being presented by Sunrise due to Sunrise's lack of certain factual allegations in its Motion. Here again, this was never raised in the trial court. As such, it was difficult for Sunrise to anticipate the issue being raised on appeal.

Davie argues that Sunrise's reliance upon City of Pinellas Park v. Cross-State Utilities Co., 205 So2d. 704 (Fla. 2d DCA 1968), is misplaced. Davie maintains the holding of the Cross-State Utilities, supra, Court turned upon the failure of the City of Pinellas Park to adopt an ordinance demonstrating its exercise of Chapter 180 powers. This is quite simply a misstatement. While the Court did find that the appellant City had not presented to the Court or entered into evidence a resolution or ordinance showing that they chose to exercise the powers granted to them under Chapter 180, this did not comprise the entire holding of the case. In fact, the Court ruled that the City of Pinellas Park could not begin a utility system because it would duplicate the efforts of Cross-State Utilities Company. This is the proposition for which Appellant cited this case and is the law of the case. Judge Allen stated:

> "The Court also found that Cross-State Utilities Company had constructed and was operating and maintaining its own water and sewer systems in the territory immediately adjacent to the municipality, City of Pinellas Park. And further, that the utility company had not consented to the construction of the system, work, project or utility within the franchise area by the Appellant, City.
>
> Based on the above findings, the Court concluded that Pinellas Park did not have the authority to create a zone or area extending five miles from the corporate limits for the purpose of constructing, operating or maintaining a sewer or water system therein, nor could the City construct any water or sewer system, work, project or utility in the franchise area by virtue of the prohibition of §180.06, Florida Statutes, which provides in pertinent part, as follows:
>
> '...provided, however, that a private company or municipality shall not construct any system, work, project or utility authorized to be constructed hereunder in the event that a system, work, project or utility with similar character is being actually operated by a municipality or private company in the municipality or territory immediately adjacent thereto, unless such municipality or private company consents to such construction.'" (Emphasis supplied.)

As we can see, Appellee's characterization of the case is far from accurate. Continuing in a misleading fashion, Appellee indicates that the case is distinguishable because the City of Pinellas Park was attempting to expand its water and sewer service area beyond its corporate boundaries to a franchise area, while the Town of Davie is merely extending its water and sewer service into a franchise area operated by Sunrise within Davie's municipal boundaries. Appellant would suggest that the language of the Statute, as quoted above, specifically provides that a municipality may not operate

such a system in its own municipal boundaries if there is already one in operation operated either by another municipality or private company.

Appellee next argues that the Statute prohibits a municipality from exercising its corporate powers within the corporate limits of another municipality. They cite Florida Statute §180.02(2) (1984) for this proposition. While the Statute speaks for itself, Appellant feels constrained to point out that the Statute was designed to allow municipal public works to be extended and operated outside of their corporate boundaries and within the corporate boundaries of an adjacent municipality and the language cited by Appellee is taken out of context and applies solely to the case of a municipality attempting to operate as a municipal government within an adjacent municipal government.

Inasmuch as Appellee raises numerous factual issues that were supposedly omitted from Sunrise's pleadings and proof, and, inasmuch as these allegations are raised for the first time on appeal, Appellant would suggest that that is yet another reason to remand this case so that a full, fair and impartial determination can be made concerning the legality of the validation.

## CONCLUSION

For the reasons stated above, Appellant, City of Sunrise, requests that this Court reverse the final Order of the Circuit Court and allow Appellant, City of Sunrise, to intervene and prove the issues framed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by mail, this 3rd day of May, 1985, to Barry S. Webber, Esq., attorney for Town of Davie, 6200 Stirling Road, Davie, Florida 33314; Clifford A. Schulman, Esq., Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel, P. A., special counsel for Town of Davie, 1401 Brickell Avenue, PH-1, Miami, Florida 33131; and Frederick J. Damski, Esq., Assistant State Attorney, Economic Crime Unit, 200 S. E. Sixth Street, Suite 504, Ft. Lauderdale, Florida 33301.

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