IN THE SUPREME COURT OF FLORIDA

THOMAS M. WOHL and JOHN F. FARLEY,

Intervenors/Appellants,

v. Case No. 67,668

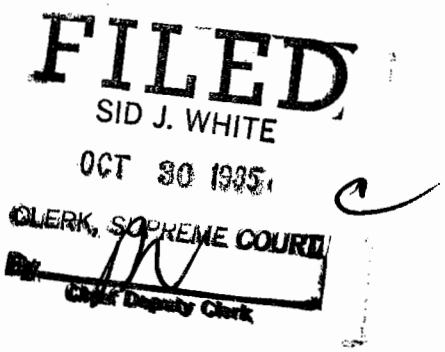
THE SEBRING UTILITIES COMMISSION, a body corporate and politic of the City of Sebring, Florida,

Plaintiff/Appellee,

v.

STATE OF FLORIDA AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF SAID CITY OF SEBRING, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHTS, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants/Appellees.



ON APPEAL FROM THE TENTH JUDICIAL CIRCUIT
IN AND FOR HIGHLANDS COUNTY

ANSWER BRIEF OF APPELLEE SEBRING UTILITIES COMMISSION

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INTRODUCTION

This answer brief is filed by appellee Sebring Utilities Commission, the plaintiff in the bond validation proceeding below.

The Sebring Utilities Commission will be referred to in this answer brief as "the Commission". Appellants Thomas M. Wohl and John F. Farley, intervenors below, will be referred to as "appellants" or "intervenors".

In accordance with Rule 9.110(i), Fla. R. App. P., portions of the record of the proceedings below not included in the Appendix filed with appellants' initial brief are contained in an Appendix filed with this answer brief. References to the Commission's Appendix filed herewith will be as (C.A. ___). References to the Appellant's Appendix will be as (A.A. ___). References to exhibits received in evidence below will be as (Com. Ex. ___) or (Int. Ex. ___). Where an exhibit below is contained in an appendix filed, the reference to the exhibit will be combined with a reference to the appropriate appendix, as follows: (C.A. ___/Com. Ex. ___) or (A.A. ___/Int. Ex. ___).

The transcript of the proceedings before the circuit court, held on February 11, 1985, and July 29, 1985, are contained in the appendix filed by appellants. References to the transcript will be as (T. ___/A.A. ___). References to appellants' initial brief will be as (B. ___).

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

The Commission accepts the Statement of the Case contained in appellants' Initial Brief (B. 2-4) except insofar as the appellants attempt to impliedly argue therein that an allegation of the immediate repurchasing of the outstanding bonds by the Commission is necessary to and omitted from the Commission's complaint. The Commission's argument with regard to the refunding nature of the bonds is presented at pages 10, et seq., below.

STATEMENT OF THE FACTS

The Commission does not accept the Statement of the Facts contained in appellant's initial brief (B. 4-12) because the statement is replete with argumentative positions regarding the facts and further states facts and argument regarding the Commission's financial status irrelevant to this Court's review of the validation proceeding below.[1] The Commission believes that the facts of this matter may more succinctly and accurately be stated as follows:

1. The Bonds. This appeal challenges the trial court's Consolidated Final Judgment validating revenue bonds to be issued

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[1]The scope of review of the Court in bond validation cases is limited to whether the issuing body has the power to act and whether it has exercised that power in accordance with law. The motivation, wisdom and feasibility of projects to be financed or of the financing arrangements proposed are not the subject of the Court's review. DeSha v. City of Waldo, 444 So. 2d 16 (Fla. 1984); Town of Medley v. State, 162 So. 2d 257 (Fla. 1964); State v. Dade County, 142 So. 2d 79 (Fla. 1962).

by the Commission for the purpose of refunding various prior bond issues and obligations of the Commission.[2]

The Commission is established and authorized by law to supervise, operate, and manage the utilities of the City of Sebring, including electric power generating facilities. (C.A. 7/Com. Ex. 2). By Resolution dated March 5, 1981 (C.A. 130/Com. Ex. 7), the Commission approved the issuance of not exceeding $99,000,000 in revenue bonds for the purpose of construction and operation of the "Phillips Plant", a 40 megawatt diesel generating plant. (C.A. 146/Com. Ex. 7; T. 73/A.A. 388). The Commission's 1981 bond issue was validated by final judgment of the circuit court in Sebring Utilities Commission v. State of Florida, Case No. 81-11-G (February 25, 1981) (Com. Ex. 10/C.A. 278). On September 27, 1984, the Commission adopted its Resolution No. 84-6 authorizing the issuance of an additional $1,800,000 in revenue bonds to be used to make payments due under the 1981 bonds. (Com. Ex. 8/C.A. 243). On March 28, 1985, the Commission by its Resolution No. 85-5 authorized the issuance of Notes in the amount of $2,350,000 to obtain funds necessary to make further payments due. (Com. Ex. 9/C.A. 258). The 1984 and 1985 undertakings by the Commission were occasioned and necessi-

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[2]The Consolidated Final Judgment of validation of the Commission's revenue bonds comes to this Court with a presumption of correctness. The burden is upon appellants to point out from the record the failure of the evidence to support the conclusions of the Commission and the trial court. International Brotherhood of Electrical Workers v. Jacksonville Port Authority, 424 So. 2d 753 (Fla. 1982); State v. Leon County, 400 So. 2d 949 (Fla. 1981).

tated by the inability of the Commission to make payments required on the 1981 Bonds (T. 40/A.A. 355).

By adoption of a Master Bond Resolution on May 23, 1985 (the "Resolution") (C.A. 30/Com. Ex. 6), the Commission authorized the issuance of Utilities System Revenue Bonds (Series 1985A) (the "Bonds") in an aggregate original principal amount not to exceed $130,000,000. The Bonds are to be issued for the purpose of paying and redeeming bonds and notes previously issued by the Commission as follows: $92,750,000 Utilities System Revenue Bonds (Series 1981) (the "1981 Bonds"); $1,800,000 Utilities System Subordinate Capital Appreciation Bonds (Series 1984) (the "1984 Bonds"); and, $2,350,000 Utilities System Subordinate Revenue Notes (Series 1985) (the "1985 Notes"), (collectively referred to as the "Outstanding Bonds") (T. 18/A.A. 333; Com. Ex. 6/C.A. 53).

The Master Bond Resolution was adopted by the Commission to provide for a restructuring of the Commission's indebtedness and to eliminate the need for further interim borrowing. (T. 40/A.A. 355). The Master Bond Resolution provides for the refunding and payment of each of the outstanding Commission obligations by providing funds for investment in U.S. Treasury securities for the payment of each outstanding obligation at its maturity or at such other date as the obligation may be called and paid by the Commission. The exact amount of principal that will need to be invested (and the amount of bonds that will have to be sold) will not be determined until the effective interest rate for the Bonds is determined at sale. (T. 19/A.A. 334).

Some of the bonds will be capital appreciation bonds and will be sold at a discount to be paid at face value at maturity. (T. 29, 32/C.A. 344, 347.

2. The Commission Charter. The Charter of the Sebring Utilities Commission was originally adopted as Ch. 23535, Laws of Florida (1945). (Com. Ex. 3). Section 12 of that act provided the original borrowing authority of the Commission. In 1951, the Charter was amended by Ch. 27893, Laws of Florida (1951) (Com. Ex. 4), in pertinent part as follows:

> Section 2. Section 12 of Chapter 23535, Laws of Florida, Acts of 1945, (as amended by Chapter 26223, Laws of Florida, Acts of 1949), be, and the same is, hereby amended to read as follows, and said Chapter 23535, Laws of Florida, Acts of 1945, as amended, is hereby further amended by adding thereto the following additional sections numbered 12.01 to 12.23 inclusive.
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> * * *
>
> Section 12.01. The said Utilities Commission, subject to the approval of the freeholders owning real estate situate in the City of Sebring, Highlands County, Florida, and who are also qualified to vote at any general election of said City, such approval to be expressed and evidenced as hereinafter set forth, are hereby fully authorized and empowered without limitation as to amount, or as to maturities, to borrow money and to issue revenue bonds or certificates securing the money so borrowed for operating expenses, cost of alterations, repairs, construction, or acquisition of repairs, additions, extensions, or improvements of said municipal utilities.
>
> Section 12.02. No resolution or resolutions adopted by the Sebring Utilities Commission authorizing the borrowing of money and the issuance of revenue bonds or certificates, shall, except as hereinbefore expressly otherwise provided, take effect unless and until the borrowing of said money and the

> issuance of said revenue bonds or certificates, as provided in said resolution or resolutions, has been approved by the freeholders owning real estate situate within the City of Sebring, Highlands County, Florida, and who are also qualified to vote at any general City election of said City, at a special election called by said Commission to determine whether or not said resolution or resolutions and the borrowing of money or moneys and the issuance of revenue bonds or certificates, as provided herein, is approved by a majority of said freeholders and voters, as above defined, voting as said special election.
>
> * * *

The 1951 act further amended the Charter by adding the following provision:

> Section 3. Construction of Act. This Act shall be construed to authorize the issuance of revenue bonds or certificates payable solely from municipal utilities revenues.

3. The 1963 Charter Amendment. In 1963, the Charter was further amended by Ch. 63-1926, Laws of Florida (Com. Ex. 5), which provided:

> Section 1. Section 3 of chapter 27893, Laws of Florida, 1951, is amended to read:
>
> Section 3. Construction of Act. -- This act shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when required under the constitution of the state and shall not be construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds or certificates payable solely from the municipal utilities revenues.

Ch. 63-1926 was approved by referendum held December 10, 1963.

The 1963 amendment to the Charter was proposed as the result of the observation and conclusion of the City Attorney and Commission Attorney, Joseph O. MacBeth, that the Commission Char-

ter, as amended in 1951, imposed restrictions upon the Commission's issuance of revenue bonds not required by the Florida Constitution or general law. Mr. MacBeth correctly noticed that neither the Constitution nor any applicable general statutes required a referendum for the issuance of revenue bonds. (T. 50, 60/A.A. 365, 375). To bring the Commission's procedures in line with those applicable to other public authorities, including the City of Sebring, the 1963 amendment to the Charter was proposed. (T. 50/A.A. 365). The amendment was duly proposed, advertised, and voted upon by the electorate. (T. 51/A.A. 366). It was the subject of full public inquiry, debate, and referendum.[3] (T. 64/A.A. 379). At referendum on December 10, 1963, the voters approved the amendment to permit the Commission to issue revenue bonds without referendum where not required by the Florida Constitution or general law.

ISSUES PRESENTED

The issues raised by this appeal as set forth in appellants' initial brief and to which this answer brief is directed may be stated as follows:

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[3]Adoption of a Special Act such as Ch. 63-1926 required only notice to the community by publication prior to adoption by the legislature or approval by election. Art. III, Sec. 21, Florida Constitution (1885), as amended; Dickinson v. Board of Public Instruction of Dade County, 217 So. 2d 553 (Fla. 1968). Because of the nature and subject matter of the proposed 1963 Charter amendment, the Commission complied with both requirements and published notice of the special law as well as submitted the amendment to popular vote. (T. 51/A.A. 366).

I. Whether the proposed bonds are "refunding bonds" covered by Section 12.04 of the Commission Charter for which no referendum is required.

II. Whether the proposed bonds may be issued by the Commission under its Charter without referendum.

A. Has the referendum issue been conclusively adjudicated by prior validation proceedings?

B. Was the Charter effectively amended in 1963 to eliminate the requirement of a referendum for the issuance of revenue bonds?

C. Does the Commission Charter as amended constitute an unlawful delegation of legislative authority?

III. Whether the validated 1981 Bonds to be refunded are invalid due to lack of referendum and fraud arising out of the 1963 amendment process.

IV. Whether the 1984 Bonds and 1985 Notes to be refunded are invalid for lack of referendum.

SUMMARY OF ARGUMENT

The argument set forth below in this answer brief may be summarized as follows:

The Commission is authorized to issue the Bonds under the terms of the Charter and it has taken all required steps for the issuance of the Bonds in compliance with the applicable provisions of law. Pursuant to the provisions of the Commission's Charter, the Bonds may be issued without referendum approval.

The Bonds are authorized as refunding bonds pursuant to Section 12.04 of the Charter. That section provides that refunding bonds may be issued without referendum approval. The fact that the principal amount of bonds issued or the total debt

service for the Bonds may exceed that presently due under the Outstanding Bonds, depending upon applicable interest rates at sale, does not prohibit characterization of the Bonds as refunding bonds under the Charter. And it is not necessary that the Bonds provide for immediate cancellation or repurchase of the Outstanding Bonds.

Even if the Bonds may not be considered refunding bonds, their issuance without referendum approval is authorized by the provisions of the Commission Charter, as amended in 1963. The effect of the 1963 amendment has been considered and determined in two previous validation proceedings in which the State Attorney represented the citizens, taxpayers, and property owners, and in which at least one of the appellants participated directly. In each proceeding, the Circuit Court specifically held that the Charter was effectively amended in 1963 to delete any requirement of referendum for the issuance of revenue bonds, and no appeal from those validation judgments was perfected.

The 1963 amendment unambiguously provides that referendum approval for issuance of revenue bonds shall be required only when required by the Florida Constitution, and that the Charter shall be interpreted consistently with the statutory authorization for issuance of revenue bonds without referendum by other governing authorities. The Charter as amended clearly reflects its intent to eliminate any referendum requirement in connection with the issuance of revenue bonds, and the application of accepted principles of statutory construction precludes any finding of conflict, ambiguity, or unbridled discretion in the

Charter. No unconstitutional delegation of legislative authority is present.

Nothing in the evidence presented as shown by the record on appeal supports the position that the trial court erred in its conclusion that the 1963 amendment process did not constitute or contain extrinsic fraud permitting the court to set aside the judgment validating the 1981 Bonds. The amendment was published and voted upon as provided by law, and the unrefuted testimony is that the amendment was the subject of considerable public attention and discussion prior to the election. The 1981 Bonds were validated by judgment of the Circuit Court, and that judgment is conclusive as to the validity of those bonds. Similarly, the only challenge to the 1984 Bonds and 1985 Notes raised by this appeal relates to the necessity of referendum. For the same reasons appliable to the 1981 Bonds, those outstanding obligations were duly and validly issued without referendum.

ARGUMENT

I. THE BONDS ARE REFUNDING BONDS DULY AUTHORIZED BY SECTION 12.04 OF THE CHARTER TO BE ISSUED WITHOUT REFERENDUM.

By its terms, the Master Bond Resolution provides for the refunding of the Outstanding Bonds. Under the Commission's Charter, the issuance of the Bonds is specifically not subject to referendum. Section 12.04 of the Charter provides:

> Section 12.04. Issuance of Refunding Bonds or Certificates. The Sebring Utilities Commission shall be, and is hereby fully authorized and empowered, for the purpose of refunding any revenue bonds or certificates

> theretofore issued, to issue refunding revenue bonds or certificates. The issuance of any such refunding bonds or certificates may be authorized by resolution which may be adopted at the same meeting at which it is introduced by a majority of all members of said Commission then in office and shall take effect immediately upon its adoption and need not be published or posted, nor shall the issuance of such refunding revenue bonds or certificates require the approval of freeholders owning real estate within said City of Sebring and who are also qualified to vote in any general election of said City to ratify and approve the same.

Appellants question the refunding nature of the Bonds because the principal amount authorized ($130,000,000) exceeds the combined principal amount currently outstanding under the Outstanding Bonds.[4] However, the Bonds are no less "refunding bonds" because their ultimate aggregate principal amount, as determined by market interest conditions upon issuance, exceeds the combined principal amount of the Outstanding Bonds. Contrary to appellants contention, the only authorized purpose of the Bonds is the refunding of Outstanding Bonds by payment of those obligations at their maturity, or at such earlier time as the Commission is permitted under the terms of the Outstanding Bonds.

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[4]As pointed out to the trial court (T. 121/A.A. 436), this issue, while properly before the court, is of little practical import and need not be reached if the Court concludes that no referendum is required under the Charter for issuance of revenue bonds. If a referendum is required, the Master Bond Resolution, even if construed to authorize a refunding issue, cannot effectively provide for refunding of the 1984 Bonds and 1985 Notes, obligations incurred without referendum and not validated by proceedings under Chapter 75, Florida Statutes. Conversely, if no referendum is required by the Charter, the Bonds may be validly issued as revenue bonds under the Charter even if they are not technically "refunding bonds". The issue therefore need not be reached if the Court finds no referendum requirement, and becomes irrelevant if a referendum requirement is found.

(T. 20/A.A. 335). Also contrary to appellants' contention (B. 12, 15), the underwriting costs, insurance permiums, and other expenses attendant to the issuance of the Bonds will not be borne by the ratepayers, since the escrow arrangement under the Master Bond Resolution will allow the Commission to recover those expenses, and will not increase the amount to be paid by ratepayers. (T. 37/A.A. 352). In any event, the existence of expenses incurred in connection with the issuance of refunding bonds does not in any way alter the declared and operative purpose of the Bonds, the refunding of existing obligations. Those expenses are merely the initial price of that refunding. Their presence certainly does not prevent the Bonds from being refunding bonds.

Because of financial considerations involving the relationship between principal and interest rate, the authorization for issuance of the Bonds in an aggregate principal amount up to $130,000,000 does not alter the refunding nature of the Bonds. Since the yield on the refunding bonds generally determines the allowable yield on the government obligations held in the escrow fund acquired with the proceeds of such bonds, the size of the refunding bond issue required to refund the Outstanding Bonds is a function of both the debt service on the Outstanding Bonds and the yield on the refunding bonds, and cannot be precisely determined until the refunding bonds are sold. (T. 19/A.A. 334). In general, if the interest rates on the refunding bonds are lower than the Outstanding Bonds (as will in all likelihood be the case with the Commission's refunding) the size of the refunding bond

issue will be greater than the outstanding principal amount of the Outstanding Bonds. This is because the government obligations must be invested at a rate lower than the Outstanding Bonds, and thus the shortfall must be made up from principal in the Escrow Fund. (T. 28/A.A. 343). However, despite the increase in principal amount, lower interest rates may enable the Commission to realize a reduction in annual and total debt service requirements if the Outstanding Bonds are discharged prior to their scheduled maturity. Conversely, the principal amount of the refunding bonds will be less than the Outstanding Bonds if interest rates have risen.

Simply stated, the principal amount necessary to refund the Outstanding Bonds will depend upon the interest rate at which the Bonds are issued, which will be determined at that time. While lower interest rates would theoretically increase the aggregate principal amount of the Bonds that must be issued, the lower interest rate might result in a lower total payout of combined principal and interest under the Bonds. (T. 33/A.A. 348).

The cases cited by appellants do not place the Commission in the financial straight-jacket that appellants urge. The dichotomy resulting from the cited decisions is between a bond issue creating "new debt" or a "new liability," and one which "merely renews and continues in a changed form the original existing indebtedness." Sullivan v. City of Tampa, 134 So. 211, 218 (Fla. 1931). The proposed Bonds clearly fall within the latter category.

Appellants' reliance upon Nolle v. Brevard County, 131 So. 776 (Fla. 1931), and State v. City of Lakeland, 16 So. 2d 294 (Fla. 1943), is totally misplaced. In Nolle v. Brevard County this Court refused to affirm the validation as refunding bonds of bonds issued by a county to refund the obligations of a separate taxing district. In State v. City of Lakeland, refunding bond status was denied where the refunding bonds pledged utility revenues in addition to the ad valorem tax revenues pledged as security for the original bonds. The Commission's proposed bond issue is for its own obligations and does not alter or extend the security pledged. In each case a "new liability", previously non-existent, was created.

In considering the constitutional restrictions upon issuance of bonds by municipalities, this Court in Sullivan v. City of Tampa, 134 So. 211 (Fla. 1931), refused to engraft the restrictions upon the issuance of refunding bonds that appellants would urge. The Court stated:

> It will be noticed that the only limitation upon the power of counties, districts, and municipalities to issue refunding bonds . . . is that such bonds be issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts, or municipalities. The constitutional provision contains no express language which purports to fix or limit the rate of interest which the refunding bonds shall bear, or to fix the price at which they may be sold. Being wholly silent as to such matters, and no such limitation being clearly implied from the use of the terms in the amendment itself, none will be implied by the court.

134 So. at 218. The Charter provision authorizing refunding bonds should be similarly construed. No such restructions upon

the Commission's authority to issue refunding bonds are stated in the Charter; none should be implied.

The Bonds comply with the essential requirement that they be issued "exclusively for the purpose of refunding" the outstanding obligations of the Commission. (C.A. 62-63/Com. Ex. 6; T. 20/A.A. 335). The Bonds would provide the Commission an extension of time or more favorable terms for the payment of the indebtedness represented by the obligations. See Sullivan v. City of Tampa, supra at 218-219. In Sullivan v. City of Tampa, supra, the Court refused to imply that refunding bonds could not be issued except at no higher interest rate than the original obligations or that they could not be sold for less than their full par value. The Court observed:

> It is also a matter of common knowledge that refunding obligations cannot always be accomplished without holding out to the creditors some inducement in the form of an increase in the rate of interest or otherwise, which would cause him to be willing to surrender his existing bonds and take the refunding bonds instead.

134 So. at 17.

Similarly structured refunding transactions have been considered and approved by this Court. And that approval necessarily disposes of appellants' objection that the Outstanding Bonds will not be immediately satisfied. In State v. Board of Public Instruction of Broward County, 164 So. 2d 6 (Fla. 1964) this Court noted that it had approved refundings where the amount necessary to satisfy the outstanding obligation is deposited in trust. The Court found:

> The Resolution authorizing the issuance of the Refunding Bonds requires that the proceeds of the sale of the bonds be invested in direct obligations of the United States Government or in time deposits evidenced by certificates of deposit fully secured by direct obligations of the United States Government at a rate or rates equal to the interest payable on the Refunding Bonds.
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> * * *
>
> The Resolution authorizing the issuance of the Refunding Bonds and the testimony of the witnesses demonstrates that the issuance of the Refunding Bonds without an immediate redemption of the Outstanding Bonds does not result in a double indebtedness or an increased burden on the taxpayers of the district.

164 So. 2d at 12. Simultaneous cancellation or satisfaction of outstanding obligations is clearly not required by the Charter or by the decisions of this Court. It is sufficient that the proceeds of the refunding bonds will be available to take the place of principal and interest of the outstanding bonds when they mature. Fleeman v. City of Jacksonville, 191 So. 840 (Fla. 1939). The Bonds are therefore clearly refunding bonds authorized by the Charter.

Appellants also contend that language in the Master Bond Resolution authorizing the issuance of additional bonds for the construction and acquisition of improvements precludes characterization of the Bonds as "refunding bonds" under the Charter. Section 210 of the Master Bond Resolution (C.A. 65/Com. Ex. 6) provides for the issuance of separate additional bonds within the authorized amount on a parity with the Bonds previously issued for refunding for construction or acquisition purposes, but specifically conditions any such action upon the adoption by

the Commission of a new bond resolution therefor. The public is thereby provided all of the substantive and procedural protections available in connection with a totally new bond issue. Section 209 (C.A. 62/Com. Ex. 6) provides that the Series 1985A Bonds for which validation is herein sought will be issued:

> ... for the purpose of providing funds, together with other available funds, for (i) paying at their respective maturities or (ii) redeeming at a redemption date or dates ... or (iii) purchasing, pursuant to a program for the solicitation of tenders, together with interest thereon until their payment or redemption or purchase and any redemption premium, all of the Outstanding Bonds.

The Bonds to be issued under the Master Bond Resolution and for which validation is sought are only the Commission's Series 1985A Bonds. (A.A. 1, 480). Those bonds are authorized exclusively for the refunding of the Outstanding Bonds. Appellant's contention that the Bonds do not qualify as refunding bonds because the proceeds may be used for construction is therefore patently in error and without merit.

II. THE BONDS ARE AUTHORIZED UNDER THE CHARTER WITHOUT REFERENDUM.

A. The Referendum Issue Has Been Previously Adjudicated And That Adjudication Is Conclusive Under Chapter 75 And Principles Of Res Judicata.

The referendum requirement and the effectiveness of the 1963 Charter amendment have been addressed by the lower court in validation proceedings since 1963 in which revenue bond issues which were not submitted to the electorate were validated. The circuit court validated the 1981 Bonds by judgment dated February 25,

1981 (Sebring Utilities Commission v. State of Florida, et al., Civil Action No. 81-11-G) (C.A. 278/Com. Ex. 10). That judgment states:

> 6. Chapter 63-1926, Special Acts of Florida of 1963, amended chapter 23535, Section 12, Acts of 1945, as amended by Chapter 27893, Sections 12.01 and 12.02, Acts of 1951, to eliminate the requirement that the issuance of revenue bonds be approved by a vote of the freeholders of the City of Sebring, Highlands County, Florida. The Act, as amended, requires the approval of the freeholders of the City of Sebring, Highlands County, Florida prior to the issuance of bonds only when required by the Constitution of the State of Florida. The Constitution of the State of Florida does not require an election for the issuance of revenue bonds, therefore an election of the freeholders of the City is not required by the Act for the issuance of the Bonds.

(C.A. 286). The 1981 validation judgment further provides that:

> 10. All Acts, conditions and things required to happen, exist and be performed precedent to and in the issuance of said $99,000,000 bonds, have happened, exist and have been performed in due time, form and manner as required by the Constitution and laws of the State of Florida.

(C.A. 287).

The issue of the effectiveness of the 1963 amendment to eliminate the referendum requirement of the Charter was specifically presented to the circuit court in the 1981 proceeding. The State Attorney, representing the taxpayers, citizens, and property owners specifically contended that a referendum should be required (T. 68/A.A. 383).

The referendum issue was again presented to the circuit court in Sebring Utilities Commission v. State of Florida, et

al., Civil Action No. 83-93-G. (C.A. 292/Int. Ex. 14). By judgment dated May 19, 1983, the circuit court held:

> (m) Section 3 of Chapter 27893 of Laws of Florida, 1951, as amended by Laws of Florida, Chapter 63-1926, provided that the Act shall be construed to require bond approval by freeholders only when required by the state constitution. There is no constitutional requirement for freeholder approval for municipal utility revenue bonds.

(C.A. 297).

Appellant John Farley participated in both the 1981 and 1983 validation proceedings, raising the referendum issue in each proceeding. (T. 78-80/A.A. 393-395). The circuit court has twice previously rendered final adjudications on the referendum issue in actions where the taxpayers, citizens, and property owners, including appellants, were properly joined and represented, and where the issue was specifically raised.[5] Issues raised and disposed of in previous validation proceedings are foreclosed, and may not be properly relitigated in an action for validation of refunding bonds. State v. Ocean Shore Improvement District, 156 So. 433 (Fla. 1934).

The purpose of bond validation proceedings and the scope of judicial inquiry held pursuant to Chapter 75 is to determine if a public body has the authority to issue such bonds under the Florida Constitution and Statutes, to determine whether the purpose of the obligation is legal, and to ensure that the

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[5]The 1981 judgment was not appealed. As pointed out in appellants' initial brief, the 1983 judgment was imperfectly appealed by "these same intervenors", and the appeal was dismissed (Case No. 63,839). (B. 1).

authorization of the obligations complies with the requirements of law. McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980); State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978); State v. City of Daytona Beach, 360 So. 2d 777 (Fla. 1978). Those determinations in validation proceedings are given conclusive and binding effect. Section 75.09, Florida Statutes, provides:

> If the judgment validates such bonds which may include the validation of the county, municipality, taxing district, political district, subdivision, agency, instrumentality or other public body itself and any taxes, assessment or revenues affected, and no appeal is taken within the time prescribed, or if taken and the judgment is affirmed, such judgment is forever conclusive as to all matters adjudicated . . . [and] . . . shall never be called into question in any court by any person or party.

Section 75.09 expresses a clear and unequivocal legislative position regarding the finality of judgments adjudicating the validity of bonds. Stop Transit Over People Inc. v. Board of County Commissioners of Dade County, 347 So. 2d 842 (3d DCA 1977), appeal dismissed, 354 So. 2d 986 (3d DCA 1977). That purpose is to put to rest and render "forever conclusive" any question of law or fact addressed affecting the validity of the bonds as well as any issue which could have been raised. Merril v. Dade County, 277 So. 2d 783 (Fla. 1973); Lipford v. Harris, 212 So. 2d 766 (Fla. 1968); Wright v. City of Anna Maria, 34 So. 2d 737 (Fla. 1948). Practical public policy demands such a position. Wright, supra. The failure to perfect an appeal of the validation judgments discussed above renders the judgments

"forever conclusive" as to the appellants. Hall v. Orlando Utilities Comm., 432 So. 2d 1318 (Fla. 1983).

The referendum issue having been previously determined in the prior validation proceedings, that determination is conclusive and may not be relitigated.

B. The Charter Was Effectively Amended In 1963 To Eliminate A Referendum Requirement For The Issuance Of Revenue Bonds.

The relevant provisions of the Charter of the Commission are set forth at pages 5-6, supra. The Charter as amended clearly and unambiguously provides that the Commission may issue revenue bonds without referendum unless required by the Florida Constitution.

The specific and obvious purpose of the 1963 Charter amendment was to make the Charter consistent with constitutional and statutory provisions that require voter approval only for issuance of general obligation bonds. Consequently, the issuance of revenue bonds without referendum in absence of Constitutional requirement, as permitted to municipalities by statute (Section 166.121, Florida Statutes) and not precluded to the Commission by the Florida Constitution, was provided. (T. 60/A.A. 375). The Commission was, therefore, fully authorized to issue the Outstanding Bonds without referendum, and no referendum is required for issuance of the Bonds.

The amended Section 3 provides in part:

> This act shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when

> required under the constitution of the state . . . .

The provision facially and logically authorizes the issuance of revenue bonds without referendum when not required by the Florida Constitution.

The amended Section 3 is not vague or indefinite. It is conceded that no provision of the Florida Constitution requires that the issuance of revenue bonds be approved by referendum. The Commission's authority to issue bonds payable from its revenues is specifically provided by the Charter, and is therefore dependent upon no other provision of general law. The language of Section 3, as amended, ensures that no construction of general law will limit that authority.

The clear and unequivocal expression of legislative intent contained in the amended Section 3 cannot be overcome by intervenors' convoluted argument of vagueness of application in the context of the Charter. Basic principles of statutory construction easily relieve any conceivable vagueness in construction and application.

The cardinal rule of statutory construction is to ascertain and give effect to legislative purpose, and to avoid any conclusion of unconstitutionality. Sun Insurance Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961). Where provisions are indeed inconsistent, the statute should be construed in a manner that will give effect to its purpose. Reyes v. Banks, 292 So. 2d 39 (Fla. 4th DCA 1974). In determining legislative intent, effect should be given to the act as a consistent and harmonious whole. Wilensky v. Fields, 267 So. 2d 1 (Fla. 1972); Berek v. Metropol-

itan Dade County, 396 So. 2d 756 (Fla. 3d DC 1981). A statute (or other enactment) must be construed in its entirety so that words, sentences, phrases, clauses and paragraphs are not construed in isolation. Weitzel v. State, 306 So. 2d 188 (Fla. 1st DCA 1974).

If the statutory provisions cannot be construed consistently, however, two accepted principles of statutory construction mandate the construction of the Charter to give full effect to the amended Section 3. It is a fundamental rule of statutory construction that the last expression of legislative will prevails. Askew v. Schuster, 331 So. 2d 297 (Fla. 1976). Although every effort should be made to reconcile inconsistent provisions, any remaining inconsistency must be resolved in favor of the last in point of time. Peterson v. Department of Environmental Regulation, 350 So. 2d 544 (Fla. 1st DCA 1977); Cable-Vision, Inc. v. Freeman, 324 So. 2d 149 (Fla. 3d DCA 1975).

Related to the fact that the 1963 amendment to Section 3 is the final expression of legislative intent is the rule of construction permitting the implied repeal of prior inconsistent provisions. 49 Fla.Jur.2d Statutes § 211, et. seq. (1984). Where it appears that a statutory enactment later in time was intended as a revision of the former provision, or there is such a positive and irreconcilable repugnancy between the two provisions so as to indicate clearly that the latter statute was to govern the subject, or the provisions of the earlier provision cannot operate lawfully without conflict with the latter, a construction of repeal of the former statute by implication is

proper. Miami Water Works Local No. 654 v. City of Miami, 26 So. 2d 194 (Fla. 1946); Richey v. Town of Indian River Shores, 337 So. 2d 410 (Fla. 4th DCA 1976).

The Richey v. Town of Indian River Shores case, supra, is particularly analogous. The court there found that a general law relating to registration systems for municipal elections implicitly repealed inconsistent provisions of the prior charter of the town of Indian River Shores. After quoting the general considerations cited above relating to repeal by implication, the court stated:

> But try as we might to find compatibility between Sections 1 and 2 of Article VI of the Town Charter in question and Section 1 of Chapter 73-155, we are unable to do so. Consequently we conclude that the two legislative enacts are repugnant, a conclusion which impels us to hold that the legislature intended Section 1 of Chapter 73-155 to prevail, thus repealing by implication Sections 1 and 2 of Article VI of Chapter 29163, Laws of Florida.

337 So. 2d at 413.

Appellants urge a finding of unconstitutionality that is possible only if the above rules of statutory construction are not applied. The law requires that the court construe the statute, if at all possible, to reach a constitutional result. Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976); Sun Insurance Office, Ltd. v. Clay, supra. A truly logical and reasonable construction of the Charter is that Section 3 of the 1951 act, as amended in 1963, amended and revised the Charter to provide for issuance of revenue bonds without referendum. Whether considered as the last chronological

expression of legislative intent, or as an implied repeal of the inconsistent portions of Sections 12.01 and 12.02, the result is the same. It is the result intended by the amendment's instigator (T. 50/A.A. 365), and the construction adopted by the circuit court in previous validation proceedings.(C.A. 278, 292/Com. Ex. 10, Int. Ex. 14). Consequently, the Charter permits issuance of the Bonds without referendum, no referendum was required for valid issuance of the Outstanding Bonds, and the Bonds may be validly issued without referendum.

C. The Charter Does Not Constitute An Unlawful Delegation Of Legislative Authority.

Intervenors contend that issuance of the Bonds is prohibited because the Commission's Charter is an unconstitutional delegation of legislative power to the Commission. The argument appears to be that the 1963 amendment of Section 3 of the Charter amendment of 1951 authorizing the issuance of revenue bonds without referendum, without a specific repeal of Sections 12.01 and 12.02 of the Charter, created a conflict in the provisions of the Charter rendering it sufficiently vague that the Commission is entitled to select to be governed by one provision or the other, thereby to determine what the law shall be, which purportedly constitutes an unconstitutional delegation of legislative power. This tortuous argument must also fail.

As set forth above (see pages 21-24, supra), the Charter as amended constitutes a complete expression of legislative intent that revenue bonds may be issued by the Commission without referendum. However, even if arguendo the conflicting provisions of

the Charter did both remain available to the Commission for the issuance of revenue bonds, it does not follow that an unconstitutional delegation of legislative power necessarily results.

The general principle regarding unlawful delegation of legislative power is contained in State v. Atlantic Line Railway Co., 47 So. 969, 976 (Fla. 1908), where the Florida Supreme Court held:

> The legislature may not delegate the power to enact the law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself designed to accomplish a general public purpose . . .

The issuance of revenue bonds without referendum, specifically authorized by the Charter, cannot constitute an unlawful delegation of legislative power, even if the Commission were also authorized to issue bonds with referendum. That action by the Commission does not (1) enact law, (2) declare what the law shall be, or (3) constitute unrestricted discretion in applying a law. The selection of one of several specifically legislated alternatives by an administrative commission is not an unconstitutional exercise of legislative power.

The Charter should be construed to reach a constitutional result. Accepted and fundamental principles of statutory construction support a constitutional construction of the Charter giving effect to the unambiguous provision of Section 3 of the 1951 act as amended in 1963 authorizing the issuance of revenue bonds by the Commission without referendum. Action by the Commission pursuant to that authority does not constitute an unlawful delegation of legislative power.

III. THE 1981 BOND ISSUE IS NOT INVALID DUE TO EXTRINSIC FRAUD ARISING FROM THE 1963 AMENDMENT PROCESS.

The validity of the 1981 Bonds was conclusively established by validation judgment. The appellants attempt to avoid the conclusive effect of the 1981 validation judgment (see pages 17-21, supra) by urging that the Commission procured that judgment through constructive fraud upon ratepayers in connection with the 1963 Charter amendment.

Rule 1.540(b)(3), Florida Rules of Civil Procedure, authorizes Florida courts to grant relief from a final judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or misconduct of an adverse party." The motion must be made within a reasonable time and in any event not later than one year following entry of the judgment. The Rule further provides that the court may relieve a party from judgment by independent action, and authorizes the court to set aside a judgment for "fraud upon the court."[6]

The long-applied rule in Florida regarding collateral attack by independent action on final judgments is that "extrinsic" fraud must be alleged, as distinguished from "intrinsic." Fair v. Tampa Electric Co., 27 So. 2d 514 (Fla. 1946); Canal Authority of State of Florida v. Harbond, Inc., 433 So. 2d 1345 (5th DCA 1983); Brown v. Brown, 432 So. 2d 704 (3d DCA 1983).

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[6]Appellants specifically do not raise here the argument, made below, that the 1981 judgment resulted from a fraud upon the Court. (B. 37-38, note 12).

Because Rule 1.540 is identical to Rule 60, Federal Rules of Civil Procedure, Florida courts have looked to federal court decisions for guidance in the application of that rule.

In Fair v. Tampa Electric Co., supra, this Court addressed the intrinsic/extrinsic distinction, and relied upon the distinctions drawn in United States v. Throckmorton, 98 U.S. 61 (1878). That case stated:

> [W]here the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, -- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained . . .
>
> We think . . . that the acts for which a court of equity will on account of fraud set aside . . . between the same parties . . . have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not a fraud in the matter on which the decree was rendered.

98 U.S. at 96. Other Florida decisions have adopted the Throckmorton intrinsic/extrinsic dichotomy. See Columbus Hotel Corporation v. Hotel Management Co., 156 So. 893, 897 (Fla. 1934); Canal Authority of State of Florida v. Harbond, supra at 1348.

Accordingly, extrinsic fraud must be such as pertains to a matter not in issue in the original action, nor that could have

been placed in issue by the exercise of reasonable diligence, as where trick, artifice or other conduct prevents a fair presentation of the issues at hand. 7 Moore, Federal Practice, 1984, ¶ 60.37; Toledo Scale Co. v. Computing Scale Co., 281 F. 488 (1922), affirmed, 261 U.S. 399 (1923). Intrinsic fraud, which is unavailable as a basis for collateral attack upon a judgment, consists of fraudulent acts pertaining to the issues involved in the litigated action. Fidelity Standard Life Ins. Co. v. First Nat. Bank & Trust Co., 382 F. Supp. 956 (S.D. Ga. 1974), affirmed, 510 F.2d 272 (5th Cir. 1975), cert. denied, 423 U.S. 864 (1975).

No showing of extrinsic fraud applicable to the 1981 validation judgment was made before the trial court. The effect of the 1963 amendment was squarely before the circuit court in the 1981 validation proceeding. Any alleged fraud relating to the amendment process could have been there asserted. No presentation was restricted or barred in the 1981 proceeding. (T. 70/A.A. 385). The circumstances surrounding adoption of the 1963 amendment do not constitute extrinsic fraud as to the 1981 proceeding entitling intervenors to have the 1981 validation judgment set aside. The plaintiffs are not entitled to reopen a final judgment of bond validation and indefinitely extend the period for reconsideration by merely labeling the amendment process, which occurred 18 months prior to the validatiion proceeding, as fraudulent. No extrinsic fraud justifying the relief requested has been demonstrated.

Appelants also contend that the ballot summary of the 1963 Charter amendment utilized for the public referendum approving the amendment was fradulently misleading and the referendum therefore invalid. The contention is also without merit.

The ballot summary (B. 7; A.A. 165/Int. Ex. 3) fairly and accurately summarizes the proposed amendment. The ballot summary clearly apprised the voters that the amendment would permit the issuance of revenue bonds by the Commission in a manner not inconsistent with the provisions of general law for the issuance of similar instruments. It is conceded that no provision of general law requires a referendum for the issuance of revenue bonds by governmental authorities.

The unrefuted testimony is that the subject of the 1963 amendment was clearly understood and widely discussed and debated. (T. 64, 66/A.A. 379, 381). The amendment was effectively presented to the public by both publication and referendum, although only one method of notice was required by law. (T. 51, 66/A.A. 366, 381).

This Court has stated:

> All that the constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and the many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. It is a matter of common knowledge that one does not wait until he enters the election booth to

> decide how he is going to cast his ballot. What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.

Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954). Similarly, in Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 987 (Fla. 1981), the court quoted the foregoing language from the Hill v. Milander case in approving a local tourist development tax and stated further:

> While there certainly are many details of the plan not explained on the ballot, we do not require that every aspect of a proposal be explained in the voting booth.

For these reasons, the 1963 ballot summary was sufficient and appellants' assertion of fraud in connection with the 1963 referendum approval of the Charter amendment is unsupported.

Furthermore, appellant's attack upon the referendum ballot over 20 years after its approval is inappropriate. This Court has held that once an amendment is duly proposed, submitted to a vote, and approved without any question, the "almost universal rule" is that "the effect of a favorable vote by the people is to cure defects in the form of a submission." Sylvester v. Tindell, 18 So. 2d 892 (Fla. 1944). And, as argued above, not only have nearly 22 years passed since the challenged amendment was adopted, its effect has been confirmed by judgments in validation proceedings, including those validating the 1981 Bonds and the 1983 Bonds. For all of these reasons, the 1963 amendment effectively amended the Charter, was not fraudulent as to the ratepayers, and cannot serve as any basis to set aside the 1981 validation judgment.

IV. THE 1984 BONDS AND 1985 NOTES WERE DULY ISSUED AND ARE VALID.

The 1984 Bonds and 1985 Notes are challenged on appeal by appellants only for the reason that they were not approved by referendum. The 1984 Bonds and 1985 Notes were not the subject of validation proceedings, but the interpretation of the Charter made in the previous validation judgments is applicable to these subsequent issues. The Charter as amended does not require referendum approval of revenue bond issues. See pages 21-25, supra. Consequently, the 1984 Bonds and 1985 Notes were duly issued and are valid subjects for refunding by the Bonds.

CONCLUSION

The judgment validating the Bonds was entered in full compliance with all constitutional and statutory requirements. Pursuant to the relevant provisions of Florida law, the Commission has the authority to undertake the bonded indebtedness proposed by the Master Bond Resolution and has complied fully with all requirements of law. Therefore, the Consolidated Final Judgment of the trial court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND DELIVERY to John R. Bush, Esquire, Bush, Ross, Gardner, Warren & Rudy, 220 South Franklin Street, Tampa, Florida; and by U.S. MAIL to Alfred C. Thullberry, Jr., Esquire, Assistant State's Attorney, Post Office Box 1309, 250 N. Wilson, Bartow, Florida 33830, this 29th day of October, 1985.

Dennis R. Ferguson