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IN THE SUPREME COURT OF FLORIDA

Wilson

STATE OF FLORIDA,

Appellant,

v.

PALM BEACH COUNTY HOUSING AUTHORITY,

Appellees.
_____/

CASE No. 69,562

(Appeal from the Fifteenth Judicial Circuit)

BRIEF OF APPELLANT

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and

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STATEMENT OF THE CASE AND FACTS

This cause originates in the Circuit Court in and for Palm Beach County, which validated Appellee's bond issue on August 12, 1986 (A 1-4). On August 19 the State moved for correction (A 5-6), and on August 26, the Judgment was amended to reflect the correct amount of the bonds thus validated (A 7-8). By Notice of Appeal filed September 11, Intervenor Craig Wilson, a taxpayer and citizen of Palm Beach County, seeks review of that order as amended (A 9-10).

The case commenced with the Complaint for Validation filed by Appellee Housing Authority on July 14 (A 11-16). The State's Answer was filed August 6 (A 17-19). In addition to demanding strict proof of the allegations of the complaint, the answer challenged validation on grounds that mortgage foreclosure was established for the lender without an election approving the bonds.

When the case came on for hearing, only the latter issue was argued against validation. The amount of bonds subject to validation was limited by oral amendment (A 5).

This Court has jurisdiction of this appeal pursuant to Florida Constitution Article V, Section 3(2), and Section 75.08, Florida Statutes.

POINT INVOLVED

THE COURT ERRED IN VALIDATING A BOND ISSUE SECURED BY MORTGAGES WITH THE ACCOMPANYING RIGHT OF FORECLOSURE.

SUMMARY OF ARGUMENT

This Court has repeatedly disapproved bonds secured by mortgages affording a right of foreclosure unless the bonds were submitted to an election. The bonds here were candidly conceded to have such a provision and no election was alleged or proven.

The Circuit Judge had no authority to overrule this Court's decisions. He must have believed the decisions were superseded by an addition to the 1980 Constitution or were distinguishable because Appellee has no taxing power. Neither theory will support his conclusion.

The 1980 Constitutional amendment does not even apply to county housing authorities. If it did, it would not be inconsistent with this Court's prior rulings. If it were inconsistent, it would have to yield to the Constitutional provision this Court construed, unless hopelessly repugnant.

The danger that a mortgage foreclosure poses to the taxing process is the rationale for some of this Court's rulings, but not all. The bonds here must not be validated unless the foreclosure provision is stricken.

ARGUMENT

Appellee HOUSING AUTHORITY, with commendable candor, conceded in its complaint that its bonds would be secured by mortgages:

> "In connection with each Housing Project, the Owner may enter into a mortgage agreement with the provider of the Project Credit Enhancement to secure the reimbursement to the provider of the Project Credit Enhancement of amounts advanced by such provider pursuant to the Project Credit Enhancement in the event that payments made by the Project Coordinator to such provider shall be insufficient to so reimburse such provider." (A 15)

Such a clause has been consistently rejected by this Court unless the bonds were approved at an election. Nohrr v. Brevard County Educational Facilities Authority (Fla. 1971), 247 So.2d 304 at 310-311, puts it thus:

> "Commencing with the case of Boykin v. Town of River Junction, 121 Fla. 902, 164 So. 558 (1935), the Court without exception has held that revenue bonds secured by a mortgage on the physical properties to be financed could not be issued by public bodies unless approved at an election."

This Court approved the bond issue, but only after deleting the provisions relating to the mortgage and the accompanying right of foreclosure.

Historically, the rulings find their basis in Florida Constitution of 1885, Article IX, Section 6, which required an election by the majority of freeholders for any bonds other than those refunding other bonds. See e.g., State v. Florida State Improvement Commission, 47 So.2d 627 at 631 (1950). The current provision, Florida Constitution, Article VII, Section 10, reads in part as follows:

> "Section 10. Pledging credit.--Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing: * * * (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the Unites States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property."

and is interpreted the same way. See e.g., State v. Putnam County Development Authority (Fla. 1971), 249 So.2d 6 at 11.

The mortgage provision was duly challenged herein by the State (A 19). Nonetheless, the Final Judgment fails to explicate any reason for failing to follow this Court's rulings.[1] One must assume the trial Judge accepted one or more of the theories presented to him by Appellee HOUSING AUTHORITY in its Memorandum in support of validation (A 20-26).

The first theory thus espoused is that the 1980 Constitutional revisions worked a change in the law. Appellee argued its bonds were authorized by Florida Constitution, Article VII,

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[1] Lower Courts are not at liberty to refuse to follow this Court's rulings, Hoffman v. Jones, (Fla. 1973), 280 So.2d 431, State v. Hayes, (Fla. 4 DCA 1976), 333 So.2d 51.

Section 16:

> "(a) When authorized by law, revenue bonds may be issued without an election to finance or refinance housing and related facilities in Florida, herein referred to as "facilities".
>
> (b) The bonds shall be secured by a pledge of and shall be payable primarily from all or any part of revenues to be derived from the financing, operation or sale of such facilities, mortgage or loan payments, and any other revenues or assets that may be legally available for such purposes derived from sources other than ad valorem taxation, including revenues from other facilities, or any combination thereof, herein collectively referred to as "pledged revenues," provided that in no event shall the full faith and credit of the state be pledged to secure such revenue bonds.
>
> (c) No bonds shall be issued unless a state fiscal agency, created by law, has made a determination that in no state fiscal year will the debt service requirements of the bonds proposed to be issued and all other bonds secured by the same pledged revenues exceed the pledged revenues available for payment of such debt service requirements, as defined by law."

It is respectfully submitted that this section does not help Appellee for several reasons.

First of all, subsection (c), with its reference to a state fiscal agency, strongly suggests that the entire section relates only to state housing authorities, not local agencies. What state agency has made or will make the required determination here? Why is this section not added to Section 12, Local bonds, if it applies to local bonds, or added to Section 9 or 10 if it is modifying them?

Secondly, Section 16(a) may authorize bonds without an election, but 16(b) does not expressly authorize a mortgage in favor of the credit provider. Rather, it allows the pledge of revenues to be derived from mortgage or loan payments. Just as

there is a difference between being authorized to sell property to satisfy the bonds and being forced to by foreclosure (see e.g., State v. Inter-American Center Authority (Fla. 1962), 143 So.2d 1), there is an even greater difference between pledging revenues and granting a mortgage lien with a right of foreclosure. The former is well within the range authorized by Article VII, Section 16; the latter plainly is not.

This Court must strive to give these sections interpretations which will harmonize and reconcile them, if it can do so, In re Advisory Opinion to Governor (Fla. 1979), 374 So.2d 959 at 964. Appellant submits that the only reasonable construction is to continue to require an election if a mortgage is to be given to the lender to secure the bonds.

Were such a construction not available, that would not mean Appellee would prevail. It would still be necessary to determine whether the later provision took precedence. Repeal or modification by implication is not favored in Constitutional construction, and will be found to occur only where provisions are irreconcilably repugnant, Wilson v. Crews, 160 Fla. 169, 34 So.2d 114 (1948).

Appellant submits that Florida is renowned for its refusal to pledge future tax revenues or credit. The historic Constitutional provision which this Court interpreted so often was not unknown to the people who proposed the 1980 revision. To attribute to them an intention to modify the long standing bedrock of Florida's fiscal strength by implication would be wrong. We suggest that the provisions are not so repugnant as to justify Appellee's claim of modification, so that Sections 9

and 10 remain fully applicable to these bonds.

The second theory advanced by Appellee is that it does not have the power to tax, so is distinguishable from agencies whose bonds have been condemned (A 24-25).

It is true that Hollywood Inc. v. Broward County, (1956) 90 So.2d 47 at 51, is based on the danger that an impending mortgage foreclosure would force the taxing authority to act to save its property. It is also true that Article VII, Section 9, deals with the taxing power. However, Section 10 prohibits either tax revenues or credit from being pledged.

This Court has not limited its rulings to the indirect effect on taxes. In Nohrr, supra, it addresses the moral compulsion "to levy taxes or to appropriate funds"(247 So.2d at 311). There is no valid distinction to be drawn. Whether the agency taxes or gets its money elsewhere, will it not rally to the defense of its property? The implication is the same whatever the revenue source, and the result should also be the same.

CONCLUSION

The validation of these bonds flies in the fact of existing case law, and with no valid basis for reaching a contrary result. This Court must either reverse the validation as in State v. Florida State Improvement Commission, supra, or strike the mortgage provision as in Nohrr, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to E. Cole FitzGerald, III, Esquire, Moyle, Flanigan, Katz, FitzGerald & Sheehan, P. O. Box 3888, West Palm Beach, FL 33402, and Frank R. Stockton, Esquire, Assistant State Attorney, 315 Third Street, West Palm Beach, FL 33401, this 1st day of October, 1986.

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