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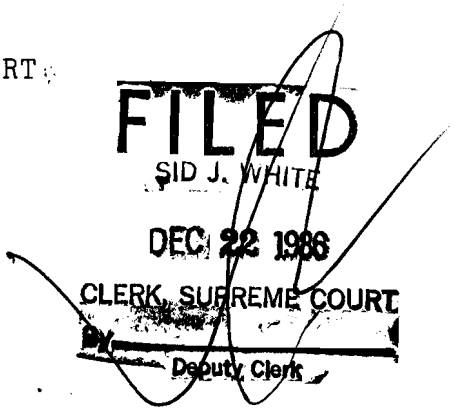
IN THE FLORIDA SUPREME COURT



Case No. _____
Cir. Civ. 86-5568-16

State of Florida,
Appellant, Defendant

v.

Housing Finance Authority of Pinellas County, Florida, a Public Body Corporate and Politic,
Appellee, Plaintiff

BOND VALIDATION
FROM PINELLAS COUNTY

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TOPICAL INDEX

TABLE OF CITATIONS AND AUTHORITY

STATEMENT OF THE CASE

The Housing Finance Authority of Pinellas County, Florida filed on April 16, 1986, its Complaint relying on Ch. 159, Part IV, Fla. Stats. (1985), for Validation of Bonds in the amount of $100,000,000 for multi-family Mortgage Revenue Bonds, Various Series ([Various] Project) and Amendments thereto on June 9, 1986, Circuit Civil No. 86-5568-16 (Appendix Exhibit 2 and 3, accompanying this brief.) Said complaint and Amendments thereto alleged that on March 4, 1986, Appellee/Plaintiff Housing Authority both cancelled prior Resolution 83-2 providing for the issuance of $100,000,000 multi-family Mortgage Revenue Bonds, Various Series ([Various] Project) and adopted a new Resolution, 86-7, providing for the same thing. Resolution 86-7, of Pinellas County Housing Finance Authority purportedly found a need for the bond issue for $100,000,000 for multi-family Mortgage Revenue Bonds. (Appendix 2, Exhibit C; Appendix 8, p. 12). The Circuit Court issued its Order to Show Cause on April 17, 1986, (Appendix Exhibit 4) and the State filed its Response to Order to Show Cause on May 14, 1986, (Appendix Exhibit 5). Amendments to the complaint were apparently made in response to some of the objections raised by the State's Response. Hearing on the Order to Show Cause was held on June 11, 1986, but rescheduled for August 28, 1986, after republication of public notice. Second Order to Show Cause was filed June 19, 1986,

(Appendix Exhibit 6). The hearing was held August 28, and continued on specific order of the Court (Appendix Exhibit 8) for the limited purpose of hearing additional testimony from witness David Scussell as to the study prepared for Appellee/Plaintiff Housing Authority's finding of need for the Project and issuance of bonds therefor. The continued hearing was held October 30, 1986. Transcripts of the hearing and its continuation are attached as Appendix Exhibits 7 and 8.

The study which was the subject of the continued hearing "Rental Housing Needs Analysis Update Pinellas County, Florida," was introduced into evidence and is attached hereto as Appendix Exhibit 9.

The final judgment of validation was filed November 3, 1986, and is the Order herein sought to be reviewed. Appendix Exhibit 1 accompanying this brief.

STATEMENT OF THE FACTS

The Executive Director of the Housing Finance Authority, Ms. Darlene Kalada (Appendix 8, p. 5) testified that the Authority enacted Resolution 86-7 after determining the need for the particular bond issue (Appendix 8, p. 12) based on market studies of local need (Appendix 8, p. 15). Four criteria were considered: geographic area, availability of three-bedroom rental units, availability of rentals reserved for low, moderate income families, and the rent

structure within the low, moderate income range (Appendix 7, p. 15-16). Ms. Kalada testified that the need for the project was primarily for low/moderate and middle income families (Appendix 7, p. 18). The Authority had two market studies prepared by consultant David Scussel within the last three years to confirm the continuing need for such rental housing in the community (Appendix 7, p. 21). She admitted that the authority had $28,000,000, or over one-fourth of the 1983 bond issue for $100,000,000, for multi-family housing still available (Appendix 7, p. 19).

Mr. Scussel testified that he is an economist and market analyst with Reinhold P. Wolff Economic Research, Incorporated, (Appendix 7, p. 22), a specialty which he described as "an on-the-job-learned specialty." (Appendix 7, p. 23). His firm "maintains an up-to-date and continuing data base on the Pinellas County rental market," which, together with surveys to determine "occupancy and vacancy and rent levels within existing apartment complexes" and planned new construction, and forecasts of demand, became the basis for the analysis reports for the Housing Finance Authority. (Appendix 7, p. 25-26). A copy of the updated report, submitted to the authority dated September 26, 1985, was submitted into evidence (Appendix 7, p. 26) and is appendix 9 herewith. He testified that it was his opinion that there was a continuing need for low and moderate income housing for

families in certain areas of the county. (Appendix 7, p. 27). Based upon the perceived need of 2,000 additional units a year, the Rheinhold P. Wolff consultant firm recommended that the Housing Authority finance up to 1,500 units per year (Appendix 7, p. 30).

At the hearing held October 30, 1986, as continued on the Court's own motion, (Appendix 8, p. 3), the Court further questioned Mr. Scussel about his market-analysis report (Appendix 9), which had been introduced into evidence at the hearing on August 28, 1986. The Court summarized the report as finding a shortage of apartments in Pinellas County only "of three-bedroom apartments for families who make $15,000 a year or less." (Appendix 8, p. 4). Mr. Scussel agreed with the Court but attempted to justify the greater need as a projected, future need. (Appendix 8, p. 5). At the time of the study he admitted a "sufficient supply to meet the needs of most renter households with the exception of the group that you [the Court] have mentioned, including an 8% vacancy rate. (Appendix 8, p. 5). But, he projected that by 1987 the projected high growth of the county would mean that "rental demand would begin to outstrip supply." (Appendix 8, p. 7). The Court again asked if he were not referring only to availability of three-bedroom rentals for families with income of $15,000 or less. Id. Mr. Scussel responded that that was the area of greatest need but that desirability of new construc-

tion in the private market was causing families to move into them, leaving older units available for lower income families, which he somehow concluded meant that construction by the Housing Finance Authority was needed for all families not just low income familes. (Appendix 8, p. 7-9). He assured the Court that this projected need justified a hundred million dollars ($100,000,000) in bonds, which would, he estimated build 3,000 units at an average market value of $33,000 a unit, (Appendix 8, p. 9), which he termed a two to three year supply (Appendix 8, p. 20).

On cross-examination, Mr. Scussel admitted omitting approximately 1,000 empty apartment units from his rental analysis and of not including new construction either not yet available for occupancy or in the initial stage of lease-up (Appendix 8, p. 10-12), amounting to another approximately 2400 units, actually constructed and 2482 under construction and 6446 units planned or proposed for construction, (Appendix 9, p. 57-61), including a construction imminent category. Although omitted as within the initial state of lease up, some constructed apartments were from 80 to 90% leased according to the table. He admitted "no shortage of supply of for-sale housing" in Pinellas County "for a number of years (Appendix 8, p. 18), including those with house payments at $400 or $500 a month (Appendix 8, p. 19). He claimed, however, that low-income and middle income families who could afford such

payments would not have mortgage origination fees or other costs, including down payment (Appendix 8, p. 20).

After argument of counsel the Court asked if he was required to grant the entire amount requested (Appendix 8, p. 27-28) and concluded that, although he had reservations about the amount, he did not believe he had the authority to reduce the amount. (Appendix 8, p. 33).

Mr. Gray Dunlap, of the investment banking firm of William R. Hough and Company, (Appendix 7, p. 31), testified as investment banker for the Authority to explain that the Authority has no credit of its own and that therefore the financing depends on the credit of the project to be financed; i.e., each developer's separate and specific apartment project. As he put it, "... the credit for the bond is in fact then the credit of the particular project financed." (Appendix 7, p. 32). He explained that the Authority raises the money through the sale of the bonds and then lends that money to developers on a "project-by-project basis ... so each project is a separate financing within the overall framework of the approved barometers of the financing." (Appendix 7, p. 32). He further explained that this financial arrangement "forms the basis for their enabling legislation and specific validation." (Appendix 7, p. 33). He testified that there would be manipulation of the mortgage or loan agreement depending upon the credit worthiness of the individual deve-

loper (Appendix 7, p. 33-34, 42-42). This would be done in order to enhance the credit of a developer by using somebody else's credit. (Appendix 7, p. 44). He concluded, however, that "the individual developer again is always legally and financially responsible throughout the whole transaction ..." (Appendix 7, p. 44).

On cross-examination he could not identify paperwork before the Court setting forth such financial agreements that established the obligation of the developer as the collateral for the bond issue. However, he was certain that no bond would be financed without documents establishing the developer's and any enhancing collateral's obligation, such as a loan agreement and promissory notes. (Appendix 7, p. 45-45).

The Court questioned this witness about the developer's liability on the bonds should a project fail (Appendix 7, p. 47). The witness explained that a financial institution was generally responsible in addition to the developer, by virtue of the collateral enhancement (Appendix 7, p. 47-49). The State's objection to testimony of the collateral arrangements in the absence of any documentation thereof before the Court was taken under advisement pending termination of the case in chief. (Appendix 7, p. 50-51).

Bond counsel, Ms. Lucy Harris of the Bryant, Miller & Olive firm in Tallahassee, (Appendix 7, p. 53) testified that mortgage loan revenues were pledged to pay off the bond issue

(Appendix 7, p. 55-56). She admitted that documents before the Court merely referred to and discussed the security devices without including the actual documents thereof (Appendix 7, p. 56-57). She admitted, also, that the security devices would assure payment to the bondholders, (Appendix 7, p. 57); that the bonds would not be marketable without appropriate security devices, (Appendix 7, p. 61); and that a bond holder would not have recourse against a defaulting developer if the security devices remained nonexistent as they were at the time of validation proceeding. (Appendix 7, p. 61-62). She agreed that the Authority would become liable if security devices were never executed. (Appendix 7, p. 62). She testified that certain requirements for the security devices appeared in the resolution and indenture which were then before the Court. She agreed, however, that the trust-indenture could be amended even in a material manner upon "consent in writing of the owners of not less than sixty percent or such other percentage as the issuer may approve prior to delivery of any series of the bonds ..." (Appendix 7, p. 63-64).

Bond counsel initially took the position that such security devices, "loan agreement or mortgage loan documents," should be validated in the proceeding even though not physically a part thereof. (Appendix 7, p. 65-66). Bond counsel explained an IRS ruling that questioned loans to lending institutions, (Appendix 7, p. 67), which ruling had prompted

cancellation of the prior validation and the instant replacement (Appendix 7, p. 12). "... [I]t made bond programs around the country," she said, "very uncomfortable with the true loans to lender structure, which is where you are looking only at the credit of the lender and not with the mortgage loan to the Authority." (Appendix 7, p. 67).

On redirect examination, the Authority's counsel asked if it were not "true that the security devices would be required to be in place according to Florida Statutes, Chapter 159? In other words, that the mortgages must be in place?" (Appendix 7, p. 68). The answer was to the affirmative to this question and the next, that the requirements of the statute could not be ignored and that the security devices would have to be in place "when it comes to a specific project." (Appendix 7, p. 68-69).

SUMMARY OF ARGUMENT

The Court erred in validating the bonds because of an insufficient showing by the Authority to support its finding of necessity for $100,000,000 for multi-family rental housing mortgage revenue bonds. Although there is a presumption supporting the finding of need by the Authority in its bond resolution, such presumption must be supported on the record of the validation proceeding. Here, the Authority presented the market analysis report and its author as the basis for its finding of need. The analysis report does not support its own conclusion of need for low and moderate income rental multi-family housing in Pinellas County, but, at most, a predicted, future need which is greatly in question and unsubstantiated in the report.

The Court erred in validating the bonds because the security device required for housing bonds by Chapter 159 is not a part of the validation proceeding.

ARGUMENT

ISSUE I. THE COURT ERRED IN VALIDATING THE BONDS BECAUSE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE ISSUING AUTHORITY'S FINDING OF PUBLIC PURPOSE

The findings and conclusions of the issuing agency as to compliance with statutory criteria and requirements for issuing bonds are called final and conclusive but subject to judicial review. State v. Leon County, Fla., 410 So.2d 1346 (Fla.1982). State v. Leon County, 400 So.2d 949 (Fla.1981).

The question of necessity for building the housing is the primary question in any proceeding seeking to validate a hundred million dollars worth of tax free bonds. The Florida Supreme Court commented on the necessity for housing bonds to benefit the public interest in State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979). "Of course, public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest."

The Court has also established the burden of proof for the issuing authority to support its own conclusions. In State v. City of Pensacola, 397 So.2d 922 (Fla. 1981), the Court said that substantial competent evidence in the record is required to uphold the city's findings of public purpose. See also Int'l. Bros. of Elec. Workers, Local Union No. 177 v. Jacksonville Port Authority, 424 So.2d 753 (Fla. 1982). In State v. City of Rivera Beach, 397 So.2d 685 (Fla. 1981), the Court found that evidence in the record constituted the requisite factual nexus to support the city's findings of benefit to the city. There is not a similar nexus of substantial competent evidence on the instant record as presented to the Trial Court by the Authority to support the Authority's finding of necessity for a hundred million dollars worth of tax free bonds to build additional rental units on the already distressed rental market of Pinellas County.

A currently existing need was required to be shown to support the bond issue in Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975). In Baycol, supra, the revenue bond issue to finance a public parking facility was disapproved because no need could be shown therefore until after construction of a proposed shopping center which was to be built by a private developer after, and contingent on, lease of air rights above the said parking lot. This existing need was reaffirmed more recently in State v. City of Miami, 379 So.2d 651 (Fla. 1980), citing Baycol.

The evidence presented to the Trial Court in support of the issuing Authority's finding of public purpose was all based on the report of Reinhold P. Wolff Economic Research, Inc. "on the status of rental housing needs and the rental apartment market in Pinellas County, Florida." Appendix Exhibit 9.

The Rheinhold P. Wolff study prepared for the Authority does not support the Authority's finding of necessity. To the contrary, it shows Pinellas County with the highest vacancy rate in 10 years (Tables 13 and 14 p.41, 42, supplemented with separate page for December, 1985 - January, 1986, stamped as received April 11, 1986, by Community Development), with the greatest vacancies being in the northern part of the county. Areas 1 and 2, Tarpon Springs/Palm Harbor/Safety Harbor vacancies almost doubled from the June,

1985 figures in Table 14, page 42 to the time of the supplemental table for the entire year of 1985, from the already high figure of 7.4% to the shockingly high figure of 14.1%. Area 3, Clearwater/Dunedin, increased, as shown by the same two tables, from 5.8% to 8.3%. All other areas, except for beaches and mid-county, increased. The exception, area 4, Largo/Seminole, dropped only one tenth of one percent, from 6.1 to 6.2 percent. The table for vacant units in new rental projects shows an excess more than double that of any of the prior 4 years included in the survey, with 915 units vacant countywide in new rental projects. Table 15, page 43. Table 17, page 45 shows new starts for rental units superseding new occupancies by huge numbers since 1983.

The Rheinhold P. Wolff study, in a classic understatement, admits to a "mild over-supply of new rental apartments during the next 21 to 25 months." Page 86. Table 18 shows the median rental household size to be 1.68 person, not indicating any overcrowding per rental unit. The study claims that 80% of the rental housing demand will be at $550 or less (p. 49). That the average (mean) monthly rent tables (Table 27, page 72 and Supplement for December 1985 - January 1986) show rents to be well below this dollar amount in all areas, except for the beaches, is probably the best reflection of the desperate plight of rental owners in Pinellas County. The Tables, 21 and 22, pages 55 and 56, for forecasted demand for <u>new</u> rental

units apparently reflects renters moving out of those vacant units into newer, more desirable units.

Testimony of the market survey report's author, David Scussel, did not support the conclusions drawn in the report. Rather, he admitted that the finding of necessity for low and middle income rental housing for families was made only by forecasting a projected need and only by ignoring over 960 empty units and the planned and projected building of 6446 new units, as shown in his own report and whose future existence were a lot more probable than the projected need of 3,000 units a year. By placing some newly constructed apartments into a category termed "still leasing-up" (Appendix 8, p. 12) Mr. Scussel avoided including available apartments which were as much as 80, 85 and 90% leased up. (Appendix 9, p. 58, 60 for i.e.). In fact, Mr. Scussel omitted from his analysis report more available apartments and more apartments under construction and soon to be available than his forecasted, projected need. The report admits to 5,050 apartments completed, under construction or soon to start construction which are not committed to leases, and an annual absorption rate of only 2,850 new apartments (Appendix 9, p. 50).

The report and the explanation by its author do not support a finding of need for low and middle income rental apartments in Pinellas County, either for the immediate

future, nor on a projected, forecasted basis. The bonds should not have been validated.

ISSUE II. THE COURT ERRED IN VALIDATING THE BONDS WITHOUT THE FORM OF THE MORTGAGE OR OTHER SECURITY DEVICE WHICH IS REQUIRED BY SEC. 159.612(2), FLA. STATS. (1985), TO SECURE PAYMENT OF THE BONDS.

The Authority argued to the Court that it is not required to have the form of the mortgage or mortgages or other security devices to be used to secure payment of the bonds, validated, or even in existence, because it is merely a collateral issue. That the Housing Finance Authority's bonds be secured by a mortgage or other security device is required by law. Sec. 159.612(2), Fla. Stats. (1985). Collateral matters not relevant nor bound by the validation, have been defined by the Court to include: whether prior bond covenants will be violated, State v. Sarasota County, 372 So.2d 1115, 1118 (Fla. 1979); a contract with investment bankers concerning the prospectus and marketing of the bonds, State v. Dade County, 70 So.2d 837 (Fla. 1954); issuing authority's power to acquire property, to declare the bonds tax exempt, or to exchange bonds for others, State v. City of Miami, 103 So.2d 185 (Fla. 1958); a community development district's waste management plan, Zedeck v. Indian Trace Com. Development Dist., 428 So.2d 647 (Fla. 1983). The statutorily required source of funding for the bond issue has not been called a collateral matter.

This Court has described the extent of the validation proceeding. "The purpose of a judgment validating and confirming bonds is to put into repose any question of law or fact that may be subsequently raised affecting the validity of the bonds." Speer v. Olson, 367 So.2d 207 (Fla. 1979). The Court noted that it could disapprove an issued bond because of specific provisions in the mortgage that was to secure the bonded indebtedness. Jacksonville Shipyards, Inc. v. Jacksonville Electric Authority, 419 So.2d 1092 (Fla. 1982), citing State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971). In the case of International Brotherhood of Electrical Workers Local Union No. 177 v. Jacksonville Port Authority, 424 So.2d 753 (Fla. 1982), the Court approved the trial court's finding of ability of the issuing Authority to pay for the bonds and that the bonds would be payable, as required, solely from specified revenues. The mortgage, as the source of payment for the instant proposed bond issue must be the basis for this Court's findings that the Authority can meet the proposed $100,000,000 bond obligation. It is not here a collateral matter. Cf. Speer v. Olson.

The authority relied on McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980), which, apparently contrary to the State's position, held that the lease agreement, which was the basis for the revenue source of

funding for the Airport Authority's revenue bonds, was a collateral matter. The lease agreements were, however, a part of the bond validation in the McCoy case and obviously before both the trial Court and the appellate Court for consideration of possible statutory or constitutional defects. See Jacksonville Shipyards, supra, a later case. See, also, the dissent of Justice Adkins in McCoy as to the necessity for the lease agreement to the bond issue and his conclusion that the agreement was fatally defective.

Similarly in Taylor v. Lee County, Florida, _____ So.2d _____ (Fla. Dec. 4, 1986), 11 FLW 623, the Court found the issue of placing a toll on an existing toll-free bridge to pay for a new bridge to be a collateral matter outside the scope of the validation, although the generation of revenue to fund the bond issue depended on the county's authority to impose the toll. Both the McCoy case and this Taylor case are distinguishable from the instant validation, however, because of the legislative requirement of Sec. 159.612(2) specifically requiring that bonds of a housing authority be secured by a mortgage or other security device.

Both the investment banker and bond counsel representative testified at the validation hearing to the necessity for the security documents as the basis for the enabling legislation and for validation (Appendix 7, p. 33) and would be the basis for any recourse by a bondholder against a

defaulting developer (Appendix 7, p. 57-62). The bond counsel promised that the Authority would become liable on the bonds if the securtiy devices we never executed. (Appendix 7, p. 62). Yet, these secutity devices were not presented to the validating court and specifically left out of the judgment of validation at the court's direction. Bond counsel also admitted that the instant validation replaced an earlier one for the same amount which was abandoned to satisfy an IRS requirement that emphasis be on the mortgage loan to the Authority rather than on the credit of the lender (Appendix 7, p. 67). Yet, that very security agreement, the mortgage loan or loan agreement, was not a part of the instant validation. The validation is therefore fatally defective and must be reversed.

CONCLUSION

Wherefore, the order of validation is not supported by the record and fatally defective as omitting the statutorily required security agreement from the validation proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Dennis Ruppel of Johnson, Blakely, Pope, Bokor and Ruppel, P.A., 911 Chestnut Street, Clearwater, Florida 33517 this 19 day of December, 1986.

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KING/7-17/1219KH(3-25)