IN THE FLORIDA SUPREME COURT

CASE NO. 70,~~169~~ 161

STATE OF FLORIDA,

Appellant,

vs.

CITY OF PANAMA CITY BEACH, FLORIDA,

Appellee.

AMICUS CURIAE BRIEF OF THE CITY OF PANAMA CITY, FLORIDA

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On Appeal From The
Circuit Court of the Fourteenth Judicial Circuit
in and for Bay County, Florida

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SUMMARY OF ARGUMENT

The Circuit Court correctly validated the $300,000,000 City of Panama City Beach, Florida, Investment Revenue Bonds (the "Bonds"), because the Florida Supreme Court has in analogous situations rendered decisions interpreting Article VIII, Section 2(b), of the Florida Constitution and the Florida Municipal Home Rule Powers Act, Chapter 166, Florida Statutes (1985) (the "MHRPA"), as granting Florida municipalities the power to issue bonds to finance valid public projects, the proceeds of which bonds will be invested in accepted revenue-producing securities.

The Circuit Court correctly validated the Bonds because Section 166.261, Florida Statutes (1985), does not prohibit the investment of the proceeds of the Bonds in an investment contract.

ARGUMENT

ISSUE I. INVESTMENT OF BOND PROCEEDS IN AN INVESTMENT CONTRACT TO REALIZE A PROFIT TO FINANCE A VALID PUBLIC PROJECT CONSTITUTES A MUNICIPAL FUNCTION WITHIN THE MEANING OF ARTICLE VIII, SECTION 2, OF THE FLORIDA CONSTITUTION, AND THE PLEDGE OF AN INVESTMENT CONTRACT AS SECURITY FOR BONDS DOES NOT VIOLATE CHAPTER 166, FLORIDA STATUTES (1985).

The Bonds will be issued to finance a "Project", defined in Resolution 87-2 as "park and recreational facilities, funding of self-insurance reserves or other municipal purposes designated by subsequent resolution of the City." Appellant's Appendix 2, Exhibit 1 at 3. The testimony at the validation hearing demonstrated that $1.5 million of Bond proceeds would be available to finance those public projects and that the entire balance of Bond proceeds, other than issuance expenses, would be invested so as to retire the Bonds at maturity. Appellant's Appendix 5 at 15-17, 22-23. Appellant concedes that park and recreational facilities, funding of self-insurance reserves and other municipal purposes designated by subsequent resolution of the City are "valid municipal functions or services." Appellant's Initial Brief at 7. Appellant contends, however, that the Bonds are not being issued to finance these public projects, but are rather being issued to finance a large pool of investments. Id. at 7-8.

Pursuant to Section 166.021, Florida Statutes (1985), Florida municipalities are granted express authority to "conduct municipal government, perform municipal functions, and

render municipal services . . . except when expressly prohibited by law." § 166.021, Fla. Stat. (1985). As Appellant has conceded, the acquisition of park and recreational facilities, the funding of self-insurance reserves and the funding of other municipal purposes designated by subsequent resolution of the City are valid municipal purposes not prohibited by law.

The MHRPA, however, contains no express authorization for the issuance of the taxable arbitrage bonds of the City to finance public projects, but the Florida Supreme Court has consistently held that when public bodies are endowed with the power to undertake authorized projects or perform specific responsibilities the act of endowment implies the power to finance such activities by any means the public body may deem appropriate. In State v. Monroe County, 148 Fla. 111, 3 So.2d 754 (1941), the Florida Supreme Court held that a general statute authorizing any county in the State to acquire property for and to construct and maintain an airport was ample authority for county commissioners to finance such projects by the issuance of bonds. The Court stated:

> Chapter 17708, Act of 1937, is a general law, the very purpose of which is to authorize any county in the State to acquire property for and to construct and maintain an airport. We hold it to be ample for this purpose and to authorize the county commissioners to raise the money to accomplish it by taxation, the

> issue of bonds or by such other means as they may deem expedient.

3 So.2d at 755.

In State v. City of Key West, 153 Fla. 226, 14 So.2d 707 (1943), the City of Key West proposed to issue bonds for the purpose of acquiring an electric light and power plant. The City's charter granted the City the authority to operate the electric light and power plant. The Florida Supreme Court held that the power to establish and operate the plant "would certainly imply the means to effect all powers expressly granted". 14 So.2d at 708.

Panama City v. State, 93 So.2d 608 (Fla. 1957), involved a validation proceeding with respect to waterfront improvement revenue bonds to be issued by the City of Panama City. The City of Panama City was authorized under its charter to construct and operate a marina. The Florida Supreme Court, reversing the Circuit Court of Bay County, held, in part, as follows:

> We therefore hold that the City has the legislative authority under the quoted sections of its charter to construct the docks and build and operate the marina in its narrowest sense and having such authority, it is authorized to issue its bonds for the purpose of financing the undertaking.

93 So.2d at 612.

The Florida Supreme Court, therefore, has consistently held that, absent an express statutory prohibition, the statutory authority to undertake a project implies the

authority to acquire and finance the project. Accordingly, the City has the authority to exercise its discretion in the selection of a method of acquiring and financing the public projects set forth in Resolution 87-2. It is within the City's discretion to determine that the most advantageous method to finance the public projects would be by issuing $300,000,000 of Bonds in order to derive $1.5 million for acquisition and funding of the public projects. Appellant has not proffered any evidence to indicate that the use of an investment contract is other than a prudent method of financing the public projects; on the contrary, the transcript of the validation proceeding indicates that the investment of Bond proceeds in an investment contract is a safe investment because the Bond proceeds are to be placed in an investment contract with "A+ rated . . . insurance companies which means they have over a billion dollars in reserve or [with] a major bank that is rated double or triple 'A'." Appellant's Appendix 5 at 16.

Appellant's second argument is that the investment of the Bond proceeds in an investment contract is prohibited by Article VIII, Section 2, of the Florida Constitution and the MHRPA. Neither Article VIII, Section 2, of the Florida Constitution nor the MHRPA, however, expressly authorize or prohibit the issuance of bonds of the type proposed or any other form of borrowing for the sole purpose of producing arbitrage revenue to finance valid public projects, and the

Florida Supreme Court has not heretofore rendered any decision approving or disapproving any bonds which were authorized solely for such purpose. Accordingly, in order to determine whether a Florida municipality has the power to issue bonds of the type proposed, the Court must look to decisions rendered in analogous situations interpreting Article VIII, Section 2(b), of the Florida Constitution and the MHRPA. Such decisions consistently interpret Article VIII, Section 2, of the Florida Constitution and the MHRPA as granting Florida municipalities the power to issue bonds the proceeds of which will be invested in accepted revenue-producing securities.

In 1978, the Florida Supreme Court considered whether a municipality may validly issue "double advance refunding" bonds (a portion of the proceeds of the proposed issue was to be applied to advance refund certain outstanding 1973 bonds which were issued to advance refund bonds issued in 1970). State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978). The Court found that the laws of Florida allow a municipality to issue double advance refunding bonds:

> The relevant constitutional provision is Article VIII, Section 2, Florida Constitution, which provides:
>
> > (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and

> may exercise any power for municipal purposes except as otherwise provided by law.
>
> . . . .
>
> Authority to issue bonds is extended to municipalities by Chapter 166.111, Florida Statutes, which provides:
>
> > The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in 166.101, Florida Statutes, from time to time to finance the undertaking of any capital or other project for the purposes permitted by the state constitution and may pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts and bonds.
>
> . . . .
>
> The constitutional and statutory scheme makes several matters clear. Municipalities may issue bonds to finance any capital or other project permitted by the state Constitution.

354 So.2d at 1208-1209 (emphasis added).

The Court then determined that "permitted by the state Constitution" does not mean "expressly authorized by the state Constitution:"

> Since there is no specific section in the Constitution authorizing municipalities to issue refunding revenue bonds, the Attorney General and all other parties have argued on rehearing that the municipalities may issue such bonds under their constitutional home-rule powers. Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must

be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority. Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, we hold that municipalities may issue "double advance refunding bonds" so long as such bonds are pursuant to the exercise of a valid municipal purpose.

In reaching this determination we recognize that our present authority to review such bonds is sharply limited, almost to the point of insignificance. Our decision cannot reach the question of whether the revenue bond plan presently before us is fiscally sound, or whether double advance refunding is a wise method of financing municipal undertakings. As was held in State v. Manatee County Port Authority, 171 So.2d 169 (Fla. 1965) at 171:

> It is further suggested that the record fails to support a conclusion that the proposed project is fiscally sound. We have held that the fiscal feasibility of a revenue project is an administrative decision to be concluded by the business judgment of the issuing agency. Such problems as the advisability of the project and its income potential, must be resolved at the executive or administrative level. They are beyond the scope of judicial review in a validation proceeding. Town of Medley v. State, Fla., 162 So.2d 257. We, therefore, disclaim any judicial responsibility for the fiscal integrity of the proposed project. As we stated in Medley, a decision on this aspect of revenue financing is one to be made by the people involved, acting through

> their proper executive or administrative officials. The function of a validation proceeding is merely to settle the basic validity of the securities and the power of the issuing agency to act in the premises.

Id. at 1209-10 (emphasis added) (footnotes omitted).

An accepted revenue-producing investment should, therefore, not be rejected as being beyond a municipality's legislative discretion. The device of investing bond proceeds in higher-yielding taxable securities to generate arbitrage profit for the issuer was an accepted revenue-producing device which disappeared from the municipal bond market only after the Internal Revenue Service announced in 1966 that it would thereafter decline to issue its rulings that bonds of this type were tax-exempt. Tech. Info. Rel. No. 840 (Aug. 11, 1966). In its announcement, the Internal Revenue Service set forth three examples of transactions with respect to which no ruling would be issued, the first two of which are as follows:

> First, a State may issue obligations and invest the entire proceeds in United States bonds with similar maturities bearing a higher interest yield. The United States bonds are then placed in escrow to accrue payments of interest and principal on the States obligations. The profit on the interest spread accrues to the State over the period of time that these obligations are outstanding.
>
> Second, a municipality may immediately realize the present value of the arbitrage profits to be derived over the future by casting the transaction in the following form: It may issue obligations in the amount of $100 million, use $20

> million to build schools or for some other governmental purpose, and invest the balance, $80 million, in United States bonds which bear a higher interest yield. The United States bonds are escrowed to secure payment of interest and principal on the municipal obligations. The interest differential is sufficiently large so that the interest and principal received from the United States bonds are sufficient to pay the interest on the municipal obligations as well as to retire them at maturity.

Id. In 1966, the Internal Revenue Service was attempting to prohibit the issuers from earning arbitrage profits from the difference between the higher-yielding taxable securities and the lower-yielding tax-exempt obligations.

Market conditions, however, have changed since 1966, and today an arbitrage profit can be obtained with the issuance of taxable bonds of the kind herein sought to be validated. Appellant's Appendix 5 at 15-18, 22-14. Under the Sunrise decision, neither the fact of taxability nor the reduced arbitrage to be earned under the taxable scenario is grounds for a determination of invalidity.

The MHRPA defines "municipal purpose" as "any activity or power which may be exercised by the state or its political subdivisions." § 166.021(2), Fla. Stat. (1985). In State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951), the Florida Supreme Court stated:

> What shall constitute a municipal function is for the legislature to determine and its decision in the matter will not

be subject to interference by courts unless a clear abuse of discretion is shown.

. . . .

In the light of the modern concept as to what may constitute a municipal purpose we are unable to say that the determination by the legislature that the City of Jacksonville should be empowered and authorized to acquire, construct, own and operate a radio broadcasting station and to make improvements thereto, constituted a "clear abuse of discretion." Though there was a time when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality.

. . . .

In the present case the grant of power to the City is broad, comprehensive and prospective in nature. Under the statute the City not only is empowered to operate and maintain radio broadcasting stations but also to acquire such buildings, enlargements, extensions or improvements as the City may deem necessary or desirable for use in connection therewith. It having been established by the evidence that the use of television equipment will amount, in effect, to the employment of a "new and improved phase of broadcasting by the same station," radio and television being but "two distinct phases of a single function," we are of the view that the facilities may be acquired by the City under the power reposed in it, even though at the time of the passage of the statute the use of "television" was unknown.

While the general rule is that the words of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was

> enacted, the rule is subject to the well-accepted qualification that where the statute to be construed is couched in broad, general and comprehensive terms and is prospective in nature, it may be held to apply to new situations, cases, conditions, things, subjects, methods, persons or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute, can be reasonably said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating an intention that they should not be brought within its terms.

50 So.2d 534-36 (citations omitted).

"Project" is defined by the MHRPA as "a governmental undertaking approved by the governing body . . . ." § 166.101(8), Fla. Stat. (1985). That Section 166.101(8), Florida Statutes (1985), continues with examples of what that term "includes" and "embraces" ("any capital expenditure which the governing body of the municipality shall deem to be made for a public purpose") does not limit the permissible governmental undertakings. Id. In Sunrise, for example, the Florida Supreme Court approved the issuance of refunding bonds not expressly mentioned in Section 166.101(8), Florida Statutes (1985). 354 So.2d at 1208-1209.

Section 166.021, Florida Statutes (1985), provides in pertinent part as follows:

> (1) As provided in s. 2(b), Art. VII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal

> services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> . . . .
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

§ 166.021, Fla. Stat. (1985).

In State v. City of Daytona Beach, 360 So.2d 777 (Fla. 1978), the Florida Supreme Court approved the issuance of "special obligation bonds" ("SOB's"). SOB's are advance refunding bonds the proceeds of which will fund part of a pool pledged to the payment of the refunded bonds to accomplish their "full cash defeasance" without calling them for redemption. SOB's are usually issued in tandem with a companion issue of advance refunding bonds, payable from the defeased revenue source formerly pledged to the payment of the refunded bonds, and the proceeds of the companion issue will fund the balance of the pledged pool. The pool will be invested in federal securities. All of the principal of and the interest on the refunded bonds will be paid solely from the principal of the pool, while all of the principal of and

the interest on the SOB's will be paid solely from the investment earnings of the pool. Outright financial gain, or convenience associated with economic matters (such as the release of a pledge of revenues or the elimination of burdensome covenants), is the sole public purpose of all refundings, and SOB's are the most pure and flagrant example of bonds issued only for the purpose of income or savings to the issuer. The Court's decision in Daytona Beach described the approved transaction clearly:

> The City also enacted Ordinance No. 78-44 authorizing the refunding of the presently outstanding revenue obligations, providing for the issuance of special obligation bonds not exceeding $16,000,000, and providing for the payment of the refunding bonds from escrow deposit income. This ordinance provides that the issuer will derive income from the investment of moneys to be deposited in escrow, that special bonds shall be payable as to principal and interest solely from and secured by a pledge of a first lien upon certain escrow deposit income, and that these bonds shall not constitute a general indebtedness of the City nor debt of the State and shall not constitute a pledge of the faith and credit of the City or the State.

360 So.2d at 779.

In State v. City of Pensacola, 397 So.2d 922 (Fla. 1981), the Florida Supreme Court indicated that projects other than capital projects may be financed under the home rule doctrine. In Pensacola, the Court validated bonds the proceeds of which would be invested in low interest mortgage

loans for construction, purchase, reconstruction or rehabilitation of single family residences within the "inner city" of Pensacola, to revitalize a blighted area of the city. The Court stated:

> The state's first argument is premised on section 166.021(3)(c), Florida Statutes (1979), which states that municipalities have the power to enact legislation concerning any subject matter upon which the state legislature may act except those subjects "expressly preempted to state or county government by the Constitution or by general law . . . ." The state claims the city is expressly preempted from the proposed involvement by the Florida Housing Finance Authority Law, Part IV, chapter 159, Florida Statutes (1979), and by the Community Redevelopment Act of 1969, as amended, Part III, chapter 163, Florida Statutes (1979). However, as respondent points out, neither of these acts expressly prohibits municipalities from issuing revenue bonds for the purpose of financing housing or redeveloping areas within their boundaries. Instead they merely authorize the creation of housing finance authorities and community redevelopment agencies whose powers to issue bonds are supplemental to those of the counties and municipalities.

397 So.2d at 924.

ISSUE II: SECTION 166.261, FLORIDA STATUTES (1985), DOES NOT PROHIBIT THE INVESTMENT OF PROCEEDS OF THE BONDS IN AN INVESTMENT CONTRACT.

Section 166.261, Florida Statutes (1985), provides in pertinent part:

> (1) Unless otherwise authorized by law or by ordinance, the governing body of each municipality shall, by resolution to be adopted from time to time, invest and reinvest any surplus public funds in its control or possession in: . . . .

§ 166.261(1), Fla. Stat. (1985). Thereafter the section lists several permissible categories of investments, none of which may be reasonably construed to include an investment contract.

Section 166.261, Florida Statutes (1985), however, does not prohibit the investment of the proceeds of the Bonds in an investment contract because the proceeds of the Bonds do not constitute "surplus funds" within the meaning of that section. "Surplus funds" are defined as follows:

> (4) For the purposes of this section, the term "surplus funds" is defined as funds in any general or special account or fund of the municipality, held or controlled by the governing body of the municipality, which funds are not reasonably contemplated to be needed for the purposes intended within a reasonable time from the date of such investment.

§ 166.261(4), Fla. Stat. (1985) (emphasis added). The definition of "surplus funds" therefore explicitedly excludes moneys which are not held or controlled by the governing body of the municipality.

The Trust Indenture to be entered into by and between the City and a corporate trustee (the "Indenture") provides that, upon receipt of the purchase price for the Bonds, the City must deliver the proceeds of the Bonds to the Trustee and "thereafter the Trustee shall become custodian of such proceeds." Appellant's Appendix 2, Exhibit A to Exhibit 1 at 6. The Indenture further provides that "the City authorizes and directs the Trustee to apply such moneys to the purchase of the Investment Agreement . . . ." Id. In that a corporate trustee will be the custodian of the proceeds of the Bonds and in that the corporate trustee will invest those moneys in an investment contract pursuant to the Indenture, the City will neither hold nor control the proceeds of the bonds within the meaning of Section 166.261(4), Florida Statutes (1985).

Furthermore, Section 166.261(1), Florida Statutes (1985), provides that a municipality is restricted to the enumerated investments "[u]nless otherwise authorized . . . by ordinance." § 166.261, Fla. Stat. (1985). Therefore, even if this Court were to construe Section 166.261(4), Florida Statutes (1985), as including the proceeds of the Bonds within the definition of "surplus funds," the proceeds of the Bonds may nevertheless be invested in an investment contract pursuant to Section 166.261, Florida Statutes (1985), by the City's enactment of a municipal ordinance expressly

authorizing investments of surplus funds in an investment agreement of the type intended for the proceeds of the Bonds.

CONCLUSION

The decisions of the Florida Supreme Court hereinabove cited strongly suggest that the City has the power to validly issue revenue bonds of the type proposed to finance a valid public project pursuant to Article VIII, Section 2(b), of the Florida Constitution, and the MHRPA. In addition, because the proceeds of the Bonds are not "surplus funds" within the meaning of Section 166.261(4), Florida Statutes (1985), the investment of the Bonds proceeds in an investment contract will not run afoul of the requirements of Section 166.261, Florida Statutes (1985). Accordingly, the Final Judgment validating the Bonds should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed by first-class United States Mail, postage prepaid, to James P. Appleman, State Attorney, Fourteenth Judicial Circuit, P.O. Box 956, Marianna, FL 32446, Attorney for Appellant State of Florida, and to Elise F. Judelle and W. Robert Olive, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, FL 32301, Attorneys for Appellee City of Panama City Beach, Florida, this 3rd day of April, 1987.

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