

IN THE FLORIDA SUPREME COURT

FILED

SID J. WHITE

CASE NO. 70,161

JAN 5 1988

CLERK, SUPREME COURT

By _____
Deputy Clerk

State of Florida
Appellant, Defendant

v.

City of Panama City Beach,
Florida
Appellee, Plaintiff

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Bond Validation Appeal from
the Circuit Court of the
Fourteenth Judicial Circuit
in and for Bay County,
Florida

Cir. Civ. 87-104

APPELLANT'S SUPPLEMENTAL BRIEF

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STATEMENT OF CASE AND FACTS

The Statement of Case and Facts are as set forth in the Brief of Appellant, State of Florida, previously adopted by the Appellee and reconfirmed in Appellee's Supplemental Brief.

In addition, after entry of the Final Judgment by the Circuit Court validating the Bonds at issue in this case, the Florida Legislature enacted Chapter 87-237, Laws of Florida, entitled "Taxable Bond Act of 1987" (the "Act"). The Act, codified as Sections 159.821-159.8291, Florida Statutes, was signed by the Governor of Florida on June 30, 1987. A copy of the Act was filed with this Court by Appellee pursuant to a Notice of Supplemental Authority on July 1, 1987. At the request of this Court, oral argument was held on this case on July 2, 1987. On August 5, 1987 the Act became law.

This Supplemental Brief is submitted pursuant to an Order of this Court dated as of December 10, 1987.

SUMMARY OF ARGUMENT

Appellant concurs in Appellee's explanation of the Act and its intended impact on Florida bonds in general, as stated under Issue I of Appellee's Supplemental Brief.

However, the structure of the Bonds before this Court, wherein more than 95% of the Bond proceeds are invested in an investment agreement rather than expended on a project, far exceeds the financing structure intended to be permitted by the Act. Accordingly, notwithstanding the enactment of the Act, the investment of proceeds of the Bonds in an investment agreement at a profit does not constitute a municipal function in accordance with Article VIII, Section 2(b), of the Florida Constitution.

ARGUMENT

Part I

ISSUE

CONCURRENCE WITH APPELLEE'S EXPLANATION OF THE TAXABLE BOND ACT OF 1987 AND ITS IMPACT ON BONDS ISSUED BY FLORIDA GOVERNMENTAL UNITS GENERALLY.

Appellant concurs in the explanation of the Taxable Bond Act of 1987 and its impact on bonds issued by Florida governmental units generally, provided by Appellee in Part I of the Argument contained in Appellee's Supplemental Brief. The specific application of the Act to the Bonds is discussed in Part II.

PART II

THE TAXABLE BOND ACT OF 1987 DOES NOT SANCTION BONDS SUCH AS THE BONDS WHERE VIRTUALLY ALL PROCEEDS ARE INVESTED AT A PROFIT RATHER THAN APPLIED TO A PROJECT SERVING A MUNICIPAL FUNCTION IN ACCORDANCE WITH ARTICLE VIII, SECTION 2(b) OF THE FLORIDA CONSTITUTION.

In the Taxable Bond Act of 1987, the Florida Legislature has undertaken to clarify many conflicting provisions of existing Florida Statutes relating to the issuance of taxable bonds, some of which are the subject of this appeal. If the Act is held to apply to the Bonds at issue in this cause, Appellant's challenges to the ability of Appellee to pledge the Investment Agreement as security for the Bonds as violative of Chapter 166, Part II, would seem to be answered by Section 159.827 of the Act.

Similarly, Appellant's challenge under Section 166.261, Florida Statutes, to the investment of bond proceeds in the Investment Agreement is apparently resolved by Sections 159.825(1)(f) and (h) of the Act.

However, Appellant does not concede that application of the Act to the Bonds would resolve Appellant's challenge that the Bonds fail to serve a municipal function as required by Article VIII, Section 2(b) of the Florida Constitution. Appellant's basic objection to the Bonds is that the financing itself, i.e. the sale of Bonds and investment of Bond proceeds at a profit, is the driving force for issuance of the Bonds. The Project to be financed is clearly secondary in volume and importance.

While the Act addresses and sanctions the investment of bond proceeds and the pledging of such investments to bondholders, it still is grounded on the basic concept that a governmental unit

begins with a project, a public undertaking, that requires financing. The legislative findings set forth in Section 159.822(1) of the Act recognize the essential need to "finance public improvements and other projects and programs that serve important public purposes..." Once the public need is identified, the other details and necessities of issuing bonds to meet that need are addressed. These details are incidental to the issuance of the bonds, as the Legislature observed in Sections 159.825(1)(f) and (g).

While Section 159.827(2) of the Act is intended to permit investment of bond proceeds and other pledged moneys, it also specifically declares such investments to be "merely incidental to the paramount public purpose of the borrowing." But the clear sense of this section is distorted beyond any reasonable interpretation if it can be read to mean that a more than \$295,000,000 investment is deemed "incidental" to a \$1.5 million project. (App. 5, p. 20). If the Legislature passed a law declaring night to be day it would not make it so; nor is that here the Legislature's intent. Rather, Section 159.827(2) can be sensibly applied to the temporary investment of bond proceeds pending construction of projects or to escrowed moneys pending happening of conditions to disbursement of proceeds for a project, for example. In other words, where the public project or purpose has dictated that a financing occur, the investment of proceeds may be viewed as "incidental to" or "in connection with" the issuance of bonds. But a case such as the case before this Court, where the Project, although admittedly for a public purpose, is so clearly incidental

to the investment of Bond proceeds, must be viewed as outside the legislative protection granted by the Act.

The same analysis is applicable to Section 159.828 of the Act, governing use of proceeds of bonds. It seems unlikely that the Legislature intended so highly disproportionate an investment of proceeds, lasting for the life of the Bonds, to become imbued with municipal purpose because an amount equal to one-half of one percent of the Bond issue is applied to the Project.

Thus, Appellant does not dispute that legislative declarations of public purpose are correct "unless patently erroneous" as this Court found in State v. Division of Bond Finance, 495 So.2d 183, 184 (Fla. 1986); nor does Appellant have to overcome the burden of showing that the Legislature acted in an arbitrary or unreasonable manner or clearly abused its discretion in enacting the Act as claimed by Appellee. Rather, even giving complete credence to the Act, Appellant maintains that the structure of the financing to be accomplished with the Bonds was not approved by the Legislature in the Act. While the Act seeks to permit investment of bond proceeds in investment contracts, it clearly provides for this to occur only incidentally in connection with a genuine municipal purpose.

The Act has not resolved the paramount objection raised by Appellant in its initial brief, that the borrowing of moneys for investment at a profit is not a municipal function under Article VIII, Section 2(b) of the Florida Constitution. Such a borrowing is the primary purpose of issuance of the Bonds. Accordingly, notwithstanding enactment of the Act, the Circuit Court Judgment validating the Bonds should be reversed.

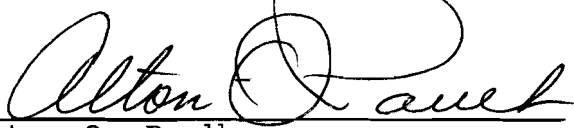
CONCLUSION

The Taxable Bond Act of 1987, while resolving several issues raised by Appellant, is not broad enough to validate bonds, such as the Bonds, where virtually all bond proceeds are invested at a profit rather than applied to a municipal project. Use of proceeds for investment does not constitute a permitted municipal function under Article VIII, Section 2(b) of the Florida Constitution. The Final Judgment validating the City's Bonds should be reversed.

Respectfully submitted,

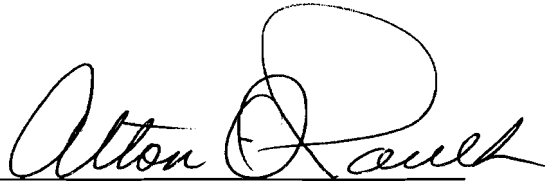
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to W. Robert Olive, Elise F. Judelle and Randall W. Hanna, Bryant, Miller and Olive, P.A., 201 S. Monroe Street, Suite 500, Tallahassee, Florida 32301; Rowlett W. Bryant, Bryant, Higby & Williams, 833 Harrison Avenue, Panama City, Florida 32401; and Thomas B. Slade, III, Foley & Lardner, Suite 1700, 200 West Forsyth Street, Jacksonville, Florida 32202, Attorneys for the City of Panama City, Florida, this 4th day of January, 1988.



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