

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARNER CABLE COMMUNICATIONS, :
INC., et al., :

Defendants-Intervenors/ :
Appellants, :

Case No. 71,134

-vs- :

CITY OF NICEVILLE, FLORIDA, :
a municipal corporation of :
the State of Florida, :

Plaintiff/Appellee. :

On Appeal from the Circuit Court of the First
Judicial Circuit, in and for Okaloosa County, Florida

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the parties will be the same as set forth in the initial brief of appellant. Appellant will be referred to as "Warner" and appellee will be referred to as "the City."

STATEMENT OF THE CASE AND OF THE FACTS

The statement set forth by Warner does contain all of the essential facts except for the additional pertinent facts set forth below.

Warner took the opportunity to make many arguments and characterizations of some of the facts in its statement. Instead of arguing those matters in this section of the brief, the City will set forth what it feels to be the pertinent arguments in the Argument section of this brief.

The main additional facts that are not set forth in Warner's brief concerns the pledged revenues that will be used for the repayment of this bond issue. As stated by the City's expert witness, financial consultant William C. Fray, Jr., there are three sources of revenue that are pledged and will be available for repayment of the debt to be created by this bond issue. The pledged revenues include (1) net revenues of the proposed cable television system, (2) the guaranteed entitlement portion of state revenue sharing funds, and (3) the local half-cent sales tax (A. 69). According to Mr. Fray's testimony, the revenue available from the state revenue sharing funds and the local sales tax is sufficient to make all of the principal and interest payments on the bonds for the life of the bond issue even if the system itself does not provide any net revenues (A. 71-72). The estimated debt service is \$240,000 (A. 71). The estimated annual revenue from the guaranteed entitlement portion of state revenue sharing is \$54,000. The estimated annual revenue from the local half-cent sales tax is \$262,000 (A. 72). The estimated revenue from the

project itself is \$244,000 (A. 71).

Therefore, the trial court properly rejected all of Warner's arguments concerning the feasibility of the system since, according to Mr. Fray, even if the system were not to receive one dime in net revenue, there are still sufficient pledged revenues to meet all principal and interest payments due on the bond issue. Of course, as stated above, estimated net revenues of the system itself are \$244,000 which is a sum in excess of the principal and interest payments on the bond issue. Mr. Fray also testified that the issue of feasibility will be again addressed by the Niceville City Council immediately prior to the sale of bonds if this validation proceeding is successful (A. 74).

SUMMARY OF ARGUMENTS

Warner has attempted to raise a veritable plethora of issues in this bond validation proceeding. In this regard, it should be brought to the attention of this Court as it was to the trial court that Warner has two other lawsuits against the City of Niceville currently pending. The proposed ownership and operation of a municipal cable television system by the City is the subject matter of both of these lawsuits. The main lawsuit is one filed in 1985 in the United States District Court for the Northern District of Florida by Warner against the City and its individual members of City Council pursuant to 42 U.S.C. §1983. Warner Cable Communications, Inc. v. City of Niceville, et al., USDC, ND Fla. Pensacola Div., PCA 85-44-14-RV. The other case is Byrd, et al. v. City of Niceville, Circuit Court for Okaloosa County, Florida, Case No. 87-1447-CAC.

All of the issues that Warner seeks to raise in this bond validation proceeding which the trial court herein found to be collateral to this proceeding are being raised in one or both of the other cases filed by Warner. The City's position on these various issues is that it has no objection to Warner having its "day in court" on each of these issues but objects to Warner having two or three "days in court" on the same issues.

Since the City (and the trial court) does not agree that all of the matters argued by Warner in its brief are relevant to this case, the City's argument will be primarily concerned with the three issues that the court set forth in its March 16, 1987, order, entered June 25, 1987, which issues are also set forth in

paragraph 23 of the final judgment rendered herein. It is the City's position that any issue not encompassed by these three matters is collateral to a bond validation proceeding and therefore not appropriate for the Court to address.

The City's position on the motion to strike issue which was discussed in much detail by Warner in its brief is that the court properly ruled that any issue raised by Warner other than the three issues stated in its Order entered after the case management conference (A. 437-439) is collateral and therefore not appropriate to be addressed in a bond validation proceeding. Those three pertinent issues as set forth by the trial court are:

- a. Whether the City of Niceville has the authority to issue bonds under the Florida Constitution and statutes.
- b. Whether the purpose of the obligation is legal (public purpose).
- c. Whether the City of Niceville's authorization of the obligation complies with the requirements of law.

Those were the three issues litigated at trial and evidence was heard from both sides on each issue. What Warner complains of is that the other issues that it attempted to raise outside the scope of these three issues were rejected by the court even though Warner attempted to introduce such evidence under the guise of one of these pertinent issues. The trial court was very careful to question Warner's counsel on each item as to the purpose of same before the court ruled as to the admissibility of the testimony or document in question. The City's position is that the court was correct on all rulings and, if there were any errors, they were

harmless. Each and every one of the court's findings contained in the final judgment (A. 219-226) is supported by competent and substantial evidence and legal authority.

Warner argues that all of the procedural requirements for adopting the bond validation ordinance (Ordinance No. 583 - A. 183-210) have not been met. This issue was litigated in full at the final hearing and the court rejected Warner's arguments. The trial court specifically found in its order issued after the case management conference (A. 437-439) that this issue would be litigated at final hearing and withdrew the granting of the motion to strike with regard to this issue. Therefore Warner's claim that it was not heard in full by the trial court on the procedural aspects is without merit.

Warner strenuously argues that the City did not comply with a section of its City Charter which could be interpreted as requiring certain procedural steps to be followed if the City expends money for a single public purpose in excess of \$100,000 in any particular fiscal year. This requirement is simply not applicable since the City has not expended \$100,000 on the proposed cable television project in the three year period since the project was first contemplated, much less a one year period. Warner argues that this requirement applies to plans to expend money. (Ordinance No. 581 is a budget ordinance which contained planned, not actual expenditures.) The plain language of the amended Charter provision is that it applies to actual expenditures and not planned expenditures. A city budget is a planning document that authorizes certain expenditures. Many of

those planned expenditures are never actually made, including the planned (budgeted) expenditure of \$2,000,000 for a cable television system. Obviously that money cannot be expended until the City acquires the funds in the first place. That cannot be done unless and until this bond issue is validated and the bonds are actually sold.

As far as public purpose is concerned, the law is very clear in Florida that operation of a municipally owned cable television system is a public purpose. It may very well be considered to be a proprietary function of a municipality rather than a governmental one, but both are considered to be municipal public purposes under the Florida law. The fact that this is a perfectly legal proprietary function of a municipality is the answer to many pages of Warner's argument contained in its brief. Warner seems to assume a function must be governmental in nature in order to be a public purpose. This is simply not the law of Florida.

The City is somewhat puzzled at arguments set forth by Warner that operation of a municipally owned cable television system is a private purpose. This is not an industrial development bond issue where the City is issuing bonds with the project to be owned and operated by a private party. This is the context in which the issue of private purpose is normally raised in a bond validation proceeding. This project is to be municipally owned with the citizens of the City of Niceville being the recipients of the benefits of the project. Warner has not alleged that any private party will be receiving any substantial benefit from this project.

The rest of the summary of the City's argument would be simply

to refer the Court to the final judgment. Since the scope of the City's brief will be less than the scope of Warner's brief, the City's argument will be categorized in a different fashion than that of Warner. The first three sections will set forth the City's position and arguments in support of the final judgment. The last section of the City's brief will deal with some of the arguments raised by Warner.

ARGUMENT

- I. THE TRIAL COURT CORRECTLY HELD THAT THE PROPER SCOPE OF A BOND VALIDATION PROCEEDING IS TO DECIDE THE THREE ISSUES REQUIRED BY FLORIDA LAW WHICH ARE (a) WHETHER THE CITY OF NICEVILLE HAS THE AUTHORITY TO ISSUE SUCH BONDS UNDER THE FLORIDA CONSTITUTION AND STATUTES; (b) WHETHER THE PURPOSE OF THE OBLIGATION IS LEGAL; AND (c) WHETHER THE CITY OF NICEVILLE'S AUTHORIZATION OF THE OBLIGATION COMPLIES WITH THE REQUIREMENTS OF LAW.

This Court has repeatedly held that the scope of bond validation proceedings shall be limited to determining (1) whether the government had the authority to act and (2) whether the government exercised that authority in accordance with the requirements of law. McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252, 253 (1980) ("The sole purpose of a validation proceeding is to determine whether the issuing body had the authority to act under the Constitution and laws of the state and to insure that it exercised that authority in accordance with the spirit and intent of the law."); State of Florida v. City of Daytona Beach, 431 So.2d 981, 983 (1983) ("The scope of judicial inquiry is limited to whether the public body had authority to incur the obligation, whether the purpose of the obligation is legal, and whether the proceedings authorizing the obligation were proper."); DeSha v. City of Waldo, 444 So.2d 16 (1984) ["Our review is limited to the question of 'whether the issuing body has the power to act and whether it exercised that power in accordance with law.'", quoting Town of Medley v. State, 162 So.2d 257, 259 (Fla. 1964)].

II. THE TRIAL COURT CORRECTLY RULED THAT THE PROCEDURAL REQUIREMENTS FOR ADOPTION OF THE BOND VALIDATION ORDINANCE WERE ALL PROPERLY FOLLOWED BY THE CITY.

The City demonstrated at final hearing that it is authorized to enact Ordinance No. 583, providing for the issuance of the bonds at issue, by its 1955 Legislative Charter, as amended by the enactment of Ordinance No. 511, and pursuant to the provisions of Art. VII, Sec. 2(b) of the Florida Constitution and Ch. 166, Parts I and II, Fla. Stat. Under these provisions of law, the City has established on the record at final hearing that it possessed the authority to enact the cable television revenue bond Ordinance No. 583, and that this ordinance was enacted according to the procedures established in the City Charter, as amended by Ordinance No. 511. Thus, the City has completely fulfilled the required showing which the trial court articulated as the proper scope of a revenue bond validation proceeding.

Warner has argued that Ordinance No. 511 (amended City Charter) was not in effect at the time that Ordinance No. 583 was adopted by the City Council. Assuming, arguendo, that this is a valid argument (which the City does not concede), the result of this argument is that the original 1955 City Charter of the City of Niceville was in effect at the time of adoption of Ordinance No. 583. Testimony of City Clerk George Ireland clearly established that the adoption of Ordinance No. 583 complied with all of the procedural requirements of the 1955 City Charter as well as the amended City Charter as set forth in

Ordinance No. 511. (Appendix at pages 12, 13, 14.) Portions of that testimony are as follows:

Q Did you, in fact, go back and check to make sure that the procedural requirements for adopting this ordinance complied with all of the provisions of the 1955 charter, assuming those provisions had been in effect at the time of adoption of this ordinance?

A Yes, sir.

Q And did the ordinance comply with those provisions?

A It did, sir.

. . . .

Q Again, Mr. Ireland, in your position as City Clerk, ordinance number 583 as far as procedural requirements are concerned, in your opinion, based upon your experience as City Clerk and duties as City Clerk, and having reviewed both city charters, in your opinion do the procedural requirements comply with both city charters that have been in effect in the City of Niceville?

A I feel it complies with both charters.

Prior to the testimony of the Niceville City Clerk referred to above, both the original and amended City Charters of the City were properly introduced into evidence and the pertinent sections were reviewed by the City Clerk prior to his testimony (Appendix at pages 6-12). There was absolutely no testimony or

other evidence submitted by Warner to contradict the testimony of the City Clerk. Warner's conclusory allegations that the proper procedures were not followed are not supported by the evidence.

Contrary to Warner's argument on page 3 of its brief, the City did introduce the proof of publication of the advertisement of the bond validation ordinance (Ordinance No. 583) into evidence. Although the City did not do so on page 13 of the Appendix, the proof of publication was introduced as indicated on page 14 of the Appendix (continuation of Mr. Ireland's testimony).

Warner also claims the City presented no proof that the ordinance was posted in three public places within ten (10) days after passage. The City submits Mr. Ireland's sworn testimony that all procedural requirements were met as such proof. It was Mr. Ireland's duty as City Clerk to see to it that this requirement was met and he testified that all such procedural requirements were met. There is no standard written document that is used for this type of proof (as contrasted with a proof of publication from a newspaper) and uncontradicted sworn testimony is sufficient evidence on this point.

Therefore, it was not necessary for the trial court to decide which City Charter was in effect at the time of adoption of Ordinance No. 583 since the City complied with the procedural requirements of both the original and the amended City Charter. (See paragraph 4 of final judgment, A. 220.)

Warner makes lengthy arguments on pages 45 through 49 of its

brief concerning the possible applicability of Section 1.02(h) of the City's 1983 amended Charter (Ordinance No. 511). The City has several arguments as to why this section does not apply but will simply adopt the position of the trial court found in paragraph 6 of the final judgment. First of all, Section 1.02(h) and its preparatory language reads as follows:

In addition to the foregoing and not by way of limitation, the City shall have the following powers: . . .

(h) To expend money for a single public purpose in a sum not to exceed \$100,000 unless such expenditure in excess of \$100,000 shall be contained in the budget for such fiscal year or approved by referendum vote or constitute an emergency as hereinafter defined.

The uncontradicted testimony adduced at trial on this subject matter that is pertinent is the testimony by City Clerk George Ireland. The pertinent testimony is whether \$100,000 was ever spent on this particular project since the Charter provision only applies to expenditures in excess of \$100,000. Mr. Ireland testified at trial that the City spent on this project \$15,453.42 in 1985, \$35,179.88 in 1986, and \$2,164.12 in 1987. The total expenditure for this "single public purpose" for a three year period was \$52,797.42 (A. 32). Mr. Ireland further testified that the City has not expended a sum in excess of \$100,000 on this project in any fiscal year (A. 33). Therefore, the lower court properly held in paragraph 6 of the final judgment that Section 1.02(h) of Ordinance No. 511 of the City is not applicable to this lawsuit. Warner neither offered nor proffered any evidence to the contrary.

Other procedural arguments made by Warner in its brief are all "spin offs" on this point and have to do with whether the City complied with the other provisions of Section 1.02(h). The lower court quite properly rejected this type of evidence since this Charter provision was not relevant to the lawsuit. Unless the City had actually expended a sum in excess of \$100,000 in a single fiscal year, which as a matter of fact it did not, the other provisions of Section 1.02(h) simply did not apply. Adoption of the City's budget has no relevance unless there had been an actual expenditure of a sum in excess of \$100,000 in a single fiscal year. The Charter provision does not apply to planned expenditures, which is what a budget document is.

Since Warner is not claiming that anything occurred within a thirty day period subsequent to adoption of the ordinance, it is a moot question as to whether the ordinance took effect immediately after its adoption or thirty days thereafter (Argument set forth by Warner on pages 3 and 4 of its brief).

III. THE TRIAL COURT PROPERLY HELD THAT THE MUNICIPAL CABLE TELEVISION PROJECT PLANNED BY THE CITY WAS FOR A PROPER AND LEGAL PUBLIC PURPOSE PURSUANT TO FLORIDA LAW.

Warner has objected in part on the ground that it argues that there is no public purpose underlying the City of Niceville's cable television project. The court received testimony from several of the City's witnesses describing several aspects of the anticipated cable television system which pertain to the public purpose of the project. A public safety official testified that, when constructed and operational, the municipally owned cable television system will be capable of providing life and safety protection to its citizens. The cable television system will be patterned after that existing in the neighboring City of Valparaiso, Florida, and it will provide (although probably not during the first of operation) low-cost burglar protection, fire protection, and medical alert capabilities (commonly referred to as bi-directional capability). These services are anticipated to operate even in the event of a power outage due to inclement weather or other disaster. In addition, the City's evidence established that the Niceville cable television system will offer local broadcasting access of a governmental and educational nature. Finally, the City's cable television system is anticipated to provide a broad range of information and entertainment to its citizens, with a high quality of reception and repair capabilities, and at a reasonable cost. These characteristics, both separately and together, established the factual foundation for the City's

public purpose underlying the construction and operation of the system. Although the anticipated bi-directional capability of the system which would result in life, health and safety protection for citizens of Niceville is relevant, these features are not essential to the City's case. The entertainment, recreation, and other aspects of a cable television system are a sufficient public purpose standing alone.

The legislative body of the City in Ordinance No. 583 adopted a legislative finding in Section 3D as follows:

It is necessary and desirable to acquire and construct the System, as provided herein (hereinafter called the "Project"), in order to preserve, protect and enhance the general welfare of the inhabitants of the issuer. The System will contribute to the recreation, entertainment, education, happiness, contentment and general welfare of the citizens of the issuer, and its acquisition, construction and operation by the issuer will, therefore, constitute a municipal purpose.

This legislative finding by the City Council of the City of Niceville is totally consistent with the evidence presented at final hearing. None of the evidence submitted or proffered by Warner showed or purported to show that the legislative determination of public purpose was so clearly wrong as to be beyond the power of the legislative body.

The law in Florida has been well established for many years that a municipality may, in its legislative wisdom, determine a valid public purpose to be health, safety, educational, cultural, and entertainment requirements of its citizens. Regarding municipal ownership and operation of a television system or a cable television system, the courts have

consistently found that this is a valid public purpose. The first such case in the State of Florida is that of State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951), decided prior to the state's enactment of Ch. 166, Fla. Stat. In City of Jacksonville the city had owned and operated a radio station for the preceding twenty-five years. It sought a revenue bond validation for the purpose of expanding the capability of the radio station so as to provide television signals to its citizens. Intervenors objected, claiming inter alia, that this expansion and television project did not constitute a valid public purpose. This Court reviewed the legislative findings in the bond ordinance, examined the special act permitting the city to construct its initial radio station, and determined that indeed it was a valid municipal purpose to provide for the recreation, entertainment, education, and general welfare of the citizens of the city. This Court stated:

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. See Saunders v. City of Jacksonville, 157 Fla. 240, 25 So.2d 648. We hold that the maintenance and operation of the radio broadcasting station by the city, and the making of improvements thereto, constitute a valid municipal purpose.

Id. at 535.

In a more contemporary decision involving governmental ownership of television facilities, the court in Cable-Vision, Inc. v. Freeman, 324 So.2d 149 (3d DCA 1975), appeal dismissed, 336 So.2d 1180 (Fla. 1976), appeal dismissed for want of substantial federal question, 429 U.S. 1032 (1977), determined that Monroe County's project of constructing facilities to provide enhanced television signals to its citizens in competition with an existing cable television franchisee satisfied valid public purpose criteria. In that case, Monroe County made a legislative determination that the television reception of its citizens required enhancement. The Court of Appeals held that this finding was sufficient to establish the public purpose of the project:

The county, in its Ordinance No. 5-1973, authorizing the Board of County Commissioners of Monroe County to construct and obtain the necessary licenses for the operation of television broadcast translator stations, recites that there are unsatisfactory conditions existing in the reception of direct television signals now available to the public in the county and that no television broadcast stations are operating in close enough proximity to Monroe County to effect any relief from this condition; that the county feels it should provide its citizens with the opportunity to obtain a better life by being more enlightened in the areas of political, cultural, social, and educational communication available by broader access to the television media and that television broadcast translators stations provide the only means of receiving and transmitting such communication. Today, counties provide vast cultural and recreational facilities for the welfare of their citizens. Television does have educational programs and is virtually a necessary means of transmitting what is thought to be cultural enlightenment, and the mere fact that Cable-Vision has a franchise for a cable

television system should not prevent the citizens of the county from obtaining other types of television service especially where the geographical and economic situation does not adequately provide access to such service. Determination of what is a county purpose may be expressed or implied in the provisions of the ordinance. The courts will not interfere with such determination unless it has no legal or practical relationship to a valid county purpose. State v. Brevard County, 1930, 99 Fla. 226, 126 So. 353, 355.

Since the franchise to Cable-Vision was not exclusive, and there appears to be, in this case, a valid county purpose, the county has the authority, under constitutional self-government and section 125.01, Fla. Stat., to construct, maintain and operate television broadcast translator stations.

Id. at 154.

In the Monroe County case, the cable supplier, Cable-Vision, renewed its public purpose objections before the Federal Communications Commission in Washington, D.C. The FCC provided appropriate licenses to Monroe County to construct its television facility and the United States Court of Appeals for the District of Columbia subsequently ruled that Monroe County was fulfilling a sufficient public purpose in undertaking the project. See Tele-Media Corp. v. FCC, 697 F.2d 402 (D.C. Cir. 1983).

When challenging a legislative determination of public purpose, the burden is on the party making such a challenge to show that the legislative determination of public purpose was so clearly wrong as to be beyond the power of the legislative body. Linscott v. Orange County Industrial Development Authority, 443 So.2d 97 (Fla. 1983). No such evidence was

offered in this case. The evidence that was offered by Warner was not on this point but instead went toward other issues discussed below in Part IV hereof.

Warner also seems to argue that municipal public purpose only encompasses governmental functions of a municipality. This argument is clearly erroneous since the law of Florida is clear that the issue of municipal public purpose encompasses not only governmental functions performed by a municipality but also those proprietary in nature.

These cases indicate that not only does a municipality in Florida have the power to engage in proprietary functions so long as such power is exercised for "municipal purposes" but also the mere fact that the city operated service competes with a privately owned business does not invalidate the city's enterprise. See Starlight Corp. v. City of Miami Beach; City Gate Garage v. City of Jacksonville.

City of Winter Park v. Montesi, 448 So.2d 1242, 1244 (5th DCA 1984).

The City of Winter Park case is informative on several points raised by Warner, including the issue of municipalities competing with private businesses. The City submits this case and the other cases cited therein to the Court as one of the City's best authorities for several of the issues raised in the case at bar.

One of the legal principles set forth in the City of Winter Park case is that it is proper and legal for a municipality to engage in private business even though it competes with private enterprise. Examples from Florida cases are as follows: City of Winter Park v. Montesi, supra, sale of sinkhole photographs;

Gate City Garage v. City of Jacksonville, 66 So.2d 653 (Fla. S.Ct. 1953), parking garage; Starlight Corporation v. City of Miami Beach, 57 So.2d 6 (Fla. S.Ct. 1952), owning and operating auditorium including booking attractions; Sunny Isles Fishing Pier v. Dade County, 79 So.2d 667 (Fla. S.Ct. 1955), fishing facilities in a public park.

In a local case, the trial court below, approximately ten years ago, made a determination that Niceville's neighbor, the City of Valparaiso, had a sufficient public purpose underlying its construction and operation of a cable television system. Jack W. Manning, et al. v. City of Valparaiso, No. 76-521-CA 01. In that Order, the lower court determined that "Whether or not the City of Valparaiso should enter into a TV cable business, in the opinion of this Court, is a proper governmental function, the wisdom of that decision lying within the bosom of the members of that commission. This Court does not find that there has been an abuse of discretion in making that determination." Ibid. Finally, nothing contained in the Cable Communications Policy Act of 1984, wherein Congress specifically authorizes municipalities and other franchising authorities to own and operate cable television systems, prohibits the City from issuing the bonds in question. The pertinent section reads as follows:

- (1) Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system.
- (2) Any State or franchising authority shall not exercise any editorial control regarding the content of any cable service on a cable system

in which such governmental entity holds ownership interest (other than programming on any channel designated for educational or governmental use), unless such control is exercised through an entity separate from the franchising authority.

47 U.S.C. §533(e).

Warner argued that the issue of editorial control as set forth in the act somehow is an issue in this bond validation proceeding. The plain language of the act shows that exercise of editorial control is not and cannot be an issue unless and until the City actually builds and starts operating a cable television system. This is something that the City has not done since it cannot do so unless and until this bond validation proceeding is completed with a favorable ruling in the City's behalf and the bonds are actually sold. Therefore, the trial court properly ruled this issue to be collateral to a bond validation proceeding.

In light of these authorities, it can hardly be disputed that the City of Niceville has, both in fact and in law, a valid public purpose underlying its intended construction and operation of a municipal cable television system.

IV. THE TRIAL COURT PROPERLY RULED AGAINST ALL OF THE OBJECTIONS SET FORTH BY WARNER AS TO ISSUES WHICH ARE DEEMED TO BE COLLATERAL TO A BOND VALIDATION PROCEEDING.

In the affirmative defenses contained in its answer to the complaint, in its motion for summary judgment, motion for abatement, and in its motion for reconsideration of the rulings entered by the lower court in its November 25, 1986, order, Warner sought rulings by the lower court in the bond validation proceeding pertaining to the following issues:

a. Whether the City can establish the economic and financial feasibility of the cable television project.

b. Whether the City can establish public necessity of the cable television project.

c. Whether the City has complied with 47 U.S.C. §533 in establishing an independent entity for programming purposes.

d. Whether the practical and actual effect of the bond issue, financing, and security is to pledge the ad valorem taxing power of the City.

These arguments are disposed of by the cases set forth below.

In DeSha v. City of Waldo, supra, the municipality was seeking validation of bonds to finance improvements to its water supply and wastewater collection and treatment systems. The intervenor defendants interposed arguments similar to those being proffered by Warner in the instant case. First, the defendants in that case argued that there were certain flaws in the financing scheme of the City of Waldo's water project and that additional steps would have to be taken in the future to

generate sufficient revenues to satisfy the bond obligations. This Court replied, "As such it is a collateral matter beyond the scope of judicial scrutiny in bond validation proceedings," citing City of Gainesville v. State, 366 So.2d 1164 (Fla. 1979). Id. at 444 So.2d 17. Second, the defendants argued that the economic feasibility of the water and sewer project had not been sufficiently established. This Court replied:

The financial strength of the project, however, is not a matter within the scope of this court's review. Our review is limited to the questions of "whether the issuing body had the power to act and whether it exercised that power in accordance with law." (Citation omitted.) The fact that prospective bond purchasers might find the project questionable because of the lack of a valid mandatory connection ordinance is not a matter of judicial concern in a bond validation proceeding. "It was never intended that proceedings instituted under the authority of this chapter to validate governmental securities would be used for the purpose of deciding collateral issues or those issues not going directly to the power to issue the securities and the validity of the proceedings with relation thereto." (Citation omitted.)

Id. at 444 So.2d 18.

Third, the defendants argued that the economic feasibility of the project was so insubstantial because the future revenues of the system were insufficient to pay the bonds, that the city would have to devote ad valorem tax revenues to their payment which would have required a referendum vote. Again, this Court replied, "This argument is without merit. The mere possibility that the city may sometime in the future choose to expend general revenues to meet its bond obligations does not render the bonds 'payable from' ad valorem taxation. (Citation omitted.)" Ibid. Finally, the defendants argued that the

plaintiffs had failed to establish the necessity or need for the project. To this argument, this Court replied that the issue of public need does not arise and need not be resolved by the court in a bond validation proceeding:

They argued that the expansion project is unnecessary, that the future mandatory connection ordinance will arbitrarily restrict property rights, and that the purpose of the project is to promote the growth and development of the city. We reject the appellants' arguments because the question of need for expansion and improvement of Waldo's water and sewer systems is a matter to be determined by the governing body of that community. In Town of Medley v. State, 162 So.2d 257 (Fla. 1964), this court stated:

"We have consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal duty. (Citation omitted.)

"In State v. Dade County, supra, Mr. Justice Drew speaking for this court explained that the courts do not have the authority to substitute their judgment for that of officials who have determined that revenue certificates should be issued for a purpose deemed by them to be in the best interest of those whom they represent. The responsibility of the courts in such proceedings is primarily that of determining whether the issuing body has the power to act and whether it exercised that power in accordance with law.

"A contrary holding would make an oligarchy of the courts giving them the power in matters such as this to determine what in their opinion was good or bad for a city and its inhabitants thereby depriving the inhabitants of the right to make such decisions for themselves as is intended under our system of government." 162 So.2d at 258-259.

Id. at 18-19.

Further authority for the legal principles set forth above is set forth in the quotes from this Court's decisions set forth below.

The court is concerned only with the legal power of the plaintiff to issue these bonds, not the political or economic wisdom of the Project purposed to be financed with the proceeds of the bonds.

Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97 (Fla. 1975).

Montesi claims that State v. City of Miami and other cases cited above stand for the proposition that a city may act where there is need of a collective effort by a public entity because private enterprise could not or was not likely to take as effective action as could be taken by the city. Montesi claims that here private enterprise was just as capable of selling the souvenirs and there was no need for the city to undertake such activity. However, this is not the test for determining whether an activity is a municipal or public purpose and the cases clearly indicate this. For instance, in Sunny Isles Fishing Pier v. Dade County, Gate City Garage v. City of Jacksonville, and Starlight Corp. v. City of Miami Beach, the complaining parties were private businesses already in existence which were providing identical services to those sought to be undertaken by the municipalities. The Supreme Court on each occasion upheld the cities authority to engage in such activities and as noted above, in Starlight Corp., and Gate City Garage, specifically declared that where such activities served a public or municipal purpose, it was not a valid objection that the city would be engaged in competition with private enterprise.

City of Winter Park v. Montesi, supra at 1245.

Finally, questions concerning the financial and economic feasibility of a purposed plan are to be resolved at the executive or administrative level and are beyond the scope of judicial review in a validation proceeding. The scope of judicial inquiry is limited to whether the public body had authority to incur the obligation, whether the purpose of the obligation is legal, and whether

the proceedings authorizing the obligation were proper. (Citations omitted.)

State v. City of Daytona Beach, 431 So.2d 981, 983 (Fla. 1983).

Warner in its brief relies heavily upon the case of Orange County Industrial Development Authority v. State, 427 So.2d 174 (Fla. 1983). This reliance is misplaced. As stated very clearly on page 179 of the Orange County case, a critical point was that municipal ownership of the project in question was lacking. The court then distinguished the factual situation of that case with the case of State v. City of Jacksonville, supra, in that municipal ownership was present in the City of Jacksonville case. As stated by the court on page 179,

Appellant's reliance on State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951), is misplaced. While there we allowed the issuance of municipal revenue certificates to finance the addition of television equipment for a radio station, that station was owned not by a private party but by the City of Jacksonville. The presence of municipal ownership was significant in our finding a public purpose in the project. Municipal ownership is absent in the project sub judice. We hold, then, that the proposed television station does not serve a paramount public purpose and hence is proscribed by our Constitution. (Emphasis supplied.)

Since the critical point of municipal ownership was present in the case before the lower court, the City of Jacksonville case is applicable rather than the Orange County case as submitted by Warner.

Other cases cited by intervenor Warner such as Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assoc., Ltd., 493 So.2d 417 (Fla. 1986), Telepromptor Corporation v. Hawkins, 384 So.2d 648 (Fla. 1980), Devon-Aire Villas Homeowners Ass'n,

No. 4, Inc. v. Americable Assocs., Ltd., 490 So.2d 60 (Fla. 3d DCA 1985) are not applicable herein. Most of those cases deal with the question of whether a cable television company has been empowered by the Florida legislature to exercise of the power of eminent domain. The Florida courts have stated that, if a cable television company has been declared by the Florida legislature or the courts to be a "public utility" that the power of eminent domain necessarily follows. It is not necessary for this Court to make any such determination since the legislative body of the City has made the only necessary legislative determination in this case and that necessary legislation determination does not involve the exercise of the power of eminent domain nor the question of whether the proposed cable television system of the City is a "public utility." None of these questions go toward any of the issues of this case which issues involve the power to issue bonds and not the power to exercise eminent domain. The powers exercised by the City are authorized pursuant to Art. VII, Sec. 2(b) of the Florida Constitution and Ch. 166 of the Florida Statutes which grant home rule powers to municipalities. As stated in §166.021(2), Fla. Stat.,

"Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

This home rule power of the City is not contingent upon a legislative finding by the State of Florida since a municipality may make the same legislative finding for its citizens that the legislature of the State of Florida could make for citizens of the rest of the state. All of the cases cited by Warner imply

that the legislature of the State of Florida has the power to make such a determination if it chooses to exercise that power. Under its home rule authority, the City has the same power to declare a municipal purpose for the citizens of the City even though the Florida legislature may not have made a determination to make such a declaration for all citizens of the State of Florida.

The estoppel argument raised by Warner on pages 22 and 23 of its brief is set forth for the first time on appeal. There were no estoppel arguments raised in the trial court. Therefore, this issue may not be properly raised for the first time on appeal.

The only reference that was made by the lower court to the Cable Communications Policy Act of 1984 was in paragraph 7 of the final judgment. The City agrees that the lower court quite properly found that this act did not preclude the City of Niceville from issuing the bonds contemplated herein. The arguments set forth by Warner in its affirmative defenses went far beyond this issue and were properly excluded as being collateral to the bond validation proceeding. All of those issues are currently being litigated in the federal court proceeding between the parties hereto.

CONCLUSION

Therefore, the City respectfully requests this Court to uphold the final judgment in all respects validating the revenue bonds to be used for the purpose of financing the cost of acquisition and construction of a municipally owned cable television system.

Respectfully submitted,



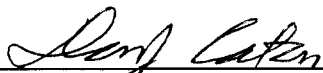
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Appellee was furnished by delivery to Ralph A. Peterson, Esquire of Beggs and Lane, 7th Floor Blount Building, Pensacola, Florida 32501; by U.S. Mail to James E. Moore, Esquire and Bert Moore, Esquire of Moore and Moore, P.A., Post Office Box 746, Niceville, Florida 32578; and by U.S. Mail to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, Florida 32579; this 13th day of October, 1987.



Attorney for Appellee