IN THE SUPREME COURT OF THE STATE OF FLORIDA

WARNER CABLE COMMUNICATIONS, INC., et al. )

Defendants/Appellants, )

vs. ) Case No. 71,134

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

# REPLY BRIEF OF APPELLANT

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## ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING WARNER'S MOTION TO DISMISS AT TRIAL AND IN CONCLUDING THAT THE CITY'S CABLE TELEVISION SYSTEM OVERBUILD SERVES A PUBLIC PURPOSE WHEN THE CITY FAILED TO MEET ITS BURDEN OF PROOF BEFORE IT RESTED AND WHEN THE EVIDENCE SHOWED THAT THE DIRECT, ACTUAL USE OF THE PROJECT WOULD ONLY SERVE PARAMOUNT PRIVATE PURPOSES AND AT BEST MAY PROVIDE ONLY SOME POSSIBLE BUT MERELY INCIDENTAL PUBLIC PURPOSE.

By redrafting of Warner's points on appeal, the City has attempted to dodge the issues of this controversy. The City, ignoring the actual issues, simply raises three basic responses - - first, that the defenses of Warner are collateral; second, the City complied with all procedural requirements; and third, that the system serves a public purpose. In this reply, Warner will not succumb to the City's avoidance of the issues, but will instead respond to the City's Answer Brief in the context of previously framed issues on appeal.

The City, in Argument III of its Answer Brief, has failed to point to any evidence in the record which actually supports its assertion that its municipally owned cable television project serves a public purpose. Indeed, the best the City can do is repeatedly state that it "anticipates" the project to have features which _may_ serve a public purpose. The City relies on this "anticipation" as "the factual foundation for the City's public purpose." Appellee's Answer Brief at 14-15. However, mere anticipation is not sufficient to support a finding of public purpose where, as in this case, the evidence, testimony, and plans for the project unequivocally establish that the direct, actual use of the project is not to serve a public or municipal purpose, but rather a purely private enterprise. _Orange County Industrial Develop. Auth. v. State,_ 427 So.2d 174, 179 (Fla. 1983) ("_Orange County_").

Indeed, once the smoke of the City's speculation about "anticipated" features is eliminated, all that is left, as the City readily concedes in its brief, is that the municipally owned cable television system will provide entertainment cable services not unlike those presently provided by Warner.[1] Attempting to bolster its argument, the City asserts that the "public purpose" requirement has also been met because it has made a general declaration in its bond ordinance, Ordinance No. 583, that its municipally funded cable television system does serve a public purpose. Reduced to its basics, the City's argument before this Court, as it was in the lower court proceedings, is that, although the City's plans and specifications do not provide for public purpose features and even though no city officials or experts can testify or pinpoint any public purpose features of the City's project, it is enough for bond validation that the City simply says the project serves a public purpose and that maybe the project will provide a few additional entertainment cable services not presently furnished by Warner. This is essentially the same argument rejected by this Court in <u>Orange County.</u>

As discussed in Warner's initial brief, the Orange County Industrial Development Authority argued that the proposed television station project would improve local programming and relied upon its broad, general "public purpose" finding. This Court in <u>Orange County</u> rejected these arguments, and examined the "direct, actual use" of the proposed project and found that Orange County's proposed project could not pass constitutional muster since it actually was serving a private purpose with at best, merely incidental public benefit. 427 So.2d at 179. Since the City's argument is no

[1] The City also states that its cable television project has recreational aspects, however, the record contains no evidence, testimony, plans, or specifications which indicate any relationship of the project to recreation.

different from Orange County's assertions, this Court should also find there is no public purpose served under the circumstances of this case by the municipally owned cable television system.

This Court recently had an opportunity to review the degree of proof required to support a finding of public purpose in State v. Housing Finance Authority of Pinellas County, 506 So.2d 397 (Fla 1987) ("Pinellas County). In Pinellas County, this Court upheld the finding that a proposed housing project would serve a public purpose. Id. at 398-400. Like the City in the present case, Pinellas County had, and introduced into evidence, a plan and study for its proposed project. However, substantially unlike the City, Pinellas County's plans and study expressly addressed and provided for the features of the project which actually served a public purpose and supported the county's declaration of a local, need for the housing project. Id. at 398-99. This evidence, the court in Pinellas County found, was in and of itself sufficient to support the trial court's finding. Id. Nevertheless, Pinellas County, again unlike the City in this case, presented testimony of an expert to interpret the plans and study, which gave further substantiation to the local need and public purpose served by the housing project. Id.. In the present case, however, the City presented no such expert testimony, and when Warner called the City's consultant, to whom the City's witnesses deferred for describing and explaining the City's actual plans, the City did not cross examine the consultant on any aspect of the CATV project to try to show any public purpose and need. Indeed, the City's own consultant could not pinpoint any areas of the plan and study which are to be constructed and operated so as to actually serve a public purpose. The only evidence in the record is the Cosmic study which on its face specifies merely a system for entertainment and news services and the testimony of Warner's expert witness, Edward Rutter, which established that

no public purpose was really being served by the City's system.

As anticipated in Warner's initial brief, the City again relies heavily on the decision in City of Winter Park v. Montesi, 448 So.2d 1242 (Fla. 5th DCA 1984), which was not a bond validation case. However, the City's reliance on Montesi is misplaced, especially in the manner in which the City interprets Montesi. First, the City asserts that Montesi stands for the proposition that the City can engage in a proprietary function such as providing entertainment, a business normally served by private enterprise. The City's assertion is correct to a point, but it fails to include the key restriction to the Montesi holding - - the power to engage in proprietary functions is limited only to those functions which serve a municipal purpose. 448 So.2d at 1244. Thus, the City's argument begs the question. Just because proprietary activities in which the City of Winter Haven were engaged in Montesi concerned entertainment, (along with promoting information about the city and promoting tourism) does not mean that any time a city engages in entertainment services it is serving a public purpose On the contrary, what the court in Montesi found was that the City of Winter Haven had sufficiently demonstrated that the proprietary activities, including the entertainment value of its activities, were serving municipal purposes. Id.

The second defect in the City's interpretation of Montesi is the City's continued failure to understand that it is not enough to merely say a project serves a public purpose, but that public purpose must be demonstrated by proof. See Orange County, 427 So.2d 174; Pinellas County, 506 So.2d 397. Implicit in Montesi, as well as decisions of this Court examining the question of public purpose, is the understanding that legitimate businesses, for example service stations, grocery stores, fast food chains, title insurance companies, and even shoe shiners (a suggested

function of the City's cable television system (A. 27)), serve the "public" in the broadest sense of the word. Of course, encompassed within the functions of these businesses are activities incidentally related to the health, safety, and welfare of the public. However, in order for a municipality to engage in such proprietary activities, it must prove that the activities of private enterprise are not merely incidental to public purpose, but actually and substantially serve legal public purposes. Orange County, 427 So.2d 174, 179; Montesi, 448 So.2d at 1244 - 45.

Thus in Montesi, the district court found that the City of Winter Haven, through introduction of evidence and proof, established the essential element of public purpose. 448 So.2d at 1244-45. That same proof is missing in the present case when the City has merely alluded to an "anticipated" or "potential" use of the municipally owned cable system and not demonstrated that the direct, actual use of its system will serve a public purpose.

Finally, as previously noted in Warner's initial brief, the City's reliance on State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951), and Cable-Vision, Inc. v. Freeman, 324 So.2d 149 (3d DCA 1975), are likewise misplaced. The City is apparently arguing that since those decisions had findings of public purpose as related to television broadcasting, this Court is now bound, as a matter of law, to find that the city's cable television system serves a public purpose. However, even a cursory reading of City of Jacksonville and Cable-Vision, Inc. reveals that the City's argument is without merit. In each of those cases, the courts found that the governmental entity had sufficiently proven by evidence that these proprietary activities would serve a public purpose chiefly because of the scarcity and unavailability of the television broadcasting capabilities in the particular geographic local. In the present case, all the city is doing

is duplicating entertainment services which are currently being adequately provided by Warner.

This court in City of Jacksonville did not find that the city's operation of a television system served a public purpose. The decision in City of Jacksonville significantly turned on the finding that the construction and installation of television equipment was simply an improvement to an existing radio station, owned and operated by the City. The court in City of Jacksonville found that the Florida Legislature had twenty-five years earlier determined that the radio station would serve a municipal purpose and authorized municipal ownership. 50 So.2d at 535. There was no such legislative finding for television, but in 1950, the Court in City of Jacksonville regarded the advent of television broadcasting as merely an improvement to the radio station. Id. at 535-36. In the present case, there is no finding by the Florida Legislature that cable television, indeed even television broadcasting, serves a public purpose.

In Cable-Vision, Inc., cited and quoted by the City in its Answer Brief, a finding of public purpose was made only after the county had proven that geographical and economic situations left the community without access to direct television broadcast signals and accordingly without access to television programming. 324 So.2d at 154. Thus, the community was without any means to receive the off-the-air signals and the public and cultural programming carried on those signals; in the absence of any other provider of the off-the-air signals, the county would be serving a public purpose by providing an over-the-air broadcast facility. Id. at 153-54. Cable-Vision, Inc. is in direct contrast to Orange County, 427 So.2d 174, in which the television system, like the City's cable system in the present action, would be duplicating programming services already being provided and might enhance some of the programming. However, as previously noted, this Court in Orange

County has held that such duplicative programming with some additional enhancement does not constitute a paramount public purpose which would support bond validation. 427 So.2d at 179.

II. THE TRIAL COURT ERRED AND DENIED WARNER FUNDAMENTAL DUE PROCESS OF LAW WHEN IT GRANTED THE CITY'S UNTIMELY MOTION TO STRIKE WARNER'S AFFIRMATIVE DEFENSES, WHEN IT PRECLUDED INTRODUCTION OF EVIDENCE PERTAINING TO THE ISSUES RAISED IN THE STRICKEN AFFIRMATIVE DEFENSES, WHEN IT DECLARED THAT IT WOULD NOT CONSIDER NOR ADDRESS THE ISSUES RAISED BY THE AFFIRMATIVE DEFENSES, AND WHEN IT SUBSEQUENTLY ENTERED FINAL JUDGMENT AFTER THE VALIDATION HEARING AGAINST WARNER ON THE ISSUES ORIGINALLY RAISED BY THE STRICKEN AFFIRMATIVE DEFENSES.

The City's Answer Brief is totally devoid of any argument on this point. The City does not attempt in any fashion to support the trial court's actions and its ultimate findings of fact and conclusions of law challenged by Warner in this point on appeal. The City has implicitly conceded that the trial court erred and that this case must be reversed as a denial of fundamental due process and remanded for rehearing on the affirmative defenses if this Court decides that there has been a proper showing that the city's project serves a paramount public purpose.

In responding to the complaint, Warner asserted certain affirmative defenses recognizable in bond validation proceedings. However, upon an and oral motion by the City, the affirmative defenses were stricken by the trial court. Additionally, the trial court, by express order and by exclusion of testimony and evidence at trial, prohibited Warner from addressing and proving its defenses at trial. In its final judgment, the trial court inexplicably made specific findings of fact and conclusions of law against Warner on those defenses and issues which were stricken and thereby the court precluded the State and Warner from introducing evidence and proof. Clearly, the trial court denied Warner fundamental due process, and reversal and remand are warranted. Cortina v. Cortina,, 98 So.2d 334, 336-37 (Fla. 1957); Stack v. Okaloosa County, 347 So.2d 145, 146 (Fla 1st

DCA 1977); Brady v. Jones, 491 So.2d 1272, 1273 (Fla. 2d DCA 1986).

III. THE TRIAL COURT ERRED IN STRIKING WARNER'S AFFIRMATIVE DEFENSES SINCE THE DEFENSES RAISED WERE LEGAL UNDER STATE AND FEDERAL LAW.

The City's arguments on whether legal defenses were raised by Warner are all at once contradictory. The City first contends that Warner's affirmative defenses raise matters collateral to the bond validation proceeding, and then asserts that the proof at hearing establishes that the defenses are without merit. The City has taken the same position as did the trial court - - first, strike the defenses and preclude and exclude evidence on the issues; then declare that the defenses have no merit because of lack of proof. In doing so, the city has failed to address any of the decisions and authorities cited by Warner which establish that Warner has asserted affirmative defenses.

Indeed, in its brief, the City cites cases and statutes purportedly supporting the finding of public purpose, but which in actuality support Warner's contention that the affirmative defenses should not have been stricken but should have been heard. In citing and quoting a holding in Manning v. City of Valparaiso, No. 76-521-CA-01 (Fla. 1st Cir.), the City noted that the trial court did not find there had been any "abuse of discretion." Clearly, even in that proceeding with different facts and circumstances than the present cause, the trial court recognized a defense concerning abuses of discretion and apparently permitted evidence to be introduced on the issue. See also City of Jacksonville, 50 So.2d 534; State v. Florida State Turnpike Authority, 134 So.2d 12, 19 (Fla. 1961); Penn v. Pensacola-Escambia Governmental Center Authority, 311 So.2d 97, 192 (Fla. 1975).

Likewise, the City cites Section 533(e) of Title 47, United States Code (Section 613(e) of the Cable Communications Policy Act of 1984), as a basis

for finding public purpose. However, as the City expressly notes in its brief, Section 533(e) concerns the City's authority to own and operate a cable television system and whether it has met certain legal requirements to be so authorized. Warner raised the issue of the City's compliance with Section 533(e), but the City took the position in the trial proceedings that that question was collateral to the bond validation. The trial court accepted the City's position, struck the defense, and precluded any hearing on the issue. Now, the city is attempting to use Section 533(e) to support its contentions and in the same breath, still prevent Warner from being heard on the same issue. Clearly, by the City's own statements in its brief, it has now conceded that the issues raised by Warner concerning authorizations under and compliance with the legal requirements under the Cable Communications Policy Act of 1984 are matters within the scope of the bond validation proceedings. See Lodwick v. Palm Beach County School District, 506 So.2d 407, 409 (Fla. 1987).

Congressional preemption through the Cable Act (47 U.S.C.§ 521 et. seq.) is a legal issue directed to the authority of the City to act under applicable law and the City's compliance with the requirements of law. In State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1981) the State Attorney raised a number of issues relating to statutory interpretation in a bond validation proceeding. This Court, although ruling adversely to the state's argument, nevertheless, addressed the statutory queries as a proper consideration in a bond issue. Likewise, in State v Florida State Turnpike Authority, 134 So.2d 12 (Fla. 1961), this Court discussed legislative construction granting the Authority the power to do acts necessarily granted by the statutes. Moreover, in Orange County, 427 So.2d 174 (Fla. 1983), statutory interpretation was the basis for denial of validation.

This Court in Lodwick, 506 So.2d 407, has recognized that collateral issues will be addressed in bond validation proceedings if they are raised as affirmative defenses and pertain to a claim that there has been a violation of legal duty by the governmental entity issuing the bonds. Id. at 408-09. Without contravention by the City in its brief, Warner had demonstrated in its initial brief that it has raised defenses which go to the issue of violations of the City's legal duties as well as issues related to the city's authority and compliance with all applicable legal requirements for issuing bonds for the municipally owned cable television system.

IV. THE TRIAL COURT ERRED IN HOLDING THAT THE BOND VALIDATION ORDINANCE WAS PROMULGATED IN COMPLIANCE WITH THE LAW.

In establishing the proof of whether the City exercised legal authority in accordance with the requirements of the City Charter, the City's evidence was limited. Testimony from the city clerk, Ireland, established the only affirmative acts taken -- first, the ordinance was read by the city council on three separate readings (A. 12); and second, the City advertised the ordinance in three publications (A. 13). The City's record is void on the 1955 Charter requirement that an ordinance be posted in three public places (A. 431), and if there had been compliance, certainly Ireland would have testified to such an important act. Ireland's statement that "I feel it complies with both charters," (A. 14), is insufficient to support a finding of compliance with the 1955 charter since Ireland understood, as his testimony clearly shows, that the ordinance needed only to comply with the separate readings and public notices in the newspaper. Moreover, Warner's proffered Exhibits A, B, C, and D (A. 405-423), specifically established the City's failure to document its compliance with the 1955 Charter.

The City's hasty fall back reliance on the requirements of the 1955

Charter occurred in the final minutes of this law suit. This retreat was contrary to the City's actual practice and was inconsistent with what the City had continued to do. As Warner's Exhibits A and B (A. 276 - 286) establish, the City in August 1985 acknowledged the 1983 Charter's limitation in its official minutes. Secondly, it admitted the requirements of the later Charter when it included the CATV subject in its budget (A. 245). As a third acknowledgment, the City stated in Paragraph 2 of the validation complaint:

> Subsequently the Legislative Charter of Plaintiff (City) was amended by the enactment of Ordinance No. 511, under the provisions of Chapter 166, Part II, Florida Statutes, said Ordinance being approved by referendum vote.

It is therefore apparent that the City has consistently acknowledged the fact that the bond involved an expenditure of a magnitude which must conform to the requirements of Section 1.02(h) of the 1983 Charter. Moreover, the minutes of the August 27, 1985 city council meeting unequivocally establish this fact. (A. 276). As the court held in City of Coral Gables v. Sackett, 253 So.2d 890 (Fla. 3d DCA 1971), when faced with determining, the validity of, the adoption of an ordinance:

> Nor have we overlooked the established rules that the minutes of a meeting of such a city commission are the best evidence of the proceedings and actions taken at the meeting, and that statements thereof appearing in the minutes are not subject to collateral attack or to be contradicted by the officials.

Id. at 896. (Emphasis added.)

The acknowledgment of the applicability of Section 1.02(h) of the City Charter has been further substantiated by the vote of the council members on that issue, by the testimony of the City Clerk, and by the pleadings for validation.

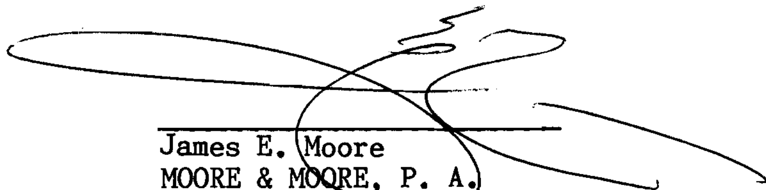
Section 1.02(h) contains conditions precedent to the expenditure of moneys imposed as a check-and-balance by the electors of the City. In Lodwick, this court stated that one of the areas of judicial inquiry in a

bond validation was "to insure that the bond issue complies with the requirements of law." 506 So.2d at 409. Acceptance of the City's argument and unilateral disregard of Section 1.02(h) would render meaningless the $100,000 budget requirement imposed on the City by its electorate. This result cannot be condoned since it would permit the City to allocate funds for projects in excess of $100,000 without inclusion in the budget, declaring it an emergency or holding a referendum.

## CONCLUSION

Based on the foregoing, Warner respectfully requests the Court to reverse the trial court's finding that the City's cable television system serves a public purpose and that the City has complied with all the requirements of law for issuance of the revenue bonds to fund that project. Therefore, the Court is requested to invalidate the bond issue. In the alternative, Warner requests the Court to void and reverse the trial court's judgment and the rulings on Warner's affirmative defenses and remand this matter for further hearing.

Respectfully submitted.



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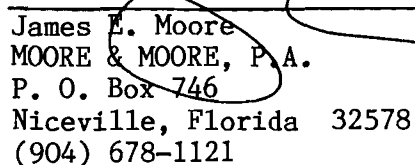
I HEREBY CERTIFY that a copy of the foregoing has been furnished to Drew S. Pinkerton, Esquire, Assistant State Attorney, Okaloosa County Courthouse Annex, Shalimar, FL 32479, Gillis E. Powell, Sr., Esquire, of Powell, Powell & Powell, P. O. Box 277, Niceville, FL 32578, and Don J. Caton, Esquire, and William D. Wells, Esquire, Officer of the City Attorney, Pensacola City Hall, Pensacola, FL, by U.S. Mail this 2nd day of November, 1987.



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