IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, and the TAXPAYERS, PROPERTY OWNERS and CITIZENS OF THE CITY OF ORLANDO, FLORIDA, including NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, and ALL OTHERS HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE BY PLAINTIFF OF THE BONDS DESCRIBED HEREIN OR TO BE AFFECTED IN ANY WAY THEREBY,	:	CASE NO. 75,804
Appellants,	:	
vs.	:	
CITY OF ORLANDO, FLORIDA	:	
Appellee.	:	

ORIGINAL

APPEAL FROM THE NINTH JUDICIAL CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF AUTHORITIES

STATUTES AND CONSTITUTION PROVISIONS

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a Final Judgment issued pursuant to Chapter 75, Florida Statutes. Amicus Curiae's Motion for Rehearing and Clarification of Decision was filed pursuant to Rule 9.330 of the Florida Rules of Appellate Procedure and this Brief of Amicus Curiae is filed pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE

This is an appeal from a Final Judgment of the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Orange County, Florida, wherein the Circuit Court held that the issuance by the City of Orlando, Florida (herein called the "City") of not exceeding $500,000,000 of revenue bonds (herein called the "Bonds") is authorized by law and that the Bonds are validated, which opinion was reversed by this Court in its decision in this case entered March 14, 1991.

The suit was initiated when the City, the Plaintiff/Appellee, filed a Complaint for bond validation pursuant to Chapter 75, Florida Statutes, seeking validation of the Bonds. The proceeds of the Bonds were to be invested until used to finance qualifying projects of local governments either through the execution of Local Agency Loan Agreements or through the purchase of securities issued by such local governments. Such qualifying projects of local governments would include the purchase of liability coverage contracts, the funding of self-insurance reserves, and such capital projects as roads, water systems, jails, utility facilities and sports facilities. The Bonds would be payable solely from repayment of the loans by the local governments. The State of Florida by and through its State Attorney objected to the Bonds on the grounds that the proposed Bonds would be illegal because the proceedings of the City pertaining to the Bonds do

not identify the specific projects to be financed, the local governments which will be borrowing the proceeds or the revenue sources that the local governments would use to repay the loans from the City. The City's position was that the City, together with the local governments which will borrow bond proceeds, will benefit from economies associated with large-scale financing and the City will be able to generate an investment profit which would be used for valid municipal purposes. The Complaint was heard and a Final Judgment was entered by the Circuit Court validating the Bonds. The State filed timely notices of appeal.

On appeal this Court reversed the decision of the Circuit Court and held that the Bonds were invalid. In its opinion the Court concluded that

> "borrowing money for the primary purpose of reinvestment is not a valid municipal purpose as contemplated by Article VIII, Section 2(b) ... [a]ccordingly we recede from State v. City of Panama City Beach to the extent that it conflicts with this opinion."

The undersigned Amicus Curiae, Griffith F. Pitcher, a resident of Florida, a member of The Florida Bar, and a bond attorney who is a member of the National Association of Bond Lawyers ("NABL") and a frequent lecturer at NABL Bond Attorneys' Workshops, filed an "Amicus Curiae Motion for Rehearing and Clarification of Decision", because, this Court's opinion raises the five legal questions specified in

the Motion and which are addressed in this Brief. A failure of this Court either (i) to withdraw its decision and enter a decision validating the Bonds or (ii) to modify its decision to clarify the five legal questions raised by the decision, will leave those legal questions unanswered, which will result in a need for the Court to address those legal questions in future cases. This Court by addressing these questions in a modified opinion can avoid the need for the Circuit Courts and this Court to address them in future bond validation cases.

FACTS

The undersigned adopts the statement of facts set forth in the City's Briefs.

ARGUMENT

I. THE COURT'S OPINION ERRONEOUSLY INTRODUCES THE PARAMOUNT PUBLIC PURPOSE DOCTRINE IN A CONTEXT IN WHICH THAT DOCTRINE IS INAPPLICABLE AND SUGGESTS THE COURT MAY BE ESTABLISHING A NEW, BUT UNARTICULATED, DOCTRINE.

All bond issues and all expenditures of funds by governmental units must serve a public purpose as contrasted with a private purpose. Some actions by governments serve dual purposes, both public and private. The paramount public purpose doctrine, annunciated in State v. Board of Control, 66 So.2d 209 (Fla. 1953), is applicable only where a financing, an expenditure of public funds or a lending of credit serves both a public purpose and a private purpose. Where such conditions exist the public purpose must be the paramount purpose and the private benefit must be merely incidental to that paramount public purpose. State v. Board of Control, supra. However, where there is no lending of public credit or expenditure of public funds (as in financings under Parts II and III of Ch. 159, Fla. Stat.) the bonds will be valid if it can be shown that any public purpose, no matter how slight, is served; such public purpose may be minor and indirect. Linscott v. Orange County Industrial Development Authority, 443 So.2d 97 (Fla. 1983).

The paramount public purpose doctrine is relevant only where public funds or credit are to be used for a private benefit. The doctrine involves the weighing of the public and

private purposes to determine which is the principal or paramount purpose.

In its opinion in this case, the Court refers to the need for a paramount public purpose (citing Orange County Indus. Dev. Auth. v. State, 427 So.2d 174 (Fla. 1983), an industrial development bond case arising under Part III of Ch. 159, Fla. Stat.). Where, as in this case, no private sector benefit is involved there is no private benefit to be weighed against the public benefit. The paramount public purpose doctrine is not applicable where there is no private sector involvement.

Here, the proposed financing benefits only governmental units, to wit: the City and other local governments to which Bond proceeds will be lent. That public benefit, although difficult to measure and arguably indirect, is entirely public. The Court's use of the term "paramount public purpose" in the context of this solely public financing is confusing because the paramount public purpose doctrine of State v. Board of Control is clearly not applicable.

If the Court is intending to announce a new doctrine which requires that a public benefit must reach a specified magnitude (not withstanding the absence of any private sector benefit) in order to support a financing then that intention should be clearly stated and the level of magnitude the Court intends to impose should also be articulated. If such a new doctrine is intended issuers, their bond counsel and the

circuit courts need clear and rational bright-line rules which they can apply. The Court's opinion needs considerable clarification if the Court is announcing a new paramount public purpose doctrine.

II. THE COURT'S OPINION CONFLICTS WITH THE MUNICIPAL HOME RULE POWERS ACT.

The Court's opinion holds that borrowing money for the primary purpose of reinvestment is not a valid municipal purpose, and bases its opinion on Article VIII, Section 2(b) of the Florida Constitution.

The Court's reasoning is articulated as follows:

> [W]e "see no valid public purpose in investing for investing's sake. Making a profit on an investment is an aspect of commercial banking and business entities." . . . Here, the city, acting alone, proposes to issue bonds and lend the proceeds at a profit. 16 FLW § 205, § 207.

The Court views the transaction as proprietary and condemns it because it is proprietary rather than governmental in nature.

Even prior to the adoption of Article VIII, Section 2(b) of the Florida Constitution, this Court recognized that a purely proprietary activity could constitute a valid "municipal purpose", stating:

> 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. . . . 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. State v. City of Jacksonville, 50 So.2d 532 (Fla. 1951) at 535.

Thus, even under the Florida Constitution of 1885 the Court would uphold a determination by the Legislature that a proprietary function serves a "municipal purpose" unless there was a clear abuse of discretion. It viewed the defining of "municipal purpose" as being a legislative rather than a judicial function.

In the first litigated case under Article VIII, Section 2(b) of the Florida Constitution of 1968, the Court held that the constitutional provision was not self-executing and that a statute was needed to define the scope of "municipal purpose". City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972). Thus, the Court, in that case, determined that the Legislature and not the Court should define the term "municipal purpose." In response to the Fleetwood decision the Legislature enacted the Municipal Home Rule Powers Act.

The Municipal Home Rule Powers Act, in Section 166.021(1), Fla. Stat., expressly provides that municipalities shall have proprietary powers and that they may exercise any power for municipal purposes, except when expressly prohibited by law. Section 166.021(4), Fla. Stat. states in pertinent part:

> 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 expressly prohibited (emphasis added).

Section 166.021(2), Fla. Stat. states that a "municipal purpose" is ". . . any activity or power which may be exercised by the state or its political subdivisions.

The foregoing provisions make it clear that "municipal purposes" include "proprietary purposes" and that proprietary activities may be conducted without judicial interference unless expressly prohibited by superior law. The Legislature has delegated to the City the power to determine its own proprietary municipal purposes subject only to express prohibitions and has removed "limitations, judicially imposed, or otherwise."

The courts have recognized that the terms "municipal purpose" and "public purpose" are similar. See City of Winter Park v. Montesi, 448 So.2d 1242 (5th D.C.A. 1984); citing Gate City Garage v. City of Jacksonville, 66 So.2d 653 (Fla. 1953). A municipal purpose is a public purpose at the municipal level. Any activity performed by a governmental entity serves a public purpose unless it serves a private purpose, i.e., unless it benefits the private sector and is not outweighed by a public purpose under the paramount public purpose doctrine. The fact that a proprietary activity of a governmental body is conducted

for profit or competes with private sector businesses is not the test for determining whether an activity is a municipal or public purpose. City of Winter Park v. Montesi, 448 So.2d 1242 (5th D.C.A. 1984) at 1244, 1245.

Determinations of public purpose are legislative determinations. The Legislature determined in the Municipal Home Rule Powers Act that it would serve a municipal purpose for municipalities to exercise proprietary powers and the City's legislative body determined that the exercise of those proprietary powers in connection with this financing would serve a public and municipal purpose. Such legislative determinations are presumed valid and must be upheld by the courts unless they are arbitrary and unfounded; unless they are so clearly erroneous as to be beyond the power of the Legislature. State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980); State v. Osceola County Ind. Dev. Auth., 424 So.2d 739 (Fla. 1982); Nohrr v. Brevard County Educational Fac. Auth., 247 So.2d 304 (Fla. 1971); State v. Daytona Beach Racing and Recreational Facilities District, 89 So.2d 341 (Fla. 1956). There must be a clear abuse of discretion before the courts may interfere. City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983) at 1280.

In this case the Court has not referred to any provision of the Constitution, general or special law or the Orange County Charter which expressly prohibits the City from engaging in the proposed transaction. On the contrary, as discussed in III,

below, Section 159.827(2) was intended to expressly permit this type of financing. The Court may, justifiably, feel that municipalities should not engage in proprietary activities which it feels are unwise from a policy or economic standpoint. The court has stated in State v. Division of Bond Finance, 530 So.2d 289 (Fla. 1988) at 290, that policy considerations:

> ... lie beyond the "legitimate judicial province to intrude or to substitute our judgment for what has been decided in the legislature or executive speakers of authority." Platts v. Division of Bond Finance, 275 So.2d 231, 232 (Fla. 1973).

The court has also made it clear in numerous cases that questions of economic feasibility are collateral and not a proper matter of inquiry in validation proceedings. Thus neither policy nor economic reasons are a proper ground for judicial interference.

The Court, in its opinion, made no finding that it was beyond the power of the Legislature to grant proprietary powers to municipalities and made no finding that the exercise by the City of its proprietary powers in the proposed manner exceeded the scope of its legislatively granted proprietary powers. Under the cases cited above, the determinations of the Legislature and of the City's legislative body must be upheld.

Clearly municipalities have the power to issue bonds to provide money for their own governmental needs (and here some of the bond proceeds may be and all of the income earned thereon will be used by the City itself). Municipalities may also loan moneys to other governments under the Florida Interlocal

Cooperation Act and have the power to invest money at a profit. It is commonly said that "two wrongs don't make a right." The Court's opinion, in effect, is saying that "three rights do make a wrong." Clearly there is an error in computation.

The Court in Fleetwood, wisely determined that the definition of "municipal purpose" was a legislative matter. In this case the Court's opinion encroaches upon the legislative prerogative, clearly conflicts with the Municipal Home Rule Powers Act and conflicts, not only with State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988), but with the cases cited in this section of this Brief.

The Court is requested to withdraw its opinion in the case and enter a new opinion validating the Bonds.

III. THE COURT'S OPINION CONFLICTS WITH THE TAXABLE BOND ACT OF 1987.

The Court's opinion recognizes that the Bonds may be issued as taxable bonds or as tax exempt bonds. Although the title of the Taxable Bond Act of 1987 refers to taxable bonds, the term "bonds" as defined in Section 159.823(2) is not limited to taxable bonds. Section 159.827(2) provides:

> "When the governing body of the governmental unit issuing the bonds finds and determines that the issuance of the bonds serves a public purpose, the issuance of the bonds shall be deemed to be for a paramount public purpose and the investment of bond proceeds ... shall be merely incidental to the paramount public purpose of the borrowing."

The foregoing provision, which was drafted by the undersigned, was intended to permit the type of financing involved in this case. The Court's opinion conflicts with the foregoing statutory provision yet does not expressly hold that provision to be unconstitutional. The Court's opinion should be modified to state whether or not the Court intended to hold that statutory provision to be invalid.

The Court's opinion states that "we recede from State v. City of Panama City Beach to the extent that it conflicts with this opinion", yet the opinion is not sufficiently clear to determine the extent of that recession. It is not possible to determine whether the Bonds would be valid:

(i) if the borrowing local governments were specifically identified; or

(ii) if the projects were specifically identified; or

(iii) if the investment profit was to be used for

(a) specifically identified projects;

(b) municipal operating expenses; or

(iv) if a combination of some, but not all, of the foregoing conditions existed.

The Court's opinion gives no meaningful guidance to issuers, their bond counsel or the Circuit Courts on the above legal questions.

IV. THE COURT'S OPINION RAISES QUESTIONS AS TO THE VALIDITY OF TRADITIONAL "BLIND POOL" FINANCINGS.

The Court's opinion expresses concern that the local governments to whom the Bond proceeds are to be lent and the specific projects to be financed are not specifically identified, and implies that either or both of those conditions may be fatal to validity. Both of those conditions will exist in every traditional "blind pool" financing. Such financings are common throughout the nation and in Florida.

The Court has approved the validation of "blind pool" bonds, the proceeds of which were to be used to finance a number of future housing projects under conditions where neither the borrowers of bond proceeds nor the specific projects were identified. See State v. Housing Finance Authority of Pinellas County, 506 So.2d 397 (Fla. 1987). It is not clear from the Court's opinion in the case at bar whether the Court is receding from Pinellas and intends to prohibit traditional "blind pool" financings by requiring the borrowers and the projects to be specifically identified or whether the Court's expression of concern is mere surplusage.

A retreat from Pinellas would have a severed adverse impact upon the new federally subsidized State Revolving Fund Program which is about to be implemented by the Florida Department of Environmental Regulation ("D.E.R."). The undersigned was a member of the consulting team which was retained by D.E.R. to structure that program. Under the

structure (which is similar to the structure utilized in other states) federal grants and State matching funds will be loaned to local governments to finance waste water and storm water facilities. After those loans are made, the State proposes to issue bonds secured by a pledge of the loan payments received on those loans. The bond proceeds will thereafter be loaned to local governments to finance new waste water and storm water projects. The loan repayments on those loans will be pledged to secure a new issue of bonds the proceeds of which will likewise be loaned and the loan payments therefrom will likewise be pledged to yet more bonds, and so on. This structure will permit the State to maximize the use of the federal and state grant moneys and will accelerate compliance with federal environmental laws. At the time each series of the State's bonds are to be issued the borrowers and the projects to be financed with bond proceeds will not be known or specified.

If the Court's opinion in this case is intended to prohibit the issuance of bonds to provide loans to unidentified borrowers to finance unidentified projects, it will be necessary for D.E.R. to restructure its proposed State Revolving Fund Program. This will necessitate a one to two year delay in implementing that program, will result in a program which is inefficient in comparison to the program as presently structured, delay the financing of badly needed

local waste water and storm water projects and entail considerable additional expenses on the part of D.E.R.

The Court is urged to modify its opinion so as not to overrule, by implication or otherwise, the Pinellas decision.

V. THE COURT'S OPINION RAISES QUESTIONS AS TO THE VALIDITY OF TRADITIONAL TAX AND REVENUE ANTICIPATION BORROWINGS.

The Court's opinion suggests that it is improper to place bond (or note) proceeds or income from the investment thereof in the City's general fund for later use as the City Commissioners may determine. The Court's opinion thus raises questions as to the validity of traditional tax and revenue anticipation borrowings.

In tax and revenue anticipation borrowings, the issuer sells and issues notes, the proceeds of which are to be deposited in the general fund and used, together with the investment income therefrom, to pay operating expenses and capital expenditures of the issuer pending the receipt of taxes or other revenues. The notes are repaid from the taxes or other revenues when the same are received. Such notes are issued to provide operating capital which is used pay general operating expenses and to make capital expenditures which would normally be paid from such taxes and revenues. Tax anticipation note ("TAN"), revenue anticipation note ("RAN") and tax and revenue anticipation note ("TRAN") financings are common throughout the nation and Florida. School District TAN

financings are routine in Florida. The proceedings authorizing TANs, RANs and TRANs generally provide for the deposit of the proceeds in the general fund and rarely identify the expenditures to be made from those proceeds or from interest income earned on those proceeds. If it is improper to structure a financing in a manner which provides for the deposit to a general fund of investment income earned on proceeds of the debt obligations and the use of that investment income to pay operating and capital expenditures to be identified in the future then there are serious doubts as to the validity of traditional TAN, RAN and TRAN financings.

In the case at bar, it is not necessary to specify the exact use of either the Bond proceeds or investment income in order to assure that the proceeds or income will be expended for proper municipal purposes. The City's proceedings and the judgment of the Circuit Court expressly restrict the use of proceeds to lawfully permitted uses. Any misapplication of those funds would violate the covenants contained in the Bond proceedings. Any misapplication could be enjoined by any bondholder or by any resident of the City. Misapplication of bond proceeds or investment income might also subject officials of the City to criminal penalties. In this case the purposes for which Bond proceeds and investment income may be used (i) is less broad than the purposes involved in most tax and revenue anticipation borrowings, (ii)

is somewhat more broad than the purposes involved in State v. Housing Finance Authority of Pinellas County, supra (which limited the use of proceeds to the financing of unidentified housing projects for unidentified borrowers), and (iii) is no less broad than the purposes specified in State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988) (which included "parks and recreational facilities, self-insurance reserves or other municipal purposes, all to be designated by subsequent resolution") because in Panama City Beach all of the income could have been used for "other municipal purposes . . . to be designated by subsequent resolution."

The opinion, if not withdrawn and replaced with an opinion approving the Bonds, should be clarified to give guidance to issuers, their bond counsel and the Circuit Courts as to whether the opinion is intended to have any effect on traditional tax and revenue anticipation borrowings.

CONCLUSION

The undersigned has no economic interest in whether the City's Bonds are issued or not issued, but has an interest in clarifying the Florida bond law, and avoiding the need to resolve, in future validation cases, the questions discussed above.

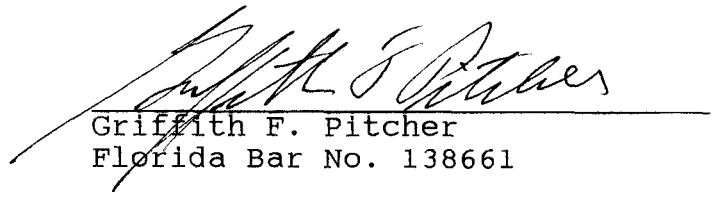
The Court's opinion: (i) refers to "paramount public purpose" in a context in which the paramount public purpose doctrine is inapplicable and thereby suggests that the Court is announcing a new doctrine the scope of which is not articulated; (ii) conflicts with the Municipal Home Rule Powers Act; (iii) conflicts with the Taxable Bond Act of 1987; (iv) raises questions as to the validity of traditional "blind pool" financings; and (v) raises questions as to the validity of traditional tax and revenue anticipation financings.

The Court's opinion casts doubt upon the continuing viability of numerous prior decisions of the Court and injects considerable uncertainty into the Florida law pertaining to bonds and to home rule powers.

The opinion, if not withdrawn or extensively clarified, will require the Court to address these legal issues in future bond validation cases. The Court has the opportunity, by withdrawing or extensively clarifying its opinion to resolve these legal questions now and thereby avoid

an otherwise inevitable increase in bond validation cases at both the Circuit Court and Supreme Court levels.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of March, 1991, to:

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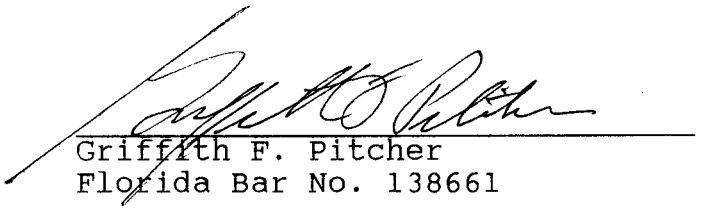

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