IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA, and the several Property Owners, Taxpayers 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 of the bonds herein more particularly described or to be affected in any way thereby,	:	CASE NO. 75,804
Defendant/Appellant,	:	Appeal from Case No. CI88-8819
vs.	:	
CITY OF ORLANDO, FLORIDA, a municipal corporation of the State of Florida,	:	
Plaintiff/Appellee.	:	

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

ANSWER BRIEF OF APPELLEE

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PREFACE

Throughout the Statement of the Facts contained in Appellant's Initial Brief, the Appellant makes reference to certain matters contained in the proposed final judgment submitted by the Appellee to the Circuit Court. Such proposed judgment was but one of a number of such documents submitted by Appellee for discussion with the Appellant in a good faith attempt to address, to Appellant's satisfaction, the issues raised before the lower court. Such proposed judgment was never signed by, nor filed with, the Circuit Court and is not properly a part of the record of the proceedings below [Fla. R. App. P. 9.200(a)] although Appellant has included it in its Appendix (App. 11). The final judgment which was ultimately executed by the Circuit Court (App. 12) contains several provisions which the Appellee included at the request of the Appellant.

In addition, Appellant has included in its Appendix a portion of the deposition of the Appellee's Director of Finance, Mr. George Michael Miller (App. 5). The rules governing proceedings of this nature provide that the record consists of

> the original documents, exhibits, and transcript of proceedings, if any, filed in the lower tribunal, except summonses, praecipes, subpoenas, returns, notices, depositions, other discovery and physical evidence. [Fla. R. App. P. 9.200(a)] (emphasis added).

Furthermore,

> The purpose of an appendix is to permit the parties to prepare and transmit copies of such portions of the

record deemed necessary to an understanding of the issues presented. [(Fla. R. App. P. 9.220)].

The deposition was never made a part of the record, nor were any of the proposed judgments filed with the lower court. Therefore, and in light of the foregoing, the Appellee respectfully submits that the inclusion of such documents in the Appendix conflicts with the cited sections of the Florida Rules of Appellate Procedure and is improper. However, in the event the Court finds either of such documents germane to the issues presented and necessary to their proper disposition, Appellee would defer to the judgment of the Court with respect thereto, and submits herewith as "Appendix 14" the portion of Mr. Miller's deposition which Appellant omitted from its Appendix.

Appellee has also included as "Appendix 15" copies of Circuit Court final judgments validating $1,090,000,000 aggregate principal amount of bonds similar to those presently before the Court.

STATEMENT OF THE FACTS

The Appellee agrees with the Statement of the Facts expressed by the Appellant, except as hereinafter stated. The bonds which are the subject of this appeal are referred to herein as the "Bonds."

In the first paragraph of the Statement of the Facts in its Initial Brief, the Appellant states that neither the City Resolutions nor the Amended Complaint identified the projects to be financed, the local agencies involved, the revenue sources, or the public purpose behind such bond issue. The Bonds, which may be issued either as tax-exempt or taxable obligations (App. 1, p. 3; App. 2, p. 4) will be used to finance qualifying projects of local agencies through either the execution of Local Agency Loan Agreements or through the purchase of Local Agency Securities. In other words, the Appellee will issue the Bonds and use the proceeds to buy debt instruments of, or make loans to, governmental units in the State of Florida. The "project" to be financed through the issuance of the Bonds does not consist of <u>capital</u> projects as such term is used by the Appellant; rather, the project is the purchase of debt obligations of, or making loans to, governmental units in the State of Florida issued to finance qualifying projects of the types identified in Appendix 10. Both the Amended Complaint (App. 2, pp. 1, 2, 4) and the City Resolutions (App. 1, pp. 2, 4) contain numerous references to the proposed purchase of the local government debt obligations and the loans.

The Trust Indenture, which was an exhibit to the City Resolutions but is contained in the Appendix as a separate document, expressly provides that:

> The Bonds are limited obligations of the Issuer and are secured by and payable solely from the Revenues pursuant to the Loan Agreement (App. 7, p. 27) (emphasis added).

The term "Revenues" is defined in the Trust Indenture as:

> all moneys (i) derived from the Governmental Units pursuant to the Local Agency Loan Agreements or the Local Agency Securities, (ii) paid or payable to the Trustee for the respective accounts of the Governmental Units and deposited in the Interest Account of the Debt Service Fund to pay principal of, premium, if any, and interest on the Bonds upon redemption, at maturity or upon acceleration of maturity, or to pay interest on the Bonds when due, and all receipts of the Trustee credited under the provisions of this Indenture against such payments, and (iii) the investment earnings on the Funds and Accounts created hereunder.

In addition, the City Resolutions and the Amended Complaint provide that the Appellee may purchase obligations of, or make loans to, only governmental units in the State of Florida (App. 1, pp. 2, 3; App. 2, p. 2).

Pursuant to the City Resolutions, the Appellee made a specific finding that the issuance of the Bonds serves a valid public purpose (App. 1, p. 2). The Final Judgment entered by the Circuit Court provides that

> no series of Bonds may be issued . . . unless the terms thereof require that on the date of issuance thereof the Plaintiff reasonably expects (as determined by resolution of the City Council of the Plaintiff) that the proceeds of such Bonds will be used to purchase Local Agency

> Securities or to make loans pursuant to a Local Agency Loan Agreement . . . (App. 12, p. 11).

In addition, the Final Judgment provides that the proceeds of any such series of Bonds must be used within three years of the date of issuance to make Local Agency Loans, purchase Local Agency Securities or redeem Bonds (Id.)

The Appellee agrees with Appellant's statement that the Bonds may be used to purchase local government securities. In addition, during the period between issuance of the Bonds and application of the proceeds thereof to originate loans or to purchase debt obligations of governmental units, the Appellee may temporarily invest the proceeds in investments authorized by Florida law (App. 7, p. 78). The proceeds of such temporary investment are themselves included within the definition of "Revenues" which are pledged to pay debt service on the Bonds (App. 7, p. 14). Appellant has confused this temporary investment mechanism with the public purpose to be served by the issuance of the Bonds. The temporary investment of the proceeds is not the ultimate project to be financed with the proceeds of the Bonds, but is simply a sound business practice designed to partially defray interest coming due on Appellee's Bonds prior to commencement of the local agencies' payments under their respective loan agreements or Local Agency Securities.

The Final Judgment states that the Bonds are to be issued for the purposes of (i) enabling Local Agencies to benefit from the economies of scale associated with large scale financings which may

otherwise be unrealized if separate financings were undertaken; (ii) developing and structuring financing programs and activities that will provide essential services and functions at lower costs; and (iii) utilizing excess funds in the Trust Estate created pursuant to the Trust Indenture for such lawful capital projects as may be approved by the City Council of the Appellee (App. 12, p. 8).

SUMMARY OF ARGUMENT

Contrary to the position taken by the Appellant, issuance of the Bonds will serve valid public purposes on two separate levels. The Appellee will receive several benefits as a result of issuing the Bonds as proposed. First, it will be able to gain access to certain financial markets and achieve certain economies of scale that would otherwise be unavailable to the Appellee or to other Local Agencies acting on their own. In addition, in testimony received in this cause, it was represented that the Appellee would be entitled to receive certain profits on the purchase of the debt obligations of governmental units (App. 8, pp. 49, 50, 56, 57). Such profits can be used only for such lawful capital projects as are authorized by law and approved by the City Council of the Appellee (App. 8, p. 57; App. 12, p. 8). In addition to the benefits accruing directly to the Appellee, the public interests of the local governmental borrowers will be served as well, as loans may be originated to finance public projects of the borrowers of the types presented to the court below (App. 12, p. 4; App. 7, p. 53).

Appellant challenges the lower tribunal's jurisdiction to validate the Bonds, on the theory that the case is not yet ripe for decision. However, this argument flies in the face of the fact that there are numerous steps to be followed prior to issuing bonds, and that validation is, of necessity, undertaken at a preliminary stage in such proceedings --- a fact which this Court has long recognized.

The procedures which must be followed prior to the origination of any loans under the proposed Bond-financed program (as spelled out in the proceedings of the Appellee, in the Final Judgment and in applicable law) are more than adequate to protect against the problems Appellant foresees with respect to pledging ad valorem tax revenues, the Appellee's borrowing from the pool, and the due process rights of taxpayers and borrowers. The validation of the Bonds does not obviate compliance with any additional requirements of law which may govern the pledge by a local borrower of a particular revenue source or its power to finance a particular project. Adequate remedies remain available to interested persons to contest the actual borrowings under the Appellee's financing program. It should be borne in mind that the Final Judgment specifically prohibits issuing any Bonds unless the Appellee reasonably expects the proceeds to be used within three years to fund a public project.

Appellant's argument that the Appellee should not be permitted to borrow from the pool is similarly lacking in merit. The operative documents contain specific lists of requirements which must be satisfied and items which must be submitted by each borrower, to all of which the Appellee is subject. By requiring deposit of the Bond proceeds with a trustee, Appellee sufficiently divests itself of control over the Bond proceeds to protect against any concerns of "self-dealing" or avoidance of applicable procedural requirements.

As discussed, supra, Appellant's mere contention that due process is denied by virtue of validation of the Bonds provides no basis for this Court to reverse the ruling of the court below. The validation does not foreclose any remedy otherwise available to interested parties, other than the right to challenge the power to issue the Bonds to make loans to governmental entities within the State, secured by payments received by the municipality from participating borrowers. Our system of open government, in which public participation is invited, provides more than ample protection of constitutional due process rights.

The ruling of the Circuit Court validating the Bonds proposed to be issued by the Appellee should be affirmed.

POINT I

THE LOWER COURT PROPERLY FOUND THAT IT HAD JURISDICTION TO VALIDATE THE BONDS

Article V, §5(b), Fla. Const., and §75.02, Fla. Stat. confer jurisdiction on the Circuit Courts to conduct bond validation proceedings. The scope of judicial inquiry in bond validations is limited to determining whether the public body, here the City of Orlando, has the authority to issue bonds, whether the purpose of the bonds is legal, and whether the City has exercised the power in accordance with the requirements of law. Lodwick v. School District of Palm Beach County, Florida, 506 So.2d 407 (Fla. 1987). Due to legislative recognition that the prompt resolution of issues in bond validation proceedings is necessary, the scope of a validation proceeding is limited to assure speedy disposition of the matter. State v. City of Miami, 103 So.2d 185 (Fla. 1958). Courts are to consider only the legal validity of the bonds, not the desirability of the bonds. State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 632 (Fla. 1980).

Section 75.01, Fla. Stat., states:

> Circuit courts have jurisdiction to determine the validation of bonds and certificates of indebtedness and all matters connected therewith.

Instruments sought to be validated need not be titled "bonds" or "certificates of indebtedness" in order to invoke the court's jurisdiction. Documents imposing a payment obligation on a governmental entity, whether bonds or other traditional debt

instruments or such less traditional matters as an interlocal agreement or other support documents, are sufficient to justify validation pursuant to Chapter 75. State v. School Board of Sarasota County, 15 F.L.W. 258 (Fla. April 26, 1990); State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983). The Appellee properly invoked the jurisdiction of the Circuit Court to determine the validation of the Bonds.

It was never intended that validation proceedings be used to decide any collateral issues. McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980). Indeed, validation orders do not preclude future collateral attacks. Glatstein v. City of Miami, 399 So.2d 1005 (Fla. 3d DCA 1981). In State v. Housing Finance Authority of Pinellas County, Florida, 506 So.2d 397 (Fla. 1987), this Court recognized that if public bodies were required to present detailed forms at validation proceedings, all needed flexibility for future planning would be lost.

The sole purpose of a validation proceeding is to determine whether the issuing entity has constitutional and statutory authority to issue the bonds in question and whether such authority has been exercised "in accordance with the spirit and intent of the law." McCoy Restaurants, Inc. v. City of Orlando, supra, at 253. The Court has stated that:

> The object of the proceedings is to have finally adjudicated by the court in advance of their issuance whether or not the proposed obligations . . . . have been validly authorized and may be issued in the form, containing the recitals, covenants, undertakings, pledges or limitations stipulated, described, or set up in the authorizing ordinance or resolution providing for same . . . . and

> to judicially determine the legal sufficiency of the proceedings constituting the initiatory steps for the issuance and sale of the particular obligation sought therein to be validated. State v. Citrus County, 157 So. 4 at 5 (Fla. 1934) (emphasis added).

That some steps remain to be taken after validation has thus been acknowledged by this Court's long-standing recognition that validation proceedings review the "initiatory steps" for the issuance and sale of bonds (Id.). Similarly, this Court has long recognized that not all aspects of a financing will necessarily be before the validating court, but that certain "recitals, covenants, undertakings, pledges or limitations" may be "stipulated, described or set up in" the ordinance or resolution authorizing the issuance of bonds (Id.). Appellant's argument that the instant case is not yet ripe for adjudication is ill-founded. The proceedings to validate the Bonds should not be confused with the actions, yet to be taken, authorizing the underlying loan agreements or Local Agency Securities. It should be borne in mind that the execution by the borrowers of the loan agreements or their issuance of the Local Agency Securities must follow established procedures which provide ample opportunity for presentation of arguments in opposition thereto.

In McCoy Restaurants, Inc. v. City of Orlando, supra, the Court held that a validation proceeding was not the proper forum for determining the legality of a proposed form of lease. The lease in McCoy Restaurants was tantamount to the Local Agency Loan Agreements or Local Agency Securities in the instant case, as both provide the very source of revenues for paying the bonds. This

Court has upheld the principle of McCoy Restaurants, in Taylor v. Lee County, 498 So.2d 424 (Fla. 1986). In Taylor, the Court held that a county's power to impose tolls on previously toll-free roads and bridges could not be adjudicated in a bond validation proceeding,

> although the generation of revenues to fund this bond issue depends on the County's authority to impose tolls. 498 So.2d at 425.

To require the validating court to adjudicate the validity of all supporting documents would be a substantial departure from long-established law in this State. Such an approach could involve the adjudication of agreements with parties not required to be before the court in such a proceeding, and over whom the court lacks in personam jurisdiction (i.e., bond insurers or banks providing letters of credit in a credit enhanced transaction; lessees of bond-financed rental housing projects; mortgagors of bond-financed single-family residences).

Appellant questions the authority of the lower court to reserve, for future proceedings, the right to collaterally attack the underlying projects, loan agreements, Local Agency Securities, revenues pledged by the borrowers, and the Local Agency proceedings authorizing the Local Agency Loan Agreements or Local Agency Securities. Such reservation is merely a restatement of existing law on the subject, as discussed supra, and merely reinforces the existing rights of Appellant and others to protest and be heard at the appropriate time.

POINT II

THE LOWER COURT PROPERLY FOUND THAT THE BONDS PROPOSED TO BE ISSUED WILL SERVE A VALID PUBLIC PURPOSE

Determining whether a proposed action serves a valid public purpose is, in the first instance, a legislative determination to be made by the appropriate elected officials. It is the role of the elected officials of the respective borrowers to determine, at public meetings conducted in accordance with Florida's "sunshine law" (§286.011, Fla. Stat.) and other applicable law whether their proposed projects serve a valid public purpose. In order to reverse the validation judgment on the ground that the Bonds do not serve a public purpose, the Court must find that the Appellee's finding of a valid public purpose constitutes an abuse of its discretion, is clearly erroneous or is beyond legislative authority. State v. Housing Finance Authority, 376 So.2d 1158 (Fla. 1979); Getzen v. Sumter County, 103 So. 104 (Fla. 1925). See also, Jackson Lumber Co. v. Walton County, 116 So. 771 at 787 (Fla. 1928), Lewis v. Leon County, 107 So. 147 at 159 (Fla. 1926).

Appellee proposes to issue the Bonds for either the purpose of (i) investing the proceeds at a profit, or (ii) establishing a "pool" of funds to make loans to cities and counties or to invest in their debt obligations, either of which is a proper municipal purpose within itself. Appellee need only show that it serves one such purpose. However, the public purpose of this proposed issue is further bolstered by the restriction that the Appellee has

determined to limit itself to simultaneously serving both such purposes. It is imperative to a proper understanding of the issues presently before the Court that the proceedings of the Appellee incident to issuance of the Bonds not be confused with the proceedings of the local governments authorizing specific loans or obligations which will be made or purchased with proceeds of the Bonds.

The City of Orlando has the authority to issue "revenue bonds" pursuant to the authority of §166.111, Fla. Stat., which provides:

> Authority to borrow.--The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in s. 166.101 from time to time to finance the undertaking of <u>any capital or other project</u> for the purposes permitted by the State Constitution and may pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts and bonds. (Emphasis supplied)

Under the Constitution of the State and Florida Statutes, the City of Orlando, as a municipality, has all powers exercisable by the State, if not expressly prohibited by the Constitution or Statutes.

Article VIII, §2(b) of the Florida Constitution provides:

> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for <u>municipal purposes except as otherwise provided by law</u>. Each municipal legislative body shall be elective. (Emphasis Supplied)

Section 166.021(2) states that a "municipal purpose" means any activity or power which may be exercised by the State or its political subdivisions.

Furthermore, §166.021(3) and (4) provides:

> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
>
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
>
> (b) Any subject expressly prohibited by the constitution;
>
> (c) Any subject expressly preempted to state or county government by the constitution or by general law; and
>
> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.
>
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. . . (Emphasis Supplied)

This is not a case of first impression in the State of Florida. Florida case law is replete with court decisions validating similar programs. [See, e.g., City of Tampa v. State,

Case No. 88-7214 (Fla. 13th Cir. Ct. 1988); City of Gulf Breeze v. State, Case No. 85-C-1098 (Fla. 1st Cir. 1985); Escambia County v. State, Case No. 84-2691-CA-01 (Fla. 1st Cir. Ct. 1984)]. In State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988), this Court was faced with a virtually identical situation. The City of Panama City Beach had sought validation of $300,000,000 in investment revenue bonds, the proceeds of which were to be used to purchase an investment contract with a guaranteed rate of return. The City of Panama City Beach proposed to use a portion of the investment earnings derived from the investment contract for valid municipal purposes. The principal invested in such contract, together with the required amount of earnings thereon, were to be pledged as security for such bonds. In particular, the investment contract constituted the sole source of the repayment of those bonds. This Court upheld the validity of such bonds, recognizing that the powers of Florida municipalities are very broad.

In rendering its decision, the Court quoted State of Florida v. City of Sunrise, 354 So.2d 1207 (Fla. 1978), where it had previously upheld the validity of advance refunding bonds:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority. Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, we hold that municipalities may issue "double advance refunding bonds" so long as

such bonds are pursuant to the exercise of a valid municipal purpose (emphasis added). Id. at 1209.

Because of the broad grant of home rule authority contained in both Article VIII, §2 of the Florida Constitution and Chapter 166, Part II, Fla. Stat., the Court correctly approved the proposed bonds, the sole purpose of which was to provide funds to make investments.

The case presently before this Court is on point with State v. City of Panama City Beach, supra, and has added public purpose aspects not present in City of Panama City Beach. Bond proceeds in that case were to be invested with a non-governmental corporation, at a guaranteed rate of return. There was no restriction in the bond proceedings as to the source from which, or the purpose for which, the investment provider obtained funds for paying its obligation under the investment contract in that case. In the instant case, however, the investments will be made in obligations of governmental entities, which obligations themselves can be incurred only in furtherance of a public purpose.

In the Bond Resolution, the Appellee has expressly determined that the issuance of the Bonds constitutes a valid public purpose (App. 1, p. 2). In testimony received in this case, it was represented by the Appellee that, through the issuance of the Bonds, the Plaintiff (i) together with the Local Agencies will be able to benefit from the economies of scale associated with large scale financings, which may otherwise be unrealized if separate financings were undertaken and (ii) will be able to generate income

for the Appellee which will be used for its own valid municipal purposes (App. 8, pp. 46-51, 56, 57; App. 12, p. 8).

One is hard pressed to conclude that minimizing a city's borrowing costs and maximizing a city's lawful income do not serve valid municipal purposes, especially considering the mounting pressures on local governments to meet the demands of a rapidly growing population and the ever-diminishing financial assistance by the state or federal governments for local programs. However, the Appellant fails to admit to this Court that its ruling in State v. City of Panama City Beach, supra, clearly states that the issuance of bonds to purchase investments is permissible if there is a public purpose associated with the program. In the instant case the Appellee has shown, by clear and convincing evidence, a public purpose for the issuance of the Bonds. Any profit realized from the making of the loans will be used only for valid municipal purposes approved by the City Council of the Appellee. See State v. City of Panama City Beach, supra, which approved the use of investment earnings for any municipal purpose.

In accordance with the provisions of §166.021(3)(a), Fla. Stat. cited above, the Legislature enacted §163.01, Fla. Stat., the "Florida Interlocal Cooperation Act of 1969" (referred to herein as the "Interlocal Act"). Pursuant to the Interlocal Act the Legislature sought

> to permit local governments to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage. . . . §163.01(2), Fla. Stat.

Under the express powers of the Interlocal Act, local governments may, by entering into an interlocal agreement, join together with other governmental units to exercise powers. It was under the powers set forth in the Interlocal Act that numerous pool financings have been validated by courts in this State. [See "History of Pool Financings Within the State of Florida" contained in App. 9(d), pp. 5-10].

For the State to prevail in its position, it must clearly establish to the Court that the issuance of revenue bonds by a municipality for the purpose of making loans to units of local government or purchasing local government obligations is prohibited by the Florida Constitution (§166.021(3)(b), Fla. Stat.) or preempted to State or county government by the Constitution or general law (§§166.021(3)(c) and (d), Fla. Stat.).

The State has not, and cannot, cite such prohibitions in the Constitution or in the general laws of the State of Florida. To the contrary, as was presented at the hearing in this case and in the two Memoranda of Law filed by the Appellee [App. 9(b); 9(d)]. Florida law clearly permits the course of action proposed by the Appellee in creating a municipal "pool" loan program.

The Appellee agrees that, as a general rule, municipalities have historically issued bonds for specific projects; however, the authority contained in §163.01, Fla. Stat. (for local governments to combine powers for their mutual benefit) provides clear authority for the issuance of the Bonds.

Appellant argues that the Local Agency Loan Agreements do not constitute "interlocal agreements" because the parties to each such agreement are not identified at present, citing §§163.01(7)(c), (d) and (e), Fla. Stat. Those sections deal with creation of a separate legal entity empowered to issue bonds, which is not a part of the financing plan before this Court. It should be borne in mind that the actual parties to each loan agreement will be clearly identified prior to execution thereof, and each loan agreement, as so executed, will satisfy the requirements of Ch. 163, Fla. Stat.

Chapter 163, Fla. Stat., does provide added public purpose aspects to the financing plan, as the Appellee and the Local Agencies will be able to realize economies of scale by joining forces pursuant to the Interlocal Act. These economies can be achieved through reducing the costs of issuing their Bonds, realizing a profit through investments and obtaining access to financial markets not otherwise available to any of the borrowers acting alone (App. 8, pp. 47-48). The legislature of this state has, in its most recent session, once again endorsed pool financings, stating:

> The issuance of bonds by such entity [created pursuant to Ch. 163, Fla. Stat.] to fund a loan program to make loans to municipalities or counties...for capital projects to be identified subsequent to the issuance of the bonds to fund such loan programs is deemed to be a paramount public purpose. (HB 2513, SB 562; enrolled June 2, 1990).

Although the above-quoted amendment deals with the powers of entities formed pursuant to Ch. 163, Fla. Stat., which consist of

multiple governmental units, surely the legislature did not intend to grant to such entities powers exceeding those which could be exercised by the participating members. Although neither of the cited legislative enactments has yet achieved the force of law, they are nevertheless evidence of current legislative intent. Appellant's argument that the Bonds do not serve a valid public purpose is without merit.

POINT III

ISSUANCE OF THE BONDS WILL NOT VIOLATE ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION OR CHAPTER 75, FLORIDA STATUTES

The Appellant contends that, because any local borrower from the Bond-financed pool has the authority to pledge ad valorem tax revenues for the payment of its loan, the financing plan violates the provisions of Article VII, §12, Fla. Const. It is essential that the Court bear in mind that the Bond issue actually involves two separate and distinct "layers" of governmental borrowing: (i) the Bonds themselves, and (ii) the underlying loans to the governmental entities, or the securities purchased from such entities. Only the first such "layer," that represented by the Bonds themselves, is presently before this Court. The documents are abundantly clear that the Bonds are payable from moneys realized from payment of the underlying loans or Local Agency Securities and certain investment earnings (App. 7, p. 27). Whether the loan payments may properly be secured by a pledge of the borrower's ad valorem taxing power is a question left for another day, with the lower court expressly recognizing that judicial recourse exists for challenging same at an appropriate stage in the proceedings authorizing the loans or Local Agency Securities (App. 12, p. 14).

The record below clearly requires that, prior to any pledge of a local agency's ad valorem tax revenues, all requirements of

applicable law must be satisfied, including conducting an election to approve such a pledge (App. 12, pp. 11, 13).

The Bonds and all payments by the Appellee are limited and special obligations of the Appellee and are payable solely from the Trust Estate created pursuant to the Trust Indenture, the form of which was entered into evidence at trial (App. 7). The Bonds and the Appellee's obligations under the Trust Indenture are solely and exclusively special and limited obligations of the Appellee and do not constitute or create a general obligation of the State or of the Appellee (App. 7, p. 27; App. 12, p. 7).

The Trust Estate, which is the sole source of payment of principal and interest on the Bonds, is comprised of "Local Agency Loan Agreements" and "Local Agency Securities" as defined in the Trust Indenture, and proceeds of the Bonds prior to their expenditure (App. 7, pp. 2, 3, 14). It is abundantly clear that the Trust Estate is not comprised of ad valorem taxes of the Appellee, but is composed only of payments received by the Appellee from the Local Agencies. Access to the ad valorem taxes of the Appellee by Bondholders is specifically prohibited in the clearest terms, absent compliance with the applicable legal requirements prior to implementing such a pledge to the Bondholders (App. 12, p. 13). Article VII, §12, Fla. Const., does not prohibit the issuance of the Bonds, although, under certain circumstances, it could limit the powers of a local borrower with

respect to its power to pledge certain revenue sources to meet its financial obligations.

The Bonds are "revenue bonds" within the meaning of §166.101(4), Fla. Stat., which states:

> (4) The term "revenue bonds" means obligations of the municipality which are payable from revenues derived from sources other than ad valorem taxes on real or tangible personal property and which do not pledge the property, credit, or general tax revenue of the municipality.

The Bonds are not "general obligation bonds" within the meaning of §166.101(2), Fla. Stat., or "ad valorem bonds" within the meaning of §166.101(3), Fla. Stat.:

> (2) The term "general obligation bonds" means bonds which are secured by, or provide for their payment by, the pledge, in addition to those special taxes levied for their discharge and such other sources as may be provided for their payment or pledged as security under the ordinance or resolution authorizing their issuance, of the full faith and credit and taxing power of the municipality and for payment of which recourse may be had against the general fund of the municipality.
>
> (3) The term "ad valorem bonds" means bonds which are payable from the proceeds of ad valorem taxes levied on real and tangible personal property.

Appellant's arguments presented in Point III of its initial brief provide no basis for this Court to reverse the ruling of the trial judge validating the Bonds.

POINT IV

THE CITY OF ORLANDO MAY PROPERLY BORROW MONEYS DERIVED FROM PROCEEDS OF THE BONDS

Under the plan proposed by the Appellee, the proceeds of the Bonds will be deposited with a trustee for application strictly in accordance with the Trust Indenture to the purchase of Local Agency Securities or the origination of loans to local borrowers to finance qualified projects (App. 1; App. 7). This mechanism is designed to remove control of the bond proceeds from the Appellee and vest such control in a fiduciary for the beneficial interest of the bondholders. Under such circumstances, it cannot fairly be said that the proceeds of the bonds are either "held or controlled by" the Appellee. (See, e.g., §166.261(4), Fla. Stat., defining "surplus funds" and cases decided thereunder). The same logic applies in reviewing the authority for the Appellant to act in the capacity of a borrower under the Bond program presently before the Court.

The first granting clause in the Trust Indenture (App. 7, p. 2) expressly assigns to the trustee all of the Issuer's right, title and interest in the Local Agency Loan Agreements and the Local Agency Securities (with certain limited exceptions not germane to this argument). The form of Loan Agreement contains a specific acknowledgment by the borrower that the issuer's rights have been assigned to the trustee, and that the trustee is entitled to act "in the place and stead of" the issuer of the

Bonds. (App. 6, p. 25). In the event the Appellee elects to borrow from this proposed pool, it will be acting in a capacity separate and apart from its capacity as issuer of the Bonds.

Trust law directs that separation of title is essential to the existence of any trust. Legal title must be separated from the beneficial or equitable title. Axtell v. Coons, 89 So. 419 (Fla. 1921). The trustee, not the Appellee, holds legal title to the Bond proceeds and actually originates each loan. Therefore, if the Appellee enters into a Local Agency Loan Agreement, the Appellee effectively contracts with the trustee. Upon receipt of the Bond proceeds by the trustee, the Appellee is divested of control over same. There is no mechanism for the Appellee to regain such control, even if the trustee resigns or is removed. (App. 7, pp. 91, 92). Because title is bifurcated, the result is that the Appellee, as borrower, would be contracting with the trustee. The trustee is the functional equivalent of a loan originator and servicer, and could, in that capacity, execute a loan agreement with the Appellee as borrower.

As a general rule, there must be two parties to a contract. According to the Restatement (Second) of Contracts:

> In one sense a person can make a promise to himself, but the law does not provide remedies for breach of such promises. This rule, which is implicit in the definition of "promise" . . . , has been thought to be a rule of substantive law independent of mere procedural requirements. But it is unlikely to have practical significance unless some other person becomes involved, and in such cases it is an unreliable basis for prediction of legal consequences. Thus a contract may be formed in which the same person is one of several on

> one side of a bargain, and either alone or with others a party on the other side. . . .
>
> One person may have different capacities, as for instance as trustee, as executor, as partner, and as individual. If he purports to make a promise in one capacity to himself in another capacity, there may be legal consequences. . . . (emphasis added) [Restatement (Second) of Contracts, §9]

Applying the foregoing reasoning, if the Appellee were the only party whose interests would be affected by execution of a loan agreement in its capacity as borrower, Appellant's argument may have some credence. However, the Loan Agreement itself expressly declares that

> all covenants, agreements and representations of the Governmental Unit and the [Issuer] . . . are hereby <u>declared to be for the benefit of the holders</u> from time to time of the Bonds and the Bank. (App. 6, p. 31).

Similarly, the City Resolutions, the vehicle by which the Appellee approved the forms of the trust indenture and the loan agreement, is by its very terms made an express contract with the holders of the Bonds (App. 1, p. 9).

Bondholders, as equitable title holders, are further protected because trustees are subject to strict fiduciary standards (see Ch. 737, Fla. Stat.). The trustee operates as a completely independent party and therefore Appellant has no cause for concern regarding the Appellee exercising improper influence over the trustee. This idea further illustrates why title is bifurcated. As initial owner of the Bond proceeds, the Appellee divests itself of all authority with respect thereto by placing legal title with the trustee.

Trustees must operate in good faith, because if they do not, they are liable to equitable title holders for breaching their fiduciary duty. Musler v. Holly, 318 So.2d 530 (Fla. 2d DCA 1975).

The decision whether to originate a loan is not one to be made solely by the Appellee. As the record indicates, the provider of any credit enhancement is the entity taking the financial risk of non-payment by a borrower, while assuring that the bondholders do receive the payments to which they are entitled. (App. 8, p. 54). Where there is no credit enhancement, the bond market itself places constraints on the terms of loans originated under the program. Bonds which could be secured by loans, of the Appellee or of any other borrower, would not be readily marketable if they did not provide adequate security for payment of the Bonds. Furthermore, the trust indenture and loan agreement recite numerous requirements which must be satisfied prior to expending Bond proceeds to fund a loan (App. 6, pp. 19-20; App. 7, pp. 29-30, 49).

Appellant demonstrates no basis for reversing the judgment of the lower tribunal on the basis of alleged violations of simple contract principles.

POINT V

ISSUANCE OF THE BONDS DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF FUTURE CITIZENS OR BORROWERS

Both the Florida and United States Constitutions protect citizens against governmental action abridging their rights without due process of law. Art. I, §9, Fla. Const.; Art. XIV, §1, U.S. Const. Both federal and state courts have had numerous occasions to define "due process of law" as the right to notice and an opportunity to be heard in opposition to action which could adversely affect citizens' rights.

> For more than a century the meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."... It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."... Fuentes v. Shevin, 407 U.S. 67, 80; 92 S.Ct. 1983, 1994; 32 L.Ed.2d 556 (1972), and cases cited therein.

See also Hadley v. Dept of Administration, 411 So.2d 184 (Fla. 1982). Unquestionably, the hearing and the notice thereof must be given at a time and in a manner which is reasonable and meaningful. Craig v. Carson, 449 F.Supp. 385, 391 (M.D. Fla. 1978).

> This means that the hearing concerning the deprivation [of a protected interest], whether before or after the initial deprivation, must be before the decision has become irrevocable and uncontestable. Id.

Taxpayers and local agency borrowers will have ample notice and opportunity to contest the execution of Local Agency Loan

Agreements or the issuance of Local Agency Securities after the instant validation proceedings become final.

The final judgment rendered by the court below expressly reserved the right to contest future Local Agency Loan Agreements at a later time. (App. 12, p. 14). In fact, as a matter of law, a collateral action is the proper procedural vehicle to challenge a Local Agency Loan Agreement or Local Agency Securities. As the State pointed out in its brief, the Final Judgment states in paragraph 25:

> the judgment shall not serve to collaterally estop any person from challenging in a collateral proceeding the
>
> (i) specific project or projects to be acquired, constructed, or erected by the Local Agencies,
>
> (ii) validity of any Local Agency Loan Agreement,
>
> (iii) validity of any Local Agency Securities,
>
> (iv) revenues pledged for the payment of such Local Agency Loan Agreements or Local Agency Securities, or
>
> (v) proceedings of any Local Agency authorizing such Local Agency Loan Agreement or Local Agency Securities (including, but not limited to Local Agency Security of the City of Orlando or a Local Agency Loan Agreement executed by the City of Orlando).

(App. 12, p. 14). The right to subsequently challenge collateral issues concerning the bonds is further supported in Glatstein v. City of Miami, supra.

In addition to the availability of judicial remedies to address defects in a Local Agency's proceedings, the procedural

steps required of such borrowers in connection therewith afford additional due process safeguards. A review of Chapter 166, Fla. Stat. (with respect to municipalities), and Chapter 125, Fla. Stat. (with respect to counties), reveals a plethora of notices which must be given and procedures which must be followed by such governmental entities in conducting their business. Similarly, city and/or county charters typically contain procedural requirements as well, as do numerous statutes permitting the issuance of bonds or governing specific types of governmental entities. See, e.g., Chapter 159, Fla. Stat. (bond financing generally); Chapter 170, Fla. Stat. (municipal special assessments); and Chapter 187, Fla. Stat. (special districts). It defies logic, and ignores applicable law, to conclude that future borrowers and citizens will not have notice or the opportunity to be heard in opposition to the actual borrowings under the Appellee's program by virtue of the Bonds having been validated.

Section 75.02 of the Florida Statutes confers upon the Appellee a right to a validation proceeding with respect to its Bonds, although an issuer of bonds is not <u>required</u> thereby to seek validation. When the court rules on the Appellee's authority to incur bonded debt or issue certificates of debt, a citizen's or future borrower's right of due process is not violated -- the citizen or future borrower can, through procedures required by law to be followed or made available by governmental entities generally, through collateral attack, and through any future validation proceedings, challenge the validity of a Local Agency

Loan Agreement or Local Agency Securities. Reasonable and meaningful notice and opportunity to be heard, as required by the due process clauses of both the Florida and United States Constitutions, are fully afforded at numerous stages of the proceedings which are yet to occur.

CONCLUSION

Bond validation judgments come to the Court with a presumption of correctness, and the Appellant carries the burden to show the record does not support the lower court's ruling. International Brotherhood of Electrical Workers, Local Union No. 177 v. Jacksonville Port Authority, 424 So.2d. 753 (Fla. 1982).

As Appellee has shown, the lower court properly found that it had jurisdiction to validate the Bonds. The Appellee has properly determined that the Bonds serve a valid public purpose. This Court should not substitute its judgment for that of the Appellee on matters which the legislature has placed in the Appellee's discretion, and which are reasonably supported by the evidence. To the extent that the Florida Constitution requires an election prior to any local agency borrowing under the proposed program, the proceedings below and the documents themselves clearly evidence the intent that such requirements be satisfied as a condition precedent to implementing the second layer of governmental borrowing which secures payment of the Bonds. The Appellee has established sufficient safeguards in the structure of the Bond program to insure that, in borrowing from the pool, it stands in precisely the same posture as any other local governmental unit. Ample recourse remains available to interested parties wishing to challenge any defect in future proceedings, thus assuring the protection of their constitutionally guaranteed due process rights.

The Appellee proposes to issue the Bonds in order to provide itself and other local governments a mechanism whereby they can

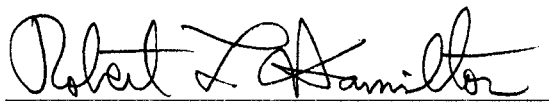
minimize their borrowing costs by providing access to capital markets not otherwise available to them. Florida law clearly authorizes governmental units to join forces when to do so is in the public interest. To deny these entities access to a legally permissible and cost-effective source of funding for improvements they must undertake in order to respond to the pressures of a rapidly growing society would run counter to the best public interest.

* * * * * * * * *

> It is an elemental principle of appellate procedure that every judgment, order or decree of a trial court brought up for review is clothed with the presumption of correctness and that the burden is upon the appellant in all of such proceedings to make error clearly appear. State v. Town of Sweetwater, 112 So.2d 852 at 854 (Fla. 1959).

Wherefore, the Appellant has failed to clearly demonstrate error and, accordingly, the Appellee prays that this Court affirm the judgment of the lower court validating the Bonds.

Respectfully submitted,



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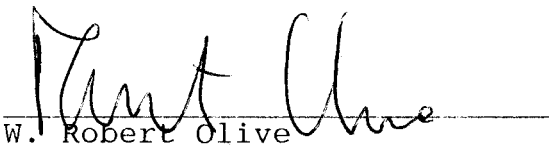

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol Levin Reiss, Esq., Assistant State Attorney, P. O. Box 1673, Orlando, Florida 32802 and Irby Pugh, Esq., 218 Annie Street, Orlando, Florida 32801, on this 12th day of June, 1990.

COUNSEL FOR PLAINTIFF/APPELLEE