

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,

Defendant/Appellant,

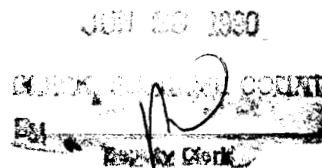
vs.

City of Orlando, Florida, a
municipal corporation of the
State of Florida,

Plaintiff/Appellee.

CASE NO. 75,804

Appeal from Case No. CI88-8819



ON APPEAL FROM THE
CIRCUIT COURT
OF ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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NINTH JUDICIAL CIRCUIT

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PREFACE

In the preface to its answer brief, Appellee, the City of Orlando, objects to Appellant, the State of Florida's, inclusion in the Appendix of the Appellee's Director of Finance's deposition and a proposed Final Judgment. (App. 5 and 11, respectively) Since the City does not phrase its complaint in form of a Motion to Strike, the State is unsure how to respond to same.

In any event, the State asserts inclusion of the deposition and proposed Final Judgment is proper and vital to understanding the nature of the bond proposal before this Court. Furthermore, the deposition was filed with the Court at time of trial and the proposed Judgment was submitted to the Court by the City together with the City's Reply Memorandum of Law.

POINT I

THE SUPREME COURT AND CIRCUIT COURT
ARE WITHOUT JURISDICTION TO
VALIDATE THE CITY OF ORLANDO,
FLORIDA \$500,000,000 REVENUE BONDS.

The City of Orlando seeks to affirm validation of \$500,000,000 City of Orlando "Revenue Bonds". The City's proposal, however, fails to identify any specific projects to be financed, the revenue sources or the local agency to receive the benefit of the bond proceeds. In its answer brief, the City suggests the court has jurisdiction to validate the bonds and that details such as the borrower, the amount to be borrowed, the debt obligation to be purchased and the revenues to secure repayment are collateral issues which can be decided at a later date. This position however ignores the realities of the bond transaction before this Court and the stated statutory reasons for validation in itself. 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) the 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 court is given jurisdiction to hear bond validation cases with the intent of hearing and determining a city's authority to incur debt and the legality of all proceedings taken in connection therewith. See, Section 75.02, Florida Statutes. Furthermore, a judgment of validation is supposed to be ". . . forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby . . . and the validity of such bonds . . . or other obligations . . . or revenues pledged for the payment thereof . . . shall never be called in question in any court by any person or party." Section 75.09.

Contrary to the City's suggestion, case law does not suggest that all of the issues remaining unanswered are collateral and determinable at another date. The City cites McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980), in support of its argument. In that case, the Greater Orlando Aviation Authority sought to validate \$169,275,000 revenue bonds to finance completion of an airport expansion project, to offset cost overruns and additional expenses in connection therewith. McCoy Restaurants, Inc. and Stephen Williams intervened

contending the airline-aviation authority agreements for the lease of the airport facilities unconstitutionally delegated the authority's powers to the private and beneficial use of the airlines. Id. at 253. This Court however rejected the intervenors arguments and held the validity of the lease agreement was a collateral issue.

The McCoy case, however, is distinguishable from the case at bar. In McCoy, the bond proposal identified the recipient of the funds, the amount to be used and the purposes therefore. The lease was clearly a collateral issue. In reaching their decision, the Court noted that validation proceedings were never intended to decide collateral issues or those not going to the power to issue the securities and the validity of the proceedings with relation thereto. Id. at 254, citing State v. City of Miami, 103 So.2d 185 (1958).

The City would have the Court believe that questions as to the identity of the local agency who will borrow the proceeds, the amount to be so borrowed, the debt obligation to be purchased, the specific project and its location to be financed, the revenues to secure repayment and the amount of profit the City realistically anticipates to earn from such program are all collateral. These issues are not slight details which can not be anticipated with some degree of certainty prior to validation. they are central to the questions before this Court and must be answered before the Court's jurisdiction is invoked.

POINT II

THE CITY OF ORLANDO, FLORIDA
REVENUE BONDS IN AN AMOUNT NOT TO
EXCEED \$500,000,000, DO NOT SERVE A
PROPER MUNICIPAL PURPOSE AND ARE
NOT AUTHORIZED BY LAW.

One of the questions to be resolved by this Court is whether the City of Orlando's bond proposal serves a valid public purpose. Appellee suggests the State must prove the bonds in question are prohibited by the Constitution or preempted by the Florida Constitution or state statute in order to prevail. There is no statutory or case authority to suggest that this test should be applied. On the contrary, this Court has long accepted it is within the proper inquiry of the court to determine whether bonds serve a public purpose. State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988).

The City cites State v. Housing Finance Authority, 376 So.2d 1158 (Fla. 1979), in support of its argument that the City's finding of public purpose should not be overturned unless it constitutes an abuse of discretion, is clearly erroneous or is beyond legislative authority. In the Housing Finance Authority case, however, the legislature specifically made a finding that the financing and construction of housing are exclusively public uses and purposes for which public money may be spent and are governmental functions of public concern. Id. at 1159. The Supreme Court upheld revenue bonds issued pursuant to that statutory authority and held that a legislative declaration of public purpose is presumed to be valid and should be deemed

correct unless so clearly erroneous to be beyond the power of the legislature. Id. at 1160.

There is no specific statutory authority in this case. Although the City draws upon Chapter 163, Part I and Section 166.101 and 111, Florida Statutes in support of its position, these sections do not specifically authorize the transaction in question. Although the Florida Constitution gives cities home rule powers, cities may only exercise powers which serve a municipal purpose. See, Article VIII, Section 2b, Florida Constitution.

A municipal purpose cannot even be determined in the instant case. The City suggests the public purpose is twofold and will allow the City to (i) benefit from the economies of scale associated with large scale financings and (ii) to generate income for the City to be used for its own purposes. See, Appellee's Answer Brief at pages 9-10. As discussed in detail in the State's Initial Brief at page 21, the City presented no concrete evidence as to how much money will be derived as profit if the bonds are to be used for investment purposes or any indication as to how much money the City planned to invest in this manner, which local government units would borrow the proceeds, the amount of funds to be borrowed or what projects the funds would eventually finance.

Even the trial judge questioned whether the bonds could be assessed in terms of public purpose and asked whether the municipal purpose of the bond issue might become something demonstrated by mirrors. See, (App.13, pp.11-12). The cases cited by the City on pages 6-8 of its Answer Brief have little to

no bearing on the instant case. As discussed at length in the Initial Brief, State v. City of Panama City Beach, supra, is not dispositive and is distinguishable on many points. The City cites City of Gulf Breeze v. State, Case No. 85-C-1098 (Fla. 1st Cir. 1985) and Escambia County v. State, Case No. 84-2691-CA-01 (Fla. 1st Cir. 1984). See, (App.15). These bond proposals were prior to the changes in the United States Tax Code and apparently issued on a tax exempt basis and thus, not on point to the issues in question in this case. See, Initial Brief at pages 17-18, discussion of history of taxable bonds.

The City also cites the City of Tampa v. State, CI88-7214 (Fla. 13th Cir. 1988). The City of Tampa's Final Judgment like the City of Gulf Breeze and Escambia County are circuit court cases not binding on this Court. Furthermore, they do not indicate whether at anytime in the proceedings the projects were identified, the amounts needed to finance each project, the revenues to secure repayment, the entities involved, whether other counties were served with the Complaint for validation or whether these issues were relevant at all to the proceedings at the time.

The Florida Supreme Court has not heard a case with the numerous unanswered variables present in this case. Since the City has not identified the amount or realistic profit to be earned by the loan of the bond proceeds or the purchase of local government securities, the local agencies involved, the revenues to secure repayment of the bonds and/or local agency loans or securities, the particular projects or their eventual location, a public purpose cannot even be identified.

POINT III

THE CITY OF ORLANDO, FLORIDA
REVENUE BONDS VIOLATE ARTICLE VII,
SECTION 12 OF THE FLORIDA
CONSTITUTION AND SECTION 75,
FLORIDA STATUTES.

Appellee admits in its Answer Brief at page 14 that the bonds are payable from moneys realized from payment of the underlying loans or local agency securities. The trust indenture clearly calls for the possibility of a borrowing municipality to secure its loan or debt obligation with a pledge of its ad valorem taxes. In section 4.01 the trust indenture states:

The Bonds and the Issuer's other obligations hereunder are solely and exclusively special and limited obligations of the Issuer and do not constitute or create an obligation, general or special, or debt, liability or moral obligation of the State or any political subdivision of the State (other than the Issuer to the extent provided herein and the Governmental Units to the extent provided in their respective Loan Agreements).

(App.7, p.48)

Since it is not known which governmental unit will borrow the proceeds or which local agency's securities the City of Orlando intends to purchase, or the funds that governmental unit will use to secure repayment, the City of Orlando cannot conclusively state that the bonds will not pledge funds payable from ad valorem taxes.

Contrary to state statute and the Florida Constitution, Appellee suggests that even if ad valorem taxes will be pledged as security for the loan agreement or debt obligation the bonds may be validated so long as an election is held at a later date.

Article VII, Section 12 of the Florida Constitution only authorizes governmental bodies to issue bonds payable from ad valorem taxation and maturing more than twelve months after issuance when approved by a vote of the electors. Furthermore, 75.03, Florida Statutes, requires "As a condition precedent to filing complaint for the validation of bonds . . . or district desiring to issue them shall cause an election to be held to authorize the issuance of such bonds . . . and show prima facie that the election was in favor of the issuance thereof"

Therefore, the City of Orlando's bond proposal should not be validated until the City can or has complied with the Florida Constitution and Chapter 75, Florida Statutes.

POINT IV

THE CITY OF ORLANDO, FLORIDA
REVENUE BONDS IN AN AMOUNT NOT TO
EXCEED \$500,000,000 VIOLATE SIMPLE
CONTRACT PRINCIPLES.

As discussed in the Initial Brief, the City must enter into a contract with itself for the City to use the bond proceeds for its own purposes. The City suggests it can do this because it is really entering into a contract with the Trustee which it asserts is a separate legal entity. The City claims that the trust is a separate entity with distinct legal title since the City does not hold or control the bond proceeds once placed into the trust estate.

The trustee, however, is not a completely separate legal entity from the City of Orlando. On the contrary the trust is actually set up to act as an agent for the City for the protection of the bond holders. The City would have this Court believe that trusts in bond issues are identical to trusts found in the estates and trusts fields and this is unfounded.

Contrary to the City's contention, the City does maintain some control over the bond proceeds and does not divest itself of ownership or interest in the funds.

For example, the bond documents allow the bond proceeds to be invested for a period of time for profit before they must be loaned to a local governmental unit or used to purchase a local government security and will be used to allow the City to make investments by purchasing these government securities. Once the monies are in the trust funds the trust indenture allows the City

to direct the Trustee to invest the proceeds in a specified manner.

Moneys in the Funds and Accounts shall at the direction of the Issuer, be invested in Investment Securities by the Trustee as directed and designated by the Issuer in a certificate of, or telephonic advice promptly confirmed by a certificate . . . the Issuer shall have the right to designate the investments to be sold and to otherwise direct the Trustee in the sale or conversion to cash of the investments made with the moneys in the Funds and Accounts . . .

(App.7, p.78)

Clearly, this allows the City to control the Trustee's funds and investments with the ease of a telephone communication and at the very least implies the City maintains some interest in the trust funds which indicates some interest in the title as well.

In its Answer Brief the City suggests that the record reflects that the market and any credit enhancements, if so provided, would place sufficient restraints on the bonds and loan agreement. The State asserts the record does not support this conclusion. On the contrary, the record does show that in order for the City to use the bond proceeds for its own use the City may on one hand direct the Trustee's investment of the bond proceeds and on the other enter into a Loan Agreement with itself. By definition this cannot result in a valid and enforceable contract and should not be allowed.

POINT V

THE CITY OF ORLANDO, FLORIDA
REVENUE BONDS IN AN AMOUNT NOT TO
EXCEED \$500,000,000 VIOLATE THE DUE
PROCESS OF FUTURE CITIZENS AND
BORROWERS.

The Final Judgment entered by the lower court leaves many of the issues subject to later review and states it shall not serve to collaterally estop any person from challenging in a collateral proceeding the

(i) the 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 City suggests that because these issues are subject to later review due process has been satisfied. This, however misses the point. Citizens of future borrowers will not have an opportunity to object to the very essence of this bond validation

proceeding; whether the proposed financing mechanism itself is authorized by law and whether the bonds serve a valid public purpose. These questions will be forever barred without giving citizens of future local agencies an opportunity to be heard.

Furthermore, Appellee suggests that validation is voluntary perhaps implying that perhaps it is unnecessary. There are several reasons an issuer would want to validate its bonds but if an issuer chooses to do so, it subjects itself to public scrutiny and judicial inquiry as provided by both statutory and case law.

CONCLUSION


As stated in both the Initial Brief and the foregoing argument, the City of Orlando's Bond Proposal leaves too many unanswered questions. Since there has been no concrete evidence as to how the proceeds will be spent, what projects the proceeds will finance, the revenues to secure repayment and/or whether the bonds will be used for anything other than investment purposes, this issue is not yet ripe for determination and the Court is without jurisdiction to confirm validation. The bonds are not authorized by law, and do not serve a public purpose.

Citizens and taxpayers of future borrowers will be affected without notice and the opportunity to be heard. The proposal's own documents do not allow the City of Orlando to use the bonds for its own projects and do not adequately prohibit a pledge of credit of the borrowing municipality in violation of the Florida Constitution.

Wherefore, the State of Florida prays this Court deny validation or return the case to the Circuit Court for further proceedings or until such time as the City of Orlando can address the variables discussed herein.

Respectfully submitted,

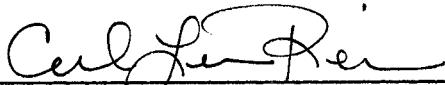
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Appellant has been furnished by U.S. Mail to Robert L. Hamilton, Esquire, City Attorney, 400 S. Orange Avenue, Orlando, Florida 32801; W. Robert Olive, Esquire and Randall W. Hanna, Esquire, Bryant, Miller & Olive, P.A., 201 S. Monroe Street, Suite 500, Tallahassee, Florida 32301 and Irby Pugh, Esquire, 218 Annie Street, Orlando, Florida 32801, this 28th day of June, 1990.



CAROL LEVIN REISS
ASSISTANT STATE ATTORNEY