

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUN 8 1990

CLERK, SUPREME COURT

By 
Deputy Clerk

THE STATE OF FLORIDA, et al.,

Appellant,

v.

CASE NO. 75,856

PALM BEACH COUNTY, FLORIDA,

Appellee.

ON APPEAL FROM A BOND VALIDATION JUDGMENT
OF THE CIRCUIT COURT OF
PALM BEACH COUNTY

ANSWER BRIEF OF APPELLEE

Edward W. Vogel III
Florida Bar No.: 221910
Henry M. Morgan, Jr.
Florida Bar No.: 351679
HOLLAND & KNIGHT
Post Office Box 32092
Lakeland, Florida 33802
Telephone: (813) 682-1161

and

William G. Capko
Assistant County Attorney
Palm Beach County Attorney's Office
Suite 601, 301 North Olive Avenue
West Palm Beach, Florida 33401
Telephone: (407) 355-2225
Florida Bar No.: 291129

Attorneys for Appellee

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii-iv
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	
I. PINE CREST IS A PROPERLY CONSTITUTED NOT-FOR-PROFIT CORPORATION UNDER CHAPTER 617, FLORIDA STATUTES, AND IS NOT GOVERNED BY CHAPTER 623, FLORIDA STATUTES.	6
II. THE COUNTY HAS THE POWER TO ISSUE THE BONDS BECAUSE THE BONDS, AND THE FACILITIES THEY FINANCE, ARE AMPLY SUPPORTED BY A PROPER PUBLIC PURPOSE.	9
CONCLUSION	15
CERTIFICATE OF SERVICE	16

TABLE OF CITATIONS

	Page
<u>CASES</u>	
<u>Butler v. Carter,</u> 123 So.2d 313 (Fla. 1960)	13
<u>Chicken'N'Things v. Murray,</u> 329 So.2d 302 (Fla. 1976)	13
<u>City of Opa Locka v. State,</u> 257 So.2d 100 (Fla. 3d DCA 1972)	13
<u>Davis v. Sails,</u> 318 So.2d 214 (Fla. 1st DCA 1975)	13
<u>DeSha v. City of Waldo,</u> 444 So.2d 16 (Fla. 1984)	13
<u>Doane v. Lee County,</u> 376 So.2d 852 (Fla. 1979)	9
<u>Linscott v. Orange County Industrial Development Authority,</u> 443 So.2d 97 (Fla. 1983)	10,11
<u>Nelson v. State ex rel. Quigg,</u> 23 So.2d 136 (Fla. 1945)	13
<u>Nohrr v. Brevard County Educational Facilities Authority,</u> 247 So.2d 304 (Fla. 1971)	14
<u>Pepin v. Division of Bond Finance,</u> 493 So.2d 1013 (Fla. 1986)	13
<u>Speer v. Olson,</u> 367 So.2d 207 (Fla. 1978)	9,10
<u>State v. City of Daytona Beach,</u> 158 So. 300 (Fla. 1934)	14
<u>State v. Daytona Beach Racing and Recreational Facilities District,</u> 89 So.2d 34 (Fla. 1956)	11
<u>State v. City of Panama City Beach,</u> 529 So.2d 250 (Fla. 1988)	11,13
<u>State v. Dade County,</u> 142 So.2d 79 (Fla. 1962)	13

<u>State v. Florida State Turnpike Authority,</u> 80 So.2d 337 (Fla. 1955)	13, 14
<u>State v. Florida State Turnpike Authority,</u> 134 So.2d 12 (Fla. 1961)	13
<u>State v. Housing Finance Authority</u> <u>of Polk County,</u> 376 So.2d 1158 (Fla. 1979)	11
<u>State v. Jacksonville Port Authority,</u> 266 So.2d 1 (Fla. 1972)	11
<u>State v. Jacksonville Port Authority,</u> 305 So.2d 166 (Fla. 1974)	11
<u>State v. Leon County,</u> 400 So.2d 949 (Fla. 1981)	9, 13
<u>State ex rel. McIver v. Swank,</u> 12 So.2d 605 (Fla. 1943)	12
<u>State v. Monroe County,</u> 3 So.2d 754 (Fla. 1941)	11
<u>State v. Orange County Industrial</u> <u>Development Authority,</u> 417 So.2d 959 (Fla. 1982)	11
<u>State v. Putnam County Development Authority,</u> 249 So.2d 6 (Fla. 1971)	11
<u>State v. Sunrise Lake Phase II</u> <u>Special Recreation District,</u> 383 So.2d 631 (Fla. 1980)	13
<u>Town of Medley v. State,</u> 162 So.2d 257 (Fla. 1964)	13
<u>Zedek v. Indian Trace Community</u> <u>District,</u> 428 So.2d 647 (Fla. 1983)	13

CONSTITUTION

Article VIII, Section 1(g), Constitution of Florida (1968)	5,9
Article IX, Constitution of Florida (1968)	10
Article V, Section (3)(b)(2), Constitution of Florida (1968)	1

FLORIDA STATUTES

Chapter 159, Florida Statutes (1989)	9,10
Chapter 617, Florida Statutes (1989)	5,6
Chapter 623, Florida Statutes (1989)	5,6,7
Section 75.08, Florida Statutes (1989)	1
Section 125.01, Florida Statutes (1989)	5,9
Section 617.01, Florida Statutes (1989)	7
Section 617.01(9), Florida Statutes (1957)	6
Section 617.13, Florida Statutes (1989)	6
Section 617.16-19, Florida Statutes (1989)	6,7
Section 623.13, Florida Statutes (1989)	5,7,8

OTHER AUTHORITIES

McQuillan, <u>Law of Municipal Corporations</u> §32.61 (3d ed. 1977)	13
---	----

STATEMENT OF THE CASE AND FACTS¹

The Statement of the Case and Statement of the Facts presented in the State of Florida's brief are incomplete, and thus do not convey an adequate understanding of the background of this controversy. To ensure that the Court is fully apprised of the factual and procedural matters that are relevant to the resolution of this appeal, Palm Beach County submits the following statement of the case and facts.

This is an appeal by the State of Florida (the "State") from a Final Judgment of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County validating certain Industrial Development Revenue Bonds (Pine Crest Preparatory School, Inc. Project), Series 1989 (the "Bonds") to be issued by Palm Beach County (the "County") [A 1]. The Court has jurisdiction of this appeal pursuant to article V, section (3)(b)(2), Florida Constitution, and section 75.08, Florida Statutes (1989).

Pine Crest Preparatory School, Inc. ("Pine Crest") was founded in 1934 and became incorporated as a for-profit corporation under Florida law on January 26, 1959, although it has actually operated since incorporation as a not-for-profit corporation and has been a designated not-for-profit corporation

¹The abbreviation "A" used throughout this brief will refer to the Appendix to the Appellant's Initial Brief, and the abbreviation "SA" will refer to the Supplemental Appendix submitted with this Answer Brief. The abbreviation "Br." will refer to the Initial Brief of the Appellant.

for federal income tax purposes since 1962 [A 53-54,85, SA 12]. On September 26, 1989, Pine Crest formally became a non-profit corporation under Florida law pursuant to an Order of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County [A 86-87].

Pine Crest has for a number of years operated a private school for students from pre-kindergarten through high school grade levels in Fort Lauderdale, Broward County [A 97, SA 12]. In May of 1987, Pine Crest acquired the assets of the Boca Raton Academy, including its campus and school building in Boca Raton, Palm Beach County (the "School"), assuming debts in an amount of approximately \$1,600,000 in connection with that acquisition [A 55-58, SA 9]. Current enrollment at the School is 690 students [A 56], with students from pre-kindergarten through the eighth grade being served [A 63].

Upon acquiring Boca Raton Academy, Pine Crest determined to expand the School through the construction of a student activity center, including a gymnasium and a swimming pool (the "Project"), at a cost of approximately \$1,300,000 (\$800,000 for the gymnasium and \$500,000 for the pool) [A 56,17, SA 9,20,23]. Pine Crest applied to the County for issuance of County revenue bonds to finance the Project and to refinance the debt assumed by Pine Crest when it acquired the School [SA 5-75]. In support of this application, the president of Pine Crest made a presentation

to the Palm Beach County Board of County Commissioners, which unanimously approved the application [SA 4].

On December 20, 1988, the Board of County Commissioners of Palm Beach County adopted Resolution No. R-88-2202 (the "Resolution"), authorizing issuance of the Bonds [A 16-22]. The Board expressly found that the issuance of the Bonds by the County and the lending of the proceeds thereof to Pine Crest would serve a proper public purpose by providing additional educational opportunities unavailable in public schools within Palm Beach County, by helping to alleviate the overcrowding in the public schools, and by increasing or preserving opportunities for employment within Palm Beach County [A 18-19]. The Resolution provides that the proceeds of the Bonds would be loaned by the County to Pine Crest and that the faith and credit of the County would not be pledged to the repayment of the Bonds; instead, the Bonds will be payable solely from amounts paid by Pine Crest to the County to repay the loan, which would be secured by a mortgage on the School [A 19-20, 24-25].

The County filed its Complaint [A 9], seeking to validate the Bonds and naming as defendants the State and the taxpayers, property owners, and citizens of the County, including nonresidents owning property or subject to taxation therein. The Complaint alleges that the Bonds will be valid and binding limited obligations, payable solely from revenues derived from

repayments of a loan of the proceeds of the Bonds to be made by the County to Pine Crest [A 6].

The trial court entered an Order to Show Cause [SA 1], which was duly published in a newspaper published and of general circulation in Palm Beach County [SA 3]. After the State filed an Answer [A 31] and then an Amended Answer with affirmative defenses opposing the validation of the Bonds [A 33], a hearing was conducted on January 8, 1990 and March 15, 1990 [A 43-82]. On March 16, 1990, the trial court entered a Final Judgment validating the Bonds, expressly adjudicating that the issuance of the Bonds "is for a proper and lawful public purpose and is fully authorized by law." [A 1-8.] The State now appeals from that Final Judgment.

SUMMARY OF ARGUMENT

POINT I

Pine Crest was incorporated as a for-profit corporation prior to the enactment of Chapter 623, Florida Statutes (1989). No provision of Chapter 623 permitted it to convert from a for-profit status to a not-for-profit status; it could do so only under Chapter 617. Therefore, the restrictions of section 623.13, Florida Statutes (1989) do not apply.

Even if section 623.13 were applicable, it would not prevent the County from participating in a conduit financing, where the County would have no involvement in operating, controlling, or administering the private school being financed, and no County funds would be pledged.

POINT II

The County has the power to issue the Bonds being validated pursuant to article VIII, section 1(g) of the Florida Constitution, and section 125.01, Florida Statutes (1989), so long as the Bonds are supported by a proper public purpose. The Board of County Commissioners expressly found that a sufficient public purpose would be served by the financing, and that finding is presumed valid and should not be disturbed absent a determination that it is patently erroneous, capricious, or unfounded. Because the State has failed to refute the Board's findings, those findings are reasonable and should not be disturbed.

ARGUMENT

POINT I

PINE CREST IS A PROPERLY CONSTITUTED NOT-FOR-
PROFIT CORPORATION UNDER CHAPTER 617,
FLORIDA STATUTES, AND IS NOT GOVERNED BY
CHAPTER 623, FLORIDA STATUTES.

The State initially contends that Pine Crest is not lawfully organized under Chapter 617, Florida Statutes (1989), but must be organized under Chapter 623, which contains a provision that prohibits the financing of private schools through public assistance. § 617.13, Fla. Stat. (1989). Pine Crest was incorporated as a for-profit corporation in January of 1959, several months prior to the enactment of Chapter 623, Florida Statutes (1989).² Although it has, at least since 1962, operated as a non-profit corporation for federal tax purposes, and has engaged solely in non-profit activities for non-profit purposes, its incorporated status under Florida law as a for-profit corporation continued for many years.

When the decision was reached to become a not-for-profit corporation under state law, Pine Crest had no choice but to utilize Chapter 617, Florida Statutes (1989). Chapter 617 contains the only provisions of Florida law that provide a method by which a for-profit corporation can convert to a not-for-profit corporation. See §§ 617.16-617.19, Fla. Stat.

²Pine Crest was unable to incorporate as a not-for-profit corporation because at the time of its formation, its debt exceeded the limitations then imposed by Section 617.01(9), Florida Statutes (1957) [A 54].

(1989). No such provisions exist in Chapter 623 or under any other statute. Therefore, the conversion of Pine Crest to a not-for-profit corporation under section 617.17, Florida Statutes (1989), is not violative of section 617.01, Florida Statutes (1989).

The only way that Pine Crest could have utilized the provisions of Chapter 623 would have been to dissolve and to reform itself as a new corporation. Since it was a going concern at the time that the decision was made to become a non-profit corporation, with ongoing legal and contractual relationships and obligations, dissolution was not a viable alternative. Pine Crest could not cease doing business, dissolve, and reincorporate, and there is no provision of Chapter 623 or any other statute that required it to do so.

Because Pine Crest was not formed under Chapter 623, the provisions of section 623.13 do not apply (just as they would not apply if Pine Crest was, for state and federal purposes, a for-profit corporation). Therefore, section 623.13 cannot be deemed to prohibit the issuance of the Bonds contemplated in this case.

Even assuming, arguendo, that section 623.13 were applicable, the provisions of that statute do not prevent a financing of the type contemplated here. The County is merely

acting as a conduit to provide the Bonds with a tax-exempt status, and thus a lower rate of interest. The County will not in any way operate, direct, control, or administer Pine Crest or the School. No funds, tax revenues, or other revenues of the County are being pledged or used to pay the Bonds; only the funds and properties of Pine Crest are so pledged. The sole source of payment for the Bonds will be loan repayments made by Pine Crest, and Pine Crest's primary source of funding is tuition paid by students utilizing Pine Crest's facilities. Therefore, the School "shall be administered, supervised, operated, financed and controlled exclusively by private persons and private entities and their funds" within the meaning of section 623.13.

POINT II

THE COUNTY HAS THE POWER TO ISSUE THE BONDS
BECAUSE THE BONDS, AND THE FACILITIES THEY FINANCE,
ARE AMPLY SUPPORTED BY A PROPER PUBLIC PURPOSE.

The law in Florida is clear that bond validation proceedings are designed solely to determine whether the entity issuing bonds has the power to issue them and whether it has exercised that power in accordance with applicable law. State v. Leon County, 400 So.2d 949 (Fla. 1981); Doane v. Lee County, 376 So.2d 852 (Fla. 1979); Speer v. Olson, 367 So.2d 207 (Fla. 1978). The final three points raised by the State can be distilled to one issue -- whether the County has the legal authority to finance the Project through the issuance of the Bonds.

The State's contention that the County is not empowered to issue the Bonds because the Project does not fall within the types of projects authorized to be financed under Chapter 159, Florida Statutes (1989), ignores the home rule powers of the County. Article VIII, section 1(g), Florida Constitution, and section 125.01, Florida Statutes (1989), grant to the governing body of a county the full power to carry on county government. Unless the Legislature has preempted a particular subject relating to county government by general or special law, the county governing body is vested by these provisions with full authority to act through the exercise of home rule power. Speer

v. Olson, supra.³ Neither Chapter 159 nor any other statute preempts the power of the County to issue bonds for a proper public purpose. Thus, so long as the issuance of the Bonds to finance the Project is supported by a proper county purpose, the County is clearly empowered to issue the Bonds.

The only remaining question is whether the contemplated use of the Bond proceeds constitutes a proper public purpose. The State argues, somewhat inconsistently,⁴ that for the issuance of the Bonds to be supported by a proper county purpose, the benefit to the public through the issuance of the Bonds must be paramount. That assertion, however, overlooks the current status of the law in this area.

This Court, through a series of decisions over the last twenty years, has determined that the "paramount public purpose" test developed in decisional law under the 1885 Constitution has lost much of its viability. The test is still applicable where a pledge of public credit is involved, but where, as here, no such pledge is involved, it is sufficient to show only that a public purpose is served. Linscott v. Orange

³The State's argument [Br. 12] that the County's powers are preempted by Article IX of the Florida Constitution is incorrect. Clearly that provision deals only with public education and not private schools.

⁴The State admits at one point in its brief that the "paramount public purpose" test is no longer necessarily appropriate [Br. 16].

County Industrial Development Authority, 443 So.2d 97 (Fla. 1983). It is immaterial that the primary beneficiary of the Project is a private party if the public interest, even though indirect, is reasonable and adequate. State v. Putnam County Development Authority, 249 So.2d 6 (Fla. 1971); State v. Housing Finance Authority of Polk County, 376 So.2d 1158 (Fla. 1979).

What constitutes a sufficient public purpose to support a bond issue is not static and inflexible. State v. Monroe County, 3 So.2d 754 (Fla. 1941). As with other aspects of bond law, the definition of public purpose has undergone, and continues to undergo, changes. State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988). Given this Court's prior determinations that a public purpose is served by the financing of a race track (see State v. Daytona Beach Racing and Recreational Facilities District, 89 So.2d 34 (Fla. 1956)), a bottling plant (see State v. Jacksonville Port Authority, 266 So.2d 1 (Fla. 1972)), a commercial laundry (see State v. Jacksonville Port Authority, 305 So.2d 166 (Fla. 1974)), a motel (see State v. Orange County Industrial Development Authority, 417 So.2d 959 (Fla. 1982)), or an insurance company headquarters building (see Linscott, supra) for profit-making corporations, the financing of elementary school facilities for a non-profit corporation should certainly be sustained.

The Board of County Commissioners, after reviewing the application of Pine Crest [SA 8,19] and hearing testimony regarding the School, its curriculum, its admission policies, the number of jobs generated by Pine Crest, the Project and the Bonds, unanimously adopted Resolution No. R-88-2202 [SA 4]. The Board expressly found that the financing of the Project and the refinancing of the debt assumed by Pine Crest when it purchased the School will serve a proper county purpose (i) by providing additional educational opportunities unavailable in the public schools, (ii) by helping to alleviate overcrowding in the public schools, and (iii) by providing or preserving opportunities for gainful employment in the County [A 18,19]. These findings are uncontroverted in the record. In fact, the State has not contested the determinations of the Board of County Commissioners either in the trial court or on appeal, but rather has attempted to cloud the issue by making assertions regarding Pine Crest's admissions policies, which assertions are unsupported by the record.

Where public officials meet as an official body and find by official resolution the existence or nonexistence of any fact within their authority to determine, the finding is conclusive. State ex rel. McIver v. Swank, 12 So.2d 605 (Fla. 1943). Questions of business policy and judgment incident to bond issues are beyond the scope of judicial interference, and are the responsibility and prerogative of the governing body of

the governmental unit which is issuing the bonds. DeSha v. City of Waldo, 444 So.2d 16 (Fla. 1984); Town of Medley v. State, 162 So.2d 257 (Fla. 1964). Findings of public purpose by the County are presumed valid and should be considered correct unless patently erroneous,⁵ or capricious or unfounded.⁶ The motives of the public body and the evidence that was presented to it in order for it to make its determination are not subject to judicial review. City of Opa Locka v. State, 257 So.2d 100 (Fla. 3d DCA 1972).

The State has asked this Court to substitute its judgment regarding the public purpose of this financing for that of the County's Board of County Commissioners. Florida law is settled, however, that a court has neither the responsibility nor the authority to substitute its judgment for that of officials who have determined that bonds should be issued for a purpose deemed by them to be in the best interest of those whom they represent. State v. Leon County, *supra*; State v. Dade County, 142 So.2d 79 (Fla. 1962); State v. Florida State Turnpike Authority, 134 So.2d 12 (Fla. 1961); State v. Florida State

⁵Pepin v. Division of Bond Finance, 493 So.2d 1013 (Fla. 1986); Zedeck v. Indian Trace Community District, 428 So.2d 647 (Fla. 1983); State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 631 (Fla. 1980).

⁶State v. City of Panama City Beach, *supra*.; Chicken'N'Things v. Murray, 329 So.2d 302 (Fla. 1976); Butler v. Carter, 123 So.2d 313 (Fla. 1960); Nelson v. State ex rel. Quigg, 23 So.2d 136 (Fla. 1945); Davis v. Sails, 318 So.2d 214 (Fla. 1st DCA 1975); McQuillan, Law of Municipal Corporations § 32.61 (3d ed. 1977).

Turnpike Authority, 80 So.2d 337 (Fla. 1955); State v. City of Daytona Beach, 158 So. 300 (Fla. 1934).

No showing has been made in the present case that the findings of the County in Resolution No. R-88-2202 are erroneous or capricious, or that they are not based on competent, substantial evidence. The importance of educating our youth is self-evident, and the overcrowding of and lack of funding for our public schools is well known. This Court clearly recognized the public benefit of private education when it validated bonds to finance a dormitory and cafeteria in Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971). The findings of the County that the public will be benefitted by a private school, which can help to alleviate the burden upon the public school system, can offer students curriculum alternatives not available in public schools, and can preserve the jobs of teachers, administrators, and other staff, are clearly substantiated and are sufficient to justify issuance of the Bonds in this case.

CONCLUSION

For the reasons set forth above, the Final Judgment entered by the trial court validating the Bonds should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class mail this 7th day of June, 1990, to David H. Bludworth, State Attorney, 15th Judicial Circuit, and Henry Phillip Yorston, Assistant State Attorney, 224 Datura Street, 7th Floor, Harvey Building, West Palm Beach, Florida 33401; Alan Pellingra, Esquire, Gunster, Yoakley, Criser & Stewart, P.A., Suite 500, 777 South Flagler Drive, West Palm Beach, Florida 33401; and William G. Capko, Esquire, Assistant County Attorney, Suite 601, 301 North Olive Avenue, West Palm Beach, Florida 33401.

Edward W. Vogel III

Edward W. Vogel III
Florida Bar No.: 221910
Henry M. Morgan, Jr.
Florida Bar No.: 351679
HOLLAND & KNIGHT
Post Office Box 32092
Lakeland, Florida 33802
Telephone: (813) 682-1161

and

William G. Capko
Assistant County Attorney
Palm Beach County Attorney's Office
Suite 601, 301 North Olive Avenue
West Palm Beach, Florida 33401
Telephone: (407) 355-2225
Florida Bar No.: 291129

Attorneys for Appellee