IN THE SUPREME COURT FOR THE STATE OF FLORIDA

FILED
SID J. WHITE
MAY 11 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

WASHINGTON SHORES HOME-OWNERS' ASSOCIATION, Ulysses Hood, Pastor Sam Hoard, Rufus Brooks, Johnny Robinson, Charlie Jean Salter, Bettye S. Smith, Jackie Perkins, Kat Gordon, Wardell Sims, James Jackson and Maurice Poitier, as

Appellants-Intervenor Below,

vs.

CITY OF ORLANDO, Florida, a municipal corporation of the State of Florida,

Appellee-Plaintiff Below,

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THE STATE OF FLORIDA, and the Taxpayers, Property Owners, and Citizens of the City of Orlando, Florida, including Non-Residents owning property or subject to taxation therein,

Respondent Below. /

CASE NO. 79,621

Appeal from Case No. CI-91-10917 (Orange Co. Cir. Ct.)

ON APPEAL FROM THE CIRCUIT COURT OF ORANGE COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANTS

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## PREFACE

Appellants are 10 African-American individuals who are homeowners in Orlando, Florida, and a Washington Shores Homeowners Association, formed by them and others more than a decade ago. They intervened in the action below during the second day of hearings. They will be referred to herein as "The Homeowners."

All of them except Bettye S. Smith are named plaintiffs in a proposed class action against the City of Orlando and in its mayor, filed in the U.S. District Court for the Middle District of Florida (Committee of Organized Groups ["COG"] et al. v. City of Orlando et al., #88-962-Civ-Orl-20 [M.D. Fla. 1988].) The case will be referred to as "The COG case."

The Appellee, the City of Orlando, Florida, a municipal corporation of the State of Florida, which filed the complaint below in this bond validation proceeding, will be referred to as "The City" or "Orlando." The State of Florida, which objected below to the proposed bond validation, will be referred to as "The State" or "Florida."

Mrs. Smith and Mrs. Jackie Perkins, one of the other individual plaintiffs, own homestead property which the City has sought to take for use in a proposed extension of a Florida state road known as the John Young Parkway. In the hearing below, the City revealed that it seeks $30-35 million of the proposed $150 million bond for the building of that section of the state road. The road will be referred to as "The John Young Project."

Appellants' Appendix will be referred to as "A- _____."

## JURISDICTIONAL STATEMENT

This is an appeal pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a final Order issued pursuant to Chapter 75, Florida Statutes, validating bonds.

## STATEMENT OF THE CASE

This is an appeal from a Final Judgment of the Circuit Court of the Ninth Judicial Circuit in and for Orange County validating Orlando Revenue Bonds not to exceed $150,000,000 ("$150 million"). The City had enacted an ordinance "providing for the construction and acquisition of additions, extensions and improvements to, and the repair of, municipal capital improvements and for refunding of indebtedness of the City issued for such purposes; providing for the issuance of not exceeding $150 million capital improvement special revenue bonds of the City to be applied to the payment of the cost of such additions, extensions, improvements and repairs and to refund all or portions of certain currently outstanding debt providing for payment of such bonds from certain legally available non-ad valorem revenues of the City budgeted and appropriated therefor; making certain covenants and agreements in connection therewith; and providing an effective date."

On Dec. 17, 1991, The City filed a Complaint pursuant to Chapter 75, Florida Statutes, to seek validation of the described capital improvement special revenue bonds not to exceed $150 million. On that date, the City served an Order to Show Cause on the State of Florida, requiring the State, through the State Attorney of the Ninth Judicial Circuit, to show cause why the prayer of said Complaint should not be granted and the bonds validated.

The Order to Show Cause, noticing a hearing at 4 p.m., Jan. 27, 1991, was published in the form submitted by the City in The Orlando Sentinel, a newspaper published and of general circulation in Orange County, Florida. The order signed by the Hon. Joseph P. Baker appeared in The Sentinel on three Sundays, Dec. 22, 1991; Dec. 29, 1991; and Jan. 5, 1992.

In addition to information about the time, place, and parties to the proceeding, the Show Cause hearing alerted readers that anyone opposing validation would have to "show cause why the prayer of the Complaint filed in the above-entitled proceeding should not be granted, and the proceedings and the Bonds therein described, be validated and confirmed, said Bonds being City of Orlando Capital Improvement Special Revenue Bonds, in the aggregate principal amount not to exceed $150,000,000, as more particularly described in the Complaint filed in these proceedings and the exhibits thereto."

In advance of the public hearing, the State took the deposition of George Michael Miller, the City's financial director, on Jan. 15, 1992. The State placed the deposition in the record and an initial excerpt is provided in the Appendix herewith. The State also filed an answer in the proceeding, in which it raised several affirmative defenses. See A-Transcript of Jan. 27, 1992 ("TR1"), TR1-6.

At the first hearing on Jan. 27, 1992, Mr. Miller testified, as did James B. Moye, Orange County chief deputy comptroller, the latter for the State. Two hours after it began, Judge Baker continued the hearing, so that the City "could close some of the open-ended provisions of its bond issue," TR1-90.

The hearing, referred to herein as the second, resumed about 2:30 p.m., Jan. 28, 1992. The City at the outset stated it would "be more specific in defining its projects for this validation. They are the refinancing of the Sunshine State Governmental Financing Commission Loans, the Florida Municipal Loan, Council Loans, and the City Hall Bonds, and for the land acquisition construction costs and costs of services related to construction of a roadway project known as the John Young Parkway, also known as State Road 423." See A-Transcript

Transcript of Jan. 28, 1992 ("TR2"), TR2-97.

On Jan. 28, 1992, attorney Gabe Kaimowitz and Pastor Sam Hoard were heard about the John Young Project. Also heard were taxpayers and property owners Jim Muszynski and Nancy Patterson. Based on what was presented at that time, Kaimowitz appeared for and intervened on behalf of Bettye Smith, who was present in the courtroom, and the plaintiffs he represents in the COG case in federal court, including Pastor Hoard, TR2-155/156.

After the judge indicated he would validate the proposed City special revenue bond, TR2-150/153, the City agreed to circulate a proposed final judgment, TR2-153, for comment by the State, counsel for the Intervenor(s), and Mr. Muszynski, TR2-156. Ms. Patterson declined the opportunity to proceed further, id..

The City circulated several proposed judgments, to seek comments and approval as to form from counsel and Mr. Muszynski (See Appendix). On March 2, 1992, Judge Baker wrote to the City that after reading all of the comments, particularly about paragraph six in the proposed judgments: "I am satisfied that the generality of the quoted language is intended to cover only projects and purposes that are not being 'validated' or even considered in the proposed final judgment.' This is made explicit in the last sentence of paragraph six and paragraph seven of the final judgment. Based on that, I have signed and entered the final judgment" (Appendix).

On March 2, 1992, Judge Baker entered a Final Judgment validating the bonds. The Homeowner Intervenors filed a timely Notice of Appeal on March 30, 1992. Neither the State nor Mr. Muszynski has elected to participate in this appeal to date.

## STATEMENT OF THE FACTS

After first and second readings on Dec. 2, 1991, and on Dec. 9, 1991, the Orlando City Council adopted an ordinance approving bond issues not to exceed $150 million. Minutes of the meetings submitted as exhibits below and presented in the Appendix, reflect no mention of the use of such funds for the John Young Project, though they do describe in the ordinance an application of the funds "to the payment of the cost of such additions, extensions, improvements and repairs" done in construction of an unspecified roadway project.

At the first reading, Nancy Patterson and City Finance Director Mike Miller spoke. Neither the Mayor nor Commissioner Nap Ford were present on the seven-member council. All were present at the second meeting, when the adoption of the ordinance was moved by Ford; seconded by Commissioner Sheldon Watson, and adopted unanimously by the City Council after no one appeared in opposition. Commissioners Ford and Watson, the Council's only black members, publicly have always opposed the John Young Project.

At the hearing below, the City reported that both Council meetings were duly noticed and the second was "advertised in the Orlando Sentinel on November 29, 1991," **TR1-5.** No mention was made of any advertisement for the first session.

In his deposition on Jan. 15, 1992, Mr. Miller stated that the $150 million in bonds was authorized to finance projects listed on Exhibit A of the Ordinance, **Deposition, p. 5.** Exhibit "A", as attached to the Complaint in this action, listed for "Construction: Roadway Project, $30,000,000-$35,000,000." Mr. Miller, however, went on to testify at deposition about the John Young Project as follows:

> ....There's one road project, a significant road project in there which basically is John Young Parkway. But the John Young Parkway, a lot of the preliminary work has been done regarding that project; but the formal authorization of City Council to proceed with the construction of that project has not come before them at this date, other than the fact by proving this ordinance, they, I believe, understand that that was the significant road project anticipated. We're somewhat cautious about that, of course, because it is a political question with regard to the placement, alignment and direction of John Young Parkway.... I'm not in that issue; I'm in figuring out how to finance whatever they elect to build. It's not my business to figure out where it goes, what right-of-way it uses; it's just how much is it going to cost, and then I come into the picture.

Deposition, City Finance Director Miller, p. 6 (emphasis added).

In fact, the John Young Project was not specified as the roadway project in Exhibit A with the Ordinance and the Complaint, until the second day of hearings in the court below. On the first day, the following relevant testimony and exchanges took place:

> (Miller) (W)e have a future road construction project--one or more future road construction projects, assuming that all road construction projects would meet the public purpose definition that would be potentially financed through the remainder of the proceeds. We have a five-year capital program that identifies the potential need for borrowings, and the road system projects is the area where future borrowings are most likely anticipated, TR1-14. Q (State) ....(W)ould you agree to identifying the road project today? (Miller) The City Council has not acted, so I am not theoretically in a position to do that formally on behalf of the City of Orlando because that would require specific action by the City of Orlando, a properly noticed meeting. So I can't necessarily do it per se, but I would be happy to try to answer your question within my own authority or capacity, TR1-19.

Miller continued to emphasize the lack of Council action on the road as he directed his remarks particularly to Judge Baker:

> (Miller) (A)t this point in time the City Council has not acted specifically to approve A-1 or a different roadway project. There are a couple in the planning stages of staff initiative, but the fact that the City Council has not acted, I would not want to be so presumptuous as to indicate what those projects might be....I would be willing to make a recommendation to the City Council that it be limited to the refunding of the present bonds outstanding and future road construction projects to be identified, TR1-21.
> (W)e would be willing to stipulate to this list of projects, refund the existing bonds and the somewhat of a broadly defined opportunity for future roadway construction projects, TR1-26.

The offers on the roadway construction project were not enough to satisfy the State at the time, TR1-26:

> (The State): There are several private citizens in the audience today and one of the private citizens, James Muszynski, asked "Well, will these bonds be used for the Central Connector?" And I think one of his concerns is that if you don't limit the type of project in this bond validation proceeding--(The Court:) Then it could be-- (The State): Yes. (The Court): Absolutely....(The State): One concern that's been brought to my attention is if these bonds are validated with the generic roadway project, that will concerned citizens be precluded from coming back at a later date and attacking the project? (The Court): Well, I think that's a legitimate concern, TR1-32.

The City continued to be reluctant to identify the roadway projects included in the proposed special revenue bonds. The Court said without such specifics: "I do not know what you're talking about. That's the point as raised here is that we don't know what you're talking about....If you were to specify what it is, what these roadways are with some particularity, I could say that's a public purpose," TR1-39.

A second day of hearings was scheduled, to "close some of the open-ended provisions of (the City's) bond ordinance," TR1-90.

The next day, the City revealed that the John Young Project was the only roadway project which Orlando intended to finance through the $30-$35 million included in the contested $150 million bond issue for a roadway project. Orlando claimed the City Council gave tacit approval to the John Young Project by the road's inclusion as a capital improvement element of the City's growth management plan adopted on Aug. 12, 1991, and as part of the transportation element of the City's capital improvement program adopted through its budgetary process on Sept. 16, 1991, TR2-97. The City "has also entered into engineering agreements pertaining to John Young Parkway, and has entered into agreements with the State Department of Transportation concerning construction of John Young Parkway, and inclusion of the project in the Department's five-year work program," TR2-97/98. Supportive documents were submitted as exhibits.

The State noted that "we were just notified of those documents today," TR2-99. Included was a map indicating the portion of the roadway at issue and "all portions of that road segment that we're identifying as being one of the projects are fully encompassed within the City's municipal incorporated limits," TR2-100.

When the City concluded its submission of the minutes, Mr. Muszynski immediately noted that nothing in the record until that point would have revealed Orlando's intention about use of funding for a "roadway project," TR2-101/102. The Court agreed, id.. Mr. Muszynski was not contradicted when he later stressed that the John Young Project was not mentioned at any time in the City Council consideration of the bond ordinance, TR2-105. This attorney also suggested the Project was being raised for the first time in court, TR2-108.

The City later justified the lack of notice as follows:

> The Council was not in the dark about the John Young Parkway. There were discussions and recommendations by the Metropolitan Planning Board, the Municipal Planning Board. It was discussed by Council. It was adopted through the growth management plan. The growth management plan was found in compliance by the State Department of Community Affairs. The objects that were mentioned here by Reverend Hoard and by (this attorney) were raised before the City Council and the Council heard them and decided, after consideration of those objections, to go ahead and approve John Young Parkway as a project within the growth management plan. As far as (this attorney's) or Mr. Muszynski's question about notice, our notice, even with the list calling it a roadway project, was probably broad, that it called for other people other than people just concerned with John Young Parkway to show up. As each of these people mentioned when they walked up to the podium, they were here yesterday as well, before we even mentioned John Young Parkway. So obviously the notice was sufficient. Again, the Council approval--before the issuance of any series for John Young Parkway, it has to go again before the Council and these same witnesses will have an opportunity to appear at that public meeting to make the same objections before the Council would approve the issuance of the series it ties to the project listed as John Young Parkway, TR2-126/127 (emphasis added).

As a result of the changes by the City between the two days of hearings, The State noted "the bond proposal that was originally brought to this Court is different from the one you're being asked to validate today, and that does raise a couple of issues," TR2-131.

> (The State): (T)he citizens that have come here today have brought up a valid point. The John Young Parkway was not identified as a specific project that would be definitely be funded by these funds until this afternoon. So there has really been no time period in which a citizen could have gone through those proceedings or objected to any of the proceedings related thereto; notice of the public hearing; any irregularities in the proceeding, TR2-131/132.

> (The State, cont.): In fact, I'm not sure before this Court there is any evidence that the City Council said at a public meeting "we approve the bonds will be used for the John Young Parkway."....I'm not sure...That the City Council has enacted a resolution saying that we intend to use those bond proceeds for the John Young Parkway.
> (The Court): I don't think there has been. The point is, they said we're going to use it for roads to be specified at some later time. Now they're saying, well, we have a resolution which the City Council has passed and it says as far as roads is concerned one of those roads is John Young Parkway, TR2-132/133.

The court below accepted that the John Young Project is within the class of roads that the City already had approved as part of its capital improvement plans, id.. The court acknowledged that validation of the bonds would preclude "further attack to the proceedings in connection therewith or proceedings authorizing the issuance," id..

The State then returned to its position that due process required the particular project to have been specified in the Complaint, TR2-134, and that the bond issue to be validated by the Court was different from the one originally presented to it, TR2-135. The State suggested the City should be required to return to the City Council with the information that the John Young Project was to be included, before any bonds could be validated, TR2-135/136.

The City in its final defense repeated that after the bond validation, the City Council, which had already approved the John Young Project in the overall growth management and contemplated capital improvement plans, would have to approve any future specific series of bonds for a specific project, such as the roadway, TR2-145.

The City said that notice for hearings about the growth management and capital improvement plans had been sufficient notice to the public objecting to The John Young Project, TR2-146.

Also the City argued that the appearance of citizens including this attorney to object to the roadway on the second day of hearings is "sufficient notice and due process on that specific project. The City Council approved a roadway project. We thought that was sufficient to meet the project definition. We are now just being more specific as the State Attorney has raised that issue. The ordinance and the exhibit were both attached to the Complaint, which was filed in the Court and mentioned in the Order to Show Cause," TR2-147.

The State summed up by saying that an issue of due process had been raised by the initial failure to identify the road and then the belated naming of the John Young Project, TR2-149/150. As a separate issue, the failure to have the Project noticed for discussion until the second day of court proceedings called into question the sufficiency of the court proceedings on the validation issue, TR2-150.

The court below disagreed:

> I think that the notice, the provisions of the State has been complied with as far as the notice given, published and so forth. Also notification to the State Attorney, obviously, who has appeared and argued statutorily. It seems to me that if the City of Orlando says that it's going to use part of this bond money for roads, which is essentially what this Exhibit A says, that it says "roadway project" we could argue about what roadway project means. The thing that troubled me actually was that they were talking about things other than roads yesterday. Well, maybe roads and maybe something else that might come up, TR2-150.

The court below suggested that the controversial nature of the John Young Project, which was the subject of a separate federal law suit brought by most of The Homeowners appearing here, "certainly put people more so on notice that this is one of the projects for which the funds might be used," TR2-151.

Before the hearing concluded, the Homeowner Intervenors, by this attorney, made one final attempt to explain that the controversy surrounding the John Young Project was insufficient to preclude the need for specific notice of inclusion of the road for funding through the proposed special revenue bonds, TR2-154.

On the first day of hearings, "(w)e though the concern was the Central Connector--as a matter of fact, it was mentioned by (the State). The John Young Parkway was never mentioned," TR2-154. This attorney tried to suggest that the City controversy itself explained why the City representatives specially had avoided designation of the John Young Project as the road in question; they had avoided due process, i.e. giving meaningful notice at any time about the John Young Project, so the City Council would not have to be exposed to heated debate about the roadway when it was considering the special revenue bond issue.

Racial tensions had risen markedly in Orlando, when there had been prior public discussions about the John Young Project after due notice in advance of City Council and other public meetings, and in the course of the COG case in federal court, TR2-109. The key issue in those disputes has been deprivation of an opportunity to be heard at a meaningful time and place, except on one occasion in 1988, TR2-110.

Pastor Hoard stressed that the black community in Southwest Orlando was not given adequate notice or eventually adequate compensation when it was directly affected by past road placements. Pastor Hoard specifically cited the construction of state and federal roads in the Washington Shores neighborhood, TR2-114. Judge Baker responded by noting that the purposes of the money in the special revenue bond were for the City Council to decide, TR2-116.

Judge Baker then concluded that "I don't think there's a due process problem with notifying people that funds might be used for the John Young--notifying people it's going to be used for a roadway project and then coming in and limiting that to the John Young Expressway," especially if the controversial aspects of the road could and were being pursued independently, TR2-151/152.

Judge Baker also stated that the City like private parties may have swept broadly in its complaint for bond validation, in the belief that it would ask for all it could get and settle for something less, if necessary, TR2-152/153. Judge Baker then appeared to rule that it was sufficient for the roadway project to have been identified at some point to satisfy any due process issue, TR2-153. He discounted the political consequences resulting from any lack of notice and said they were beyond his purview, TR2-154/155.

Judge Baker indicated he would approve a final judgment after opportunity was provided by the City for interested counsel and parties to review its proposal, TR2-155/156. By agreement of all, the Final Judgment, page 15, paragraph 24, contains the following:

> This Final Judgment is limited to the validation of the issuance of Senior Bonds to finance the Exhibit "A" Projects and is not intended to address issues raised by the intervenor in Committee of Organized Groups ("COG"), et al., vs. The City of Orlando, Florida, et al., United States District Court Middle District of Florida, Orlando Division, Case Number 88-962-ORL-CIV-20, concerning the alignment of the roadway known as the John Young Parkway (State Road 423).

At no time have The Homeowners or this attorney suggested that inclusion of that paragraph or the exchange of letters and comments by counsel and those who attended the public hearing(s) waived any objection they might have to the lack of due process in this matter.

## SUMMARY OF ARGUMENT

The City of Orlando has sought to avoid meaningful public discussion about the John Young Project, ever since a City Council meeting on the issue in 1988 (1) exacerbated racial tensions in the community and (2) resulted in a federal law suit initiated against the municipality and its mayor by black homeowners, who are intervenors and appellants in this case. However, as newspaper accounts reveal, that roadway project continues to generate controversy. Orlando black commissioners and members of the public unanimously have opposed the Project.

In 1991, the City sought to have the John Young Project positioned for financing and construction without any specific debate about the road itself. To that end, the roadway project was approved in August, 1991, as a listed item for "Alternative Transportation Funding," under Figure CI ("Capital Improvement")-13, City of Orlando 1990-1995 Capital Improvements Fund Schedule," on page CI-35d--actually, page 329 of about 370, in a Growth Management Plan Policy Document. On Sept. 16, 1991, the Project was similarly approved after a full page description on page 181 in the middle of publication of 523 pages used to describe a City of Orlando Capital Improvement Program 1991-1996. Only $400,000 was committed at that time, by the Florida Department of Transportation for the City. **Where would the money come from to pay for the John Young Project?**

At first and second readings by the Orlando City Council on Dec. 2, and 9, 1991, for consideration of an ordinance for the Special Revenue Bond of $150 million, at issue here, the local legislators unanimously approved the use of the methods to secure money to pay off a number of projects listed as Exhibit A. Exhibit A included 12 specific projects totalling about $70.23 million scheduled for **Refinancing.**

Another $36 million also was needed for **Refinancing** of City Hall Bonds, which had been issued to pay for that recent municipal addition. The final item was for $30-$35 million for **Construction** of an unspecified Roadway Project. Was that to be the John Young Project?

Nothing in any record made known in the Court below shows any explicit knowledge by the City Council or the public about the particular "Roadway Project" to be financed with that money. The City finance director, who provided the information for the City Council at those December public hearings on the ordinance, acknowledged that neither the John Young Project nor any other was identified to the Council as the roadway for which the money would be spent.

Indeed, when the City made its initial presentation in the Court below on Jan. 27, 1992, to have the bonds validated, Orlando representatives, including that finance director, could not say what road or roads would be the object(s) of the financial largesse to be provided for their construction, through the bond issue.

The Washington Shores' homeowners monitored the proceedings but took no steps to intervene, precisely because the John Young Project was not identified. No other roadway in Orlando is of concern to them at this point in time. Jim Muszynski, who coordinates efforts to block a proposed Central Connector, also was present to monitor the proceedings, but likewise did not speak. Both roads are proposed to allow predominantly white city dwellers and surbanites to bypass the City's downtown as they go to and from Orlando International Airport.

On the second day of hearings, after the court below expressed reluctance to validate the judgment unless the roadway was identified, the City revealed that it had intended to fund the John Young Project all along. Black Washington Shores Homeowners intervened.

Muszynski did not intervene. The bond was not about the Connector, as he and the State initially suspected. No one knew, because the City never provided the kind of meaningful notice about the roadway project required if due process of law is to be afforded, to those with actual or legally cognizable potential interest in a judicial matter.

Bond validation proceedings specifically provide for notice by publication. That form of notice has been deemed constitutionally acceptable under such circumstances, but it is recognized as being a generally poor means of apprising those with particularized interests. So Florida law requires that the party providing such notice bear an exacting burden of being as clear as possible about its purposes and likely outcome(s) of the proceedings to those potentially affected.

But in this instance, apparently to avoid controversy, the City failed to follow state statutory procedures contemplated for bond validation. The City included $30-$35 million of funding for an unnamed "roadway project" to secure passage of a City Council Ordinance approving the $150 million bond issue. When the City later filed its Complaint, the roadway project continued to be unidentified.

When urged by the court below to identify the project, Orlando had another opportunity to reveal it to its City Council and secure approval. But the City did not do so. Under these circumstances, it is clear that the notice given, only in and to the court below, satisfies neither the letter nor the spirit of due process requirements for notice, set forth in Chapter 75 for bond validation proceedings.

Admittedly, judicial determinations of the sufficiency of notice by publication as required by Florida law for bond validation proceedings vary according to the circumstances. Those determinations are made within parameters set forth 42 years ago by the U.S. Supreme Court.

The notice by publication of the Order to Show Cause on its face was inadequate. More significantly, reference to the underlying Complaint was of little use to The Homeowners or other parties, because that document did not identify any specific roadway project for funding, though all other items were carefully delineated.

Neither publicity nor the presence of Homeowner representatives in the court below when the roadway finally was identified as the John Young Project is the kind of measure envisioned as a cure for a defective notice, to all those with a legal interest in the outcome of the bond validation, who had no reason to come forward until the roadway project was identified. The City perhaps could have cured the defect by returning quickly to identify the roadway project for its Council at a public meeting, but it did not do so.

**The Homeowner Intervenors here do NOT raise the issue of discrimination or any other collateral matter**, except to suggest that racial tension about the John Young Project may explain why the City failed to give adequate and proper notice, first to its own City Council, then to the public, about the roadway.

The City failure to properly and timely identify the controversial roadway project resulted in a derogation of the procedures contemplated for public protection in a bond validation process. Had proper procedures been used, the public--or Council--might have questioned whether local taxpayers are disadvantaged by financing arrangements between the City and State, even if both approved them.

Until the City <u>first</u> notifies the public and its own Council of <u>all</u> of the projects involved in a proposed bond issue, so timely objections can be made, the challenged Ordinance must be declared invalid or other assurance given to preserve The Homeowners' legal rights.

## ARGUMENT

### POINT I

**TO AVOID CONTROVERSY, THE CITY FAILED TO FOLLOW THE PROCEDURES CONTEMPLATED FOR VALIDATION OF BONDS. THE NOTICE GIVEN WAS INSUFFICIENT TO ALERT INTERESTED PARTIES ABOUT A KEY PURPOSE FOR THE VALIDATION.**

The John Young Project had been a source of controversy between the City and black neighborhood known as Washington Shores in Orlando for more than a decade,[1] when the Orlando officials began to seek public acceptance of the roadway in local legislation without a hearing on the construction or financing of the highway itself.

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1--See e.g. P. Saunders, "Protest Kills John Young Parkway Plan," The Orlando Times weekly, March 20, 1980; D. Tracy, "Blacks say road protests are hitting dead end," The Orlando Sentinel, Sept. 4, 1988; R. Benedick, "Blacks trying to fight city hall--Neighbors fear parkway's extension," The Orlando Sentinel, Oct. 17, 1988; R. Benedick, "Angry residents fail to stop road but claim small victory," The Orlando Sentinel, Oct. 18, 1988; R. Benedick, "State moves ahead to extend road--Angry residents may sue Orlando," The Orlando Sentinel, Oct. 19, 1988; R. Benedick, "Blacks put federal lawsuit in path of parkway project," The Orlando Sentinel, Oct. 27, 1988; S. R. Mitchell, "Blacks fighting for land, dignity--Road divides so residents unite," The Orlando Sentinel, Dec. 11, 1988; S. R. Mitchell,"Judge lets blacks go ahead with suit he calls confusing," The Orlando Sentinel, Feb. 21, 1989; S. R. Mitchell/B. Levenson, "John Young Parkway foes find friends at Capitol," The Orlando Sentinel, May 24, 1989; D. Tracy, "Road, black opposition won't die--Orlando wants to extend parkway," The Orlando Sentinel, June 25, 1990; M. Vosburgh, "Protests grow over plan for road in black neighborhood," The Orlando Sentinel, Nov. 3, 1990; M. Vosburg, "Neighborhood asks Chiles to block road," The Orlando Sentinel, Jan. 17, 1991; D. Jackson, "John Young Parkway extension: not a done deal," The Orlando Times weekly, Feb. 20, 1992; D.E. Owens, "Reddick hears from road critics; 80 blame lawmaker for not changing route for the parkway," The Orlando Sentinel, March 1, 1992.

In 1991, City officials did include mention of the John Young Project in plans for long-range growth management and capital improvements, but made no mention of it as the unidentified "roadway project" presented to the City Council, for funding through the special bond revenue issue. That body did approve the City obtaining $150 million in special bond revenues, primarily for refinancing purposes.

The proposed local law the Council approved did include $30-35 million for that unspecified roadway project. During deliberations on Dec. 2, 1991, and Dec. 9, 1991, City Council commissioners apparently did not ask, and the City finance director, briefing them on the Ordinance's purposes, did not say anything about the "roadway project."

But the City knew or should have known that the courts would view the purposes of the bonds closely, if they were submitted subsequently for validation. Earlier in the year, on March 14, 1991, this Court unanimously rejected resolutions offered by Orlando for bonds not to exceed $500 million, after this Court decided "that the overall purpose of the bond issue should be examined," State v. City of Orlando, 576 So.2d 1315, 1317 (Fla. 1991).

No specific projects or uses for the money were identified, id.. "The proposed bond issue could be invalidated because of its failure to provide enough details by which its legality can be measured," id.. In this matter, the City again did not provided details for all of the projects by which the legality of the proposed bond issue could be measured--until the second day of hearings. No prior notice had suggested the controversial John Young Project was the roadway project to be funded by the proposed $150 million bond issue.

State bond validation proceedings provide for notice by publication, but not just of a time and place for hearing, F.S.A. §75.06.

If taxpayers and citizens potentially affected by a bond validation proceeding are to have meaningful notice, they must be informed about the substance of the matters at issue as well, either directly by publication or indirectly in an underlying complaint submitted to the courts. In this case, no such advance notice alerted anyone that funding for construction of the controversial proposed John Young Project was included in the proposed $150 million bond issue.

Consider the notice from the perspective of affected citizens and taxpayers, in this case, Homeowner Intervenors Jackie Perkins and Bettye Smith. Mrs. Perkins has been represented by this attorney for more than three years. Along with other Washington Shores homeowners, Mrs. Perkins contacted him in October, 1988, because the City had made known to her that it wished to obtain part of her homestead property for the John Young Project.

On her behalf and those of other homeowners indirectly affected by the proposed road, this attorney initiated a proposed class action, the COG case, in the U.S. District Court for the Middle District of Florida. Widow of an attorney and mother of two others, Mrs. Perkins became a spokesperson for the COG plaintiffs and regularly appeared thereafter at Orlando City Council meetings, especially to monitor any proceedings concerning the John Young Project.

But in 1991, Mrs. Perkins was given no reason to believe, by notice of any proceedings, that either construction or funding of the John Young Project would be affected by the $150 million bond issue.

When the court proceedings were begun for validation of that bond issue, this attorney had no reason to alert Mrs. Perkins to appear at the start of hearings below, because no mention of the John Young Project had been included in any prior notice, or in the Complaint.

Homeowner Intervenor Bettye Smith is NOT a COG plaintiff. But in 1988, the City notified her, as it had informed Mrs. Perkins, that a portion of her homestead property would be needed for a John Young Project. Mrs. Smith likewise began to attend City Council meetings, to monitor any proceedings concerning the proposed roadway.

Like Mrs. Perkins, Mrs. Smith had no reason to attend the bond validation court proceeding, since the John Young Project was not known to be the roadway for which funding would be included in the proposed $150 million bond issue. But after the initial hearing, Pastor Sam Hoard, who had attended the opening session for reasons not relevant here, alerted Mrs. Smith. She is a member of his congregation.

He informed her the City would identify a specific roadway project in court on the following day. The road might be the Central Connector, which is of no concern to Mrs. Smith, but it might be the John Young Parkway extension to which she had objected for years.

Mrs. Smith attended the continuation of the hearing; heard that funding for construction of the John Young Project would be included, and retained this attorney on the spot to intervene on her behalf.

The case most applicable here is Baycol, Inc. v. Downtown Development Authority, 315 So.2d 451 (Fla. 1975). The petitioner in that case was a landowner seeking to be heard in a subsequent proceeding after a final judgment validating a relevant bond issue was entered.

This Court first determined "The bond judgment validating the bonds was inclusive of funds for the land acquisition" the landowner sought to challenge, id., 454. The key to a determination of whether estoppel barred a contest in a subsequent eminent domain proceeding "vests in the adequacy of the notice afforded by the bond resolution and related proceedings," id..

In State v. City of Boca Raton, 172 So.2d 230 (Fla. 1965), this Court had been satisfied that adequate notice had been given because an underlying resolution had described *"the purchase and acquisition of lands and rights-of-way for streets, and for the purchase of land for a city waste dump*, all to be carried out pursuant to a detailed set of plans," Baycol, 315 So.2d, supra, at 454. (The italics are those of the Baycol court, but the emphasis is added here.)

> By contrast, the resolution in the case sub judice is so vague and indefinite that it is incapable of being reasonably construed on its face to include the condemnation of specific properties.
>
> Id.

The Orlando Ordinance likewise is incapable of being reasonably construed on its face to include condemnation of specific properties, for a John Young Project, such as those of Jackie Perkins and Bettye Smith, unless it could be said that each Orlando property owner ever notified about a possible taking of land for any "roadway project" had received notice in this case and forever would be barred from objecting to financing by this bond validation proceeding. Nothing in Baycol would allow such an interpretation of bond validation notice.

The City has suggested that the notice requirement was satisfied by the described publicity about the road controversy itself. That did attract this attorney to this validation process.

Such a factor was considered and rejected in Baycol. Prior to referendum, voters "had been submitted to a barrage of publicity," and they got, by mail, sketches of a small downtown section including the property of the landowner, Baycol, 315 So.2d, supra, at 454. But, as in the present instance, such information was insufficient to apprise the Baycol landowner about the effect of the bond issue on its property.

> (T)here is no evidence that property owners were ever informed of the ultimate plan prior to the bond validation proceedings. The show cause order was devoid of any reference to land acquisition pursuant to a plan of any nature or kind.

Baycol, Inc., v. Downtown Development, 315 So.2d, supra, 454-455.

The Baycol Court next considered and rejected the argument that the landowner had been given de facto notice that funding for purchase of its property was be contained in the proposed bond issue. The Court concluded that the bond validation notice had been inadequate to preclude the landowner from challenging "the public purpose and necessity for condemnation of its property" subsequently, id., at 454.

In this case, there still is time for Mrs. Perkins, Mrs. Smith or any of the other Washington Shores Homeowner Intervenors, to alert the Orlando City Council about the effect the bond validation ordinance would have on their homestead properties--before that body takes action lawfully to authorize $150 million in special bond revenues, including $30-35 million for the John Young Project construction.

Then City Council Commissioners publicly opposed to that roadway could seek its exclusion and approve an ordinance for the remainder. When the challenged Ordinance was presented to them in December, 1991, all those Commissioners were told they were approving was a sum for an unidentified roadway project, in addition to refinancing of various specific projects, including funding for the new City Hall.

City lawyers and perhaps the finance director, according to his deposition testimony, may have been aware that the John Young Project was the item being considered for application of bond funds for roadway construction. But there is no evidence that either the public or the City Council itself had information sufficient for it to act as if a "roadway project" and the John Young Project were synonymous.

## POINT II

### JUDICIAL DETERMINATIONS ABOUT SUFFICIENCY OF NOTICE BY PUBLICATION VARY ACCORDING TO CIRCUMSTANCES. IN THE INSTANT CASE, THE KIND OF NOTICE GIVEN WITHOUT REFERENCE TO THE JOHN YOUNG PROJECT WAS INSUFFICIENT TO SATISFY THE REQUISITES OF DUE PROCESS OF LAW.

U.S. Supreme Court precedent has guided Florida courts in their determination about the adequacy of notice by publication. The landmark case is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865 (1949), cited most recently in Florida in Gross v. Fidelity Federal Sav. Bank, 579 So.2d 846, 848 (Fla. 3rd DCA 1991).

Notice is intended to be "a reliable means of acquainting interested parties of the fact that their rights are before the court," Mullane v. Central Hanover, 339 U.S., supra, at 315. A recent dissent, also at the Florida court of appeal level, does convey what should be included in addition to information about the pendency of an action, In re Hill, 582 So. 2d 701, 708 (Fla. 1st DCA 1991), (Booth, judge, dissenting), quoting Martin v. Dugger, 686 F. Supp. 1523, 1562 (S.D. Fla. 1988): "(N)otice must be sufficient to provide a person with a meaningful opportunity to be heard," id..

No such meaningful opportunity can be said to have been provided here, when this attorney and Pastor Sam Hoard scrambled on the second day of proceedings to marshal whatever arguments they could against the proposed bond validation after they learned for the first time that the John Young Project was the "roadway project" construction contemplated in the local ordinance and the Complaint.

Until that point, the Homeowners did not know whether they were interested parties whose rights were before the court, Town of Bay Harbor Islands v. Driggs, 522 So.2d 912, 915 (Fla. 3rd DCA 1988).

"Interest in an administrative or judicial proceeding 'generally means a concern which is more than mere curiosity or academic or sentimental desire,' (cite omitted)," Town of Bay Harbor Islands v. Driggs, 522 So.2d, supra, at 915. Interest sufficient to warrant opportunity to be independently heard depends on whether "legal rights or legal liabilities...may be enlarged or diminished by the official action," id., 916.

The Homeowners could not know whether they had such legal rights at stake until the roadway project was identified. Admittedly, the City could have cured the lack of notification, lack of specificity, at almost any time before final judgment, perhaps by corrective Council action, County of Palm Beach v. State, 342 So.2d 56 (Fla. 1977).

In the County of Palm Beach case, County Commissioners corrected a deficiency in a bond validation resolution after a referendum. "As regards the failure to comply with the notice requirements of Section 100.211, this Court has very clearly stated that after-the-fact validating legislation is perfectly proper to cure procedural defects," id., at 58. The Court found that the failure to give statutory notice to voters "was cured by subsequent legislative validation," id..

This Court has rejected citizen objections when a City body considering such an ordinance has before it "drawings and other data with reference to the esimated cost of these improvements," and there is evidence which is "clearly sufficient for any interested citizen to determine the nature and the extent of the improvements," Miller v. City of St. Augustine, 97 So.2d 256, 258 (Fla. 1957).

Here, not only were the Homeowners deprived of adequate information sufficient for them to act. So was the Orlando City Council, when it was asked to approve an ordinance which provided in part for $30-35 million for construction of an unspecified "roadway project."

Homeowner Intervenors admittedly would be hard pressed to convince this Court about the merit of their argument, if City representatives had returned to the City Council for proper approval after disclosure, and provided evidence about the John Young Project to satisfy subsequent judicial scrutiny. Those attorneys were given the opportunity below, when the court asked them to identify the unspecified roadway project, because the judge was not even certain the money would be limited to roads, let alone to a particular highway.

If the city attorneys quickly had presented the missing link to the Council, Homeowner Intervenors would have had meaningful opportunity to be heard by that body. Instead, City lawyers consulted person or persons unknown and reported to Judge Baker that the John Young Project was the roadway intended for construction. There is no sign that any ratification came at a public City Council meeting.

In County of Palm Beach v. State, 342 So. 2d, supra, at 60, two dissenters warned that the majority decision thenceforth would make it "difficult to disapprove bond issues regardless of how defective and regardless of how obvious the constitutional violation." But the State v. City of Orlando decision discussed supra heartens Homeowner Intervenors to believe their complaint of inadequate notice will be given greater scrutiny than it was below before the proposed special revenue bonds were approved to gain $150 million for the City, including $30-$35 million for the roadway project at issue here.

Even if the $150 million bond issue were to be upheld now, the Homeowners should be entitled to some assurance from this Court about legal protection (granted by the majority in County of Palm Beach v. State, 342 So.2d, supra at 59), if the City were to try to use bond validation approval for purposes not contemplated in this process.

## POINT III

### HOMEOWNER INTERVENORS DO NOT SEEK TO CHALLENGE THE PROPOSED $150 MILLION SPECIAL REVENUE BOND ISSUE, ON THE BASIS OF RACIAL DISCRIMINATION IN THE APPLICATION OF THE FUNDS OR ANY OTHER COLLATERAL MATTER.

Washington Shores Homeowner Intervenors, with the exception of Bettye Smith, did initiate COG, et al., v. the City of Orlando, et al., supra, in federal court in 1988, in part because they allege the John Young Project will have a racially discriminatory impact on the neighborhood where the roadway is to be built. However, these parties stress that this state court challenge to the proposed $150 million special revenue bond issue is neither based on a claim of racial discrimination nor founded on the existence of pending federal litigation.

> The state's second argument questions whether these bonds can be used to finance projects which are restricted to certain groups based on income, age, and family size. In other words, the state raised the specter of discrimination against persons who do not fit within the specified groups. The legislature, however, has legitimately targeted certain groups as deserving of special consideration because members of those groups might be discriminated against. Whether anyone outside those groups might be discriminated against in projects financed by these bonds is collateral to, and beyond the scope of, these proceedings (citations omitted).

State v. Division of Bond Finance, 530 So.2d 289, 291 (Fla. 1988).

> At the time of the bond validation proceedings numerous persons had already challenged the district's water management plan in separate litigation. Zedeck claims that the district abused its discretion by pursuing the bond validation prior to resolution of that litigation. This is a collateral matter which cannot be resolved in a bond validation (citations omitted).

Zedeck v. Indian Trace Co. Comm., 428 So.2d 647, 648 (Fla. 1983).

The heart of the argument by the Homeowners who appear is

the lack of due process and notice afforded to the Washington Shore Homeowners affected by the proposed John Young Project, as well as to the City Council, particularly its black members. Racial discrimination may have played a part in the wanton disregard of constitutional protection for black homeowners, who sought to be heard at every opportunity in opposition to funding or construction of that roadway.

But that is not the issue before this Court. What is presented for resolution is the City's failure to provide timely and proper notice for objections to be raised, first to the City Council and then to the court below, about inclusion of funding for construction of the John Young Project in the proposed $150 million special revenue bond issue.

In 1991, this Court quoted Judge Baker, to chide the City for failing to speak in language understandable to City Council members and Court alike, so they could clearly delineate specific projects with a public purpose to justify validation of a proposed $500 million bond issue, State v. City of Orlando, 576 So. 2d, supra, at 1317. (Fla. 1991).

In 1992, the City has asked the courts to validate less--$150 million--on the basis of most--but not all--of the needed information. The exception concerned an roadway project specified after the fact. Identification was provided only after Orlando's citizenry was denied the information needed to make meaningful objections, either to the City Council before it approved the challenged ordinance, or to the court below before the judicial proceedings were commenced.

## CONCLUSION

For the foregoing reasons, this Court is asked to reverse the lower court and declare invalid the City Ordinance approving $150 million to be raised by a special revenue bond issue. Such relief is sought because the City failed to follow requisite statutory procedures.

## Conclusion (cont.)

At issue are not just procedural niceties peripheral to the bond validation process. At the heart of the matter is the need for due process of law, provided in Florida law for specified notice by publication, intended to alert parties with legal interests who wish to object to proposed public revenue bond issues, before they are precluded forever from being heard about all questions raised in the validation process, as well as about all questions which could have been raised.

Neither the Orlando citizenry generally nor the Homeowner Intervenors were notified, by publication or otherwise by the City, about its intent to have the John Young Project be the unspecified "roadway project" constructed with $30-35 million of the larger amount. The Homeowners are here now, only because the court below insisted the City identify the unspecified roadway project included among those to be funded. When the road was identified, Homeowners intervened.

The court below then clearly erred in its finding that objectors had been given sufficient notice by a general reference to an unspecified roadway in an attachment to the Ordinance and to the Complaint. This Court should reverse that ruling and invalidate the bond, because of a lack of requisite constitutional notice and opportunity contemplated by the Florida law applicable to bond validation proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. mail this 9th day of May, 1992, to: Steve Zucker, esq., city of Orlando, 400 South Orange Ave., Orlando, FL 32801; Michael L. Rosen, esq. and Randall C. Clement, esq., Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32302; Lawson Lamar, esq., and Carol Levin Reiss, esq., 250 N. Orange Ave., Orlando, FL 32801; and James Muszynski, 5537 Chennault Ave., Orlando, FL 32838.

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