IN THE SUPREME COURT FOR THE STATE OF FLORIDA

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,

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

> Cite newspapers in ordinary roman type, unless consecutively paged by volume. In the latter case, cite as a periodical in large and small capitals....

Uniform System of Citation, supra, at 104.

Newspapers are self-authenticating under Florida and federal rules of civil procedure, if they are offered into evidence as exceptions to the hearsay rule. As such, they can be considered, to ascertain public perception and usage, Miller Brewing Co. v. Heileman Brewing Co., 562 F.2d 75, 80 (7th Cir. 1977), cited in Nestle Co., Inc. v. Chester's Market, 571 F. Supp. 763, 775, n. 9 (D. Conn. 1983). They reflect occurrence of events, Richard v. Perales, 402 U.S. 389, 401-402 (1971), cited in Wathen v. United States, 527 F.2d 1191, 1199 (Ct. Cl. 1975); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556 (5th Cir. 1980). Finally, news reports may be used to show how the events of the day have been recorded, Ammons v. Dade City, 594 F. Supp. 1274, 1280, n. 8 (S.D. Fla. 1984), aff'd 783 F.2d 982 (11th Cir. 1986). As legal support, newspaper cites should be considered for similar purposes.

Ironically, the Appellee does want this Court to take note that the publication of notice was satisfied by being published "in the Orlando Sentinel, a newspaper published and of general circulation in the City," Answer Brief, p. 2. All but two of the more than dozen citations for Appellants were to The Orlando Sentinel.

Appellants at page 18, Initial Brief, cited the newspaper articles for one proposition: "The John Young Project had been a source of controversy between the City and black neighborhood known as Washington Shores for more than a decade...." Based on the cited continuing news reports about the road project and frequent headline identification of the racial composition of the neighborhood, this Court is asked to take judicial notice of those facts.

ARGUMENT

POINT I

THE JOHN YOUNG PROJECT WAS NOT DESCRIBED IN SUFFICIENT DETAIL UNTIL THE FINAL DAY OF THE JUDICIAL BOND VALIDATION PROCEEDING, SO THAT THE AFFECTED PUBLIC WAS DEPRIVED OF A TIMELY AND MEANINGFUL OPPORTUNITY TO BE HEARD. THUS THE NOTICE GIVEN WAS CONSTITUTIONALLY INADEQUATE TO PROTECT THE RIGHTS AND INTERESTS OF APPELLANTS AND OTHERS.

Appellee concedes that "Exhibit A Projects" had to be "more particularly described by evidence presented at the final hearing to limit the component of such projects under the heading [Construction--Roadway Project] to the roadway project known as the John Young Parkway State Road 423," Answer Brief, p. 3.

According to Appellee, that was done "to close some of the open-ended provisions of its bond ordinance," id., p. 4. The Appellee suggests that the judge appeared to want the information to "'satisfy' the state attorney" or "remove a lot of her objections," id., p. 4. In fact, Appellee appears to persist that the Exhibit A Projects had been "sufficiently defined" without identification of a particular road as the Roadway Project for which $30-$35 million would be raised, id..

Indeed, Appellee apparently sees no difference between that identification and the assurance provided after Judge Baker said he would validate the total $150 million bond package. "(P)rovisions... were included in the Final Judgment, in an effort to resolve concerns of Mr. James Muszynski that the Bonds could be used to finance projects other than Exhibit A Projects," id. Muszynski's principal concern had been the building of another roadway project, the so-called Central Connector, discussed in Appellants' Initial Brief, p. 7; see also **TR1-32.** Mr. Musynzski is not involved at this level.

Appellee recognizes that the kind of notice to be given the public

may depend on the circumstances. For instance, it notes that the City was required to advertise a meeting about a proposed bond issue Ordinance only at a meeting at which it is adopted. No such special advertising is required to announce its introduction at first reading, Answer Brief, p. 6.

Appellee would have this Court accept that the City gave sufficient notice about the John Young Parkway Project, to satisfy requisites of its inclusion in a bond validation proceeding, by alerting the public to 1991 City Council meetings at which that route was one of numerous roads "to be constructed" (City emphasis) and identified "in both the City's Growth Management Plan...and Capital Improvement Program 1991-1996," Answer Brief, p. 7. The public also would have an opportunity to be heard by the City Council "before any bonds could be issued," but that would be done after validation affirmance.

Before City Council action on the bonds "beyond the mere enactment of the Ordinance...the specific roadway project would be identified by supplemental ordinance or resolution," id.. (Emphasis is added here.) At least that is how Appellee's counsel wisely quotes the City Finance Director. Wisdom is credited, because the City Council on Nov. 4, 1991, with City Council member Mary Johnson acting as mayor pro tem, already has acted by resolution to use unspecified revenues to purchase real property it claims for the John Young Parkway Project.

The resolution became known to Appellants' attorney only by virtue of the "hint" provided by Appellee in its Answer Brief, pp. 14-15:

> (T)o the extent Appellants rely on Baycol, Inc., (v. Downtown Dev. Auth., 315 So.2d 451 [Fla. 1975]), as authority for the premise that the Final Judgment in the bond validation proceeding will estop a later public purpose challenge in eminent domain proceedings to take land for the John Young Parkway Project, the point may be moot (cont.), id..

> The City has already obtained a favorable ruling on the public purpose issue with regard to the taking of property along the planned route for the John Young Parkway; and that ruling was obtained without any objection as to public purpose by any member of the Washington Shores Homeowners' Association, and without relying on the Final Judgment in this bond validation proceeding. City of Orlando v. J. K. McLean, No. CI-90-10165 (Fla. 9th Cir. Feb. 10, 1992), (in which Bettye S. Smith, an Appellant in the instant case, is a named party defendant).

Answer Brief, pp. 14-15.

To get such a ruling, the City Council passed that November 4th resolution: "Whereas, negotiations to acquire the necessary real property and other necessary appurtenances have begun and will continue after this resolution is adopted; however due to the construction timetable for this project and the possibility that these negotiations may fail and/or break down, it is necessary and for a public purpose to exercise the power of eminent domain." That J. K. McLean condemnation proceeding was filed in the 9th Judicial Circuit on Nov. 19, 1991.

Until now, that resolution has never been mentioned in this case. This attorney went to the J. K. McLean file and discovered the resolution in the condemnation proceedings currently being held before the Hon. Emerson Thompson. Having gone through the J. K. McLean open case file, this attorney learned that Judge Thompson has declared that the John Young Parkway satisfies a public purpose, so the City can exercise the power of eminent domain to obtain various properties, including Mrs. Smith's, for the John Young Parkway Project.

Another Appellant, Jackie Perkins, on March 18, 1992, has intervened in the J. K. McLean matter to protect her interest should the Project eventually be adopted and money made available for purchase. But why didn't she or Mrs. Smith oppose that resolution?

The resolution did not afford them an opportunity to do so. The distinction, between ordinance, and resolution, is made clear in Barry v. Garcia, 573 So.2d 932 (3rd DCA 1991). That court found that the City of Miami did not have the authority to delegate subpoena power to non-elected officials, in part because Miami had acted by resolution.

Citing the distinction between ordinance and resolution, as each is defined in Fla. Stat. Ann. 166.041(1)(a), the Barry court observed:

> Upon the enactment of a resolution, citizens of the incorporated municipalities have no right to appear and no opportunity to be heard prior to the adoption of the resolution. However, upon the consideration of a municipal ordinance, the public is entitled to a notice and an opportunity to be heard, id., at 938.

Such niceties of law, of due process, seem to escape Appellee. Judging from the City's argument that adequate notice to the public in this bond validation proceeding was given even before the John Young Parkway Project was identified, the meaning of adequate constitutional protection for the citizenry seems to elude Appellee and its counsel. As will be shown, their view of adequate notice is dated.

Florida courts and its Office of Attorney General have recognized that"due public notice" does vary, depending on the fact situation, Rhea v. City of Gainesville, 574 So.2d 221, 222 (1st DCA 1991), rhg. den.. But the purpose of any such notice is clear to the Rhea court: "apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views and afford them a reasonable time to make an appearance if they wished," id.. No such notice was given here to parties like Appellants who were sufficiently opposed to the John Young Parkway Project that they took the pending legal action to stop it in federal court, COG, et al. v. City of Orlando, et al., #88-962-Civ-Orl-20 (M.D. Fla. 1988).

At the heart of the dispute about notice between the parties are the purposes of a judicial bond validation proceeding. Appellee argues succinctly that "this Court should acknowledge, for the benefit of future bond validation proceedings, that it was unnecessary for the City to identify specifically the roadway projects for which the Bond proceeds are to be used," Answer Brief, p. 13, n. 3.

Appellee relies for that proposition primarily on Pirman v. Florida State Improvement Comm'n, 78 So.2d 718, 721 (Fla.), cert. den. 349 U.S. 956 (1955). Pirman rarely has been cited since, and not at all on point since promulgation of the present Florida Constitution in 1968. This Constitution's due process clause surely embodies modern concepts set forth by the U.S. Supreme Court for notice and hearing for judicial or other public proceedings. See, e.g., In re Gault, 387 U.S. 1 (1967).

Alternations have been made in the Florida bond validation proceedings, including the provision for notice by publication, especially in 1967. And the judiciary, led by this Court, has followed suit.

In State v. City of Panama Beach, 529 So. 2d 250 (Fla. 1988), this Court in a 4-3 decision did approve a bond after it determined that revenues would be used for a public purpose. State constitutional change broadening public purpose prompted a majority affirmance.

Like Appellee here, this Court commended the decision in State v. Suwanee County Development Authority, 122 So.2d 190, 193 (Fla. 1960) for stating that the judiciary must determine "'whether the [issuing] agency may legally expend the proceeds for the contemplated purpose," State v. City of Panama Beach, 529 So. 2d, supra, 251. But while in Pirman, and in Suwanee County, "public purpose" seemed to be the sine qua non of judicial responsibility in bond validation, the Panama Beach decision is careful to note that is only one consideration today.

> (A) court must determine if a public body has the authority to isue the subject bonds, must determine if the purpose of the obligation is legal, and must insure that the bond issuance complies with the requirements of law. Taylor v. Lee County, 498 So.2d 424 (Fla. 1986). (Emphasis is added here.)

State v. City of Panama Beach, 529 So.2d, supra, at 251.

The singular purpose set forth in State v. Suwanee County, supra, now is "included" among the others, State v. City of Panama Beach, supra. Another part of the scope of review now is assessment of the validation process, to determine if it meets requirements of law, of due process of law. Like municipal authority to determine "public purpose," the public's right to due process of law has been broadened.

This case does not concern the "public purpose" of the John Young Parkway Project, which may yet be questioned in federal court. It does concern the adequacy of notice. In its Answer Brief, Appellee does not seem to see how that is embodied in Appellants' claim that "[h]ad proper procedures been used, the public--or Council--might have questioned whether local taxpayers are disadvantaged by financing arrangements between the City and the State, even if both approved them," Answer Brief, p. 15, n. 5.

Cited by Appellee is State v. City of Daytona Beach, 431 So.2d 981, 983 (Fla. 1983). But in fact Appellants' argument is derived from that holding which includes, for purposes of judicial review, a determination "whether the proceedings in connection with authorizing the bonds were proper and legal," Answer Brief, p. 10. As the Rhea panel recognized, actions taken at public meetings can be declared improper and illegal, if there is inadequate notice, id., 574 So.2d, supra, at 222.

The John Young Parkway Project was never timely and sufficiently identified to afford the public, including Appellants, the right to be heard meaningfully, at the proper time and place, e.g. by City Council.

A City Council resolution allowing the City to take property by eminent domain for the Project certainly didn't afford such opportunity. Indeed, that resolution wasn't cited in this proceeding. Why not?

Is it because that resolution raises questions which are pertinent about the legality and propriety of these proceedings? On November 4, 1991, how did Appellee City intend to pay for the property it condemns for the road? Through ad valorem taxes? Or through this bond issue?

If it were the latter, as seems to be the case, surely the avoidance of public discussion by Appellee at any time about the connection between the resolution and this judicial proceeding makes suspect its intentions about this process. In this matter, the City tried so hard to avoid any reference to the John Young Parkway Project until it was forced to do so, by the lower court, at the insistence of the State.

On this point, State v. Suwanee County Development Authority, supra, is instructive. The 4-3 majority in State v. Manatee Co. Port Auth., 171 So.2d 169, 171 (1965), cited that decision with approval for its requirement for sufficient definiteness in identification of a project before bonds could be validated to secure revenue.

The Manatee Co. dissenters quoted State v. Suwanee, supra, on point, to show, as Appellants do here, that the issuing agency in fact has not provided sufficient definiteness to warrant validation:

> "(C)ommon sense impels the conclusion that the issuing agency should set forth in the petition for validation of bonds or revenue certificates a description of the purpose for which the proceeds are to be used, which description should be sufficiently detailed to enable a member of the public and the state to determine whether the issuing agency can lawfully expend public monies therefor."

State v. Manatee Co. Port Auth., 171 So.2d, supra, at 171-712.

The dissenters concluded: "(t)he vague and general statement as to the nature of the facilities proposed does not afford the public"

"an opportunity to safeguard its essential interest in the development,"State v. Manatee Co. Port Auth., 171 So. 2d, supra, at 172 (Justices Caldwell, Drew and O'Connell, dissenting).

Here, too, the essential interest that Appellants and others have in the John Young Parkway Project has been thwarted by the vague and general description of the "roadway project" which was never identified in this judicial bond validation proceeding in a timely manner. So the public has yet to be heard on the connection between the so-called "approved" roadway project and the means to finance it.

Point II

THE IDEA OF DUE PROCESS IN THE SPECIFIC BOND VALIDATION PROCESS CANNOT BE ALTERED BY REFERENCE TO GENERAL LAW APPLICABLE TO PASSAGE OF ORDINANCES ON OTHER SUBJECTS.

The City blithely tries to claim that the City Council gave proper notice in accordance with F.S.A. §166.041(3)(a) for passage of an ordinance authorizing the $150 million bond issue before filing the Complaint for validation, Answer Brief, p. 17. At the outset, Appellee ignores the fact that F.S.A. §166.041(3) provides greater due process protection in some circumstances when the proposed law would "substantially change permitted use categories in zoning districts," id., (c).

But that law can't be read to avoid the requisites in F.S.A. §75.06, for notice by publication; such notice has been interpreted to require specific definition for projects to be financed when judicial bond validation is sought. A statute covering such a specific subject is controlling over one applicable to a general class of subjects, e.g., enactment of ordinances; the specific operates as an exception to the general, Palm Harbor Sp. Fire Control D. v. Kelly, 516 So.2d 249, 251 (1987).

The issue here is not whether Appellants were entitled to individual notice, as Appellee suggests they seek, Answer Brief, p. 19.

Notice by publication is adequate--if it defines directly, or by reference to an underlying complaint, each and every specific project to be financed by the proposed bond revenues. For the John Young Parkway Project, no such notice was given.

Appellee states the City did not define the Project in the Ordinance, because it sought "to retain planning flexibility," Answer Brief, p. 20. That's why Jim Muszynski thought the "Roadway Project" might refer to the Central Connector, even after Judge Baker said he would approve a final order limiting the thoroughfare definition to the John Young. Indeed, numerous contemplated roads meet the City's description of "an approved transportation element of the City Growth Management Plan" and have "been included in the City's Budget through adoption of its Capital Improvement Program, 1991-1996," id..

What the City sought to do was to circumvent the proper proceeding required by Chapter §75, Fla. Stat. Only if this Court were to accept the Appellee's plea, and declare it to be "unnecessary for the City to identify specifically the roadway projects for which the Bond proceeds are to be used," can the entire $150 million bond issue be validated, including the $30-$35 million for the John Young Parkway Project. See Answer Brief, p. 13, n. 3.. No such declaration can be made, if the public is to be afforded due process, by reasonable notice, with time for preparation, to take exception to specifically defined projects, before bonds to finance them can be validated judicially.

Conclusion

Appellants agree with the alternative conclusion proposed by Appellee. This Court should affirm the bond validation, including the Ordinance and the Validated Projects, except for the John Young Project at issue on this appeal. See Munroe v. Reeves, 71 So. 922 (1916).

CERTIFICATE OF SERVICE

A copy of the foregoing has been served by first class mail within the time allotted for reply, on June 16, 1992, to: Robert L. Hamilton, city attorney and Steven J. Zucker, assistant City Attorney, City of Orlando, 400 S. Orange Ave., Orlando, FL 32801; Michael L. Rosen, esq., and Randell C. Clement, esq., Holland & Knight, P.O. Drawer 810, Tallahassee, FL 32301; and Lawson L. Lamar, State Attorney, Ninth Judicial Circuit, by and through Paula Kaufman, assistant State Attorney, for Carol Levin Reiss, former assistant State Attorney, 250 N. Orange Ave., Orlando, FL 32801.

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