IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 84, 917
L.T. CASE NO. 94-882CA 02

SEAN F. MURPHY,

Appellant,

v.

CITY OF PORT ST. LUCIE, FLORIDA,
a municipal corporation of the State
of Florida,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

On appeal from the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida (Civil Division).

Sean F. Murphy
1956 S.E. Dranson Circle
Port St. Lucie, FL

Pro Se Appellant

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ARGUMENT

I. THE FINAL JUDGMENT VALIDATING THE SPECIAL ASSESSMENT BONDS MUST BE REVERSED BECAUSE THE CITY FAILED TO COMPLY WITH CHAPTER 180.301, F.S. IN ITS ACQUISITION OF THE UTILITY FROM ST. LUCIE COUNTY

The City's Answer generally avoids Appellant's argument that violation of Chapter 180 precludes validation of the instant bonds. Instead, the City misstates Appellant's position as one questioning the wisdom and financial feasibility of the project and the bond issue, and generally, "whether the City should acquire the system." Appellees Brief at 15, 17. However, Appellant and Intervenors have never argued those points in the trial court or on this appeal.

What Appellant and Intervenor's have argued and what the City has failed to respond to or cite authority in opposition to is that the City did not comply with the requirements of Chapter 180, F.S. in acquiring the utility, and therefore, the City is without legal authority to pledge the revenues of the utility.

Section 180.301, Florida Statutes, provides:

> No Municipality may purchase or sell a water, sewer, or Wastewater reuse utility that provides service to the public for compensation, until the governing body of the municipality has held a public hearing on the purchase or sale and made a determination that the purchase or sale is in the public interest. In determining that the purchase or sale is in the public interest, the municipality shall consider, at a minimum, the following:
>
> * * *
>
> (5) The Reasonableness of the Purchase or sales price and terms; (emphasis added).

Chapter 180.301, F.S. provides clear and specific requirements for the acquisition of a water and wastewater utility by a municipality. When the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning. In Re McCollam, 612 So.2d 572 (Fla. 1993). Courts are without the power to construe an unambiguous statute in a way that would limit its express terms or its obvious implications. Steinbrecher v. Better Constr. Co., 587 So.2d 492 (Fla. 1st DCA 1991). Further, the use of the term "shall" in a statute has a mandatory connotation. S.R. v. State, 346 So.2d 1018 (Fla. 1977); Steinbrecher, 587 So.2d 494.

A reading of Chapter 180.301 according to the plain meaning of its language, including the use of the mandatory "shall", requires a City to consider the reasonableness of the purchase price or sales price before purchasing a utility system. In this case, the City did not consider the purchase price and its "reasonableness" because the purchase price was unknown and subject to litigation at the time of acquisition. As Gerald Hartman testified, "until the utility litigation is completed, one would not know the total acquisition costs of this system." (CA-14; 155)

The disagreement over the purchase price is significant. The developer AGC is claiming an additional $100 million above the amount originally ordered by the trial judge, for a total purchase price of $140 million, including attorney fees and

costs, owed as the price of the utility. (CA-14; 154)1/

In light of the fact that the purchase price of the utility has been overturned on appeal and has been subject to ongoing litigation involving a dispute between the parties of over 100 million dollars, a finding that the City complied with the authorizing statute would have to disregard the clear language of the statute and would have to presume that the legislature employed useless language. Such a statutory interpretation that renders the provisions of Chapter 180.301 meaningless and superfluous must be avoided and it must be assumed that the statutory provisions have some useful purpose. Johnson v. Feder, 485 So.2d 409 (Fla. 1986).

The City in its Answer Brief claims that failure to follow the requirements of Chapter 180 and the illegality of the acquisition of the utility are not relevant to this validation proceeding. The argument must fail because the City's complaint seeks approval of their pledge of the utility system revenues to secure payment of the Series 1994A Bonds, as provided in Section 3.02 of Ordinance 94-35 (Master Assessment Bonds Ordinance). Therefore, the City's legal authority to pledge the system revenues and the legality of the proceedings providing them with

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1/ Hartman testified that City was aware only of the total debt of the utility and the cost of that debt when it acquired the utility. (CA-14; 155) However, the City was not even aware of the total debt of the utility which has increased from 75 million dollars to 84 million since the acquisition and the issuance of the transfer bonds. (CA-14; 145) The 84 million dollar debt is exclusive of the purchase price of the utility which could amount to an additional 100 million dollars. (CA-14; 142, 143, 145, 147).

that authority have been made directly relevant to this proceeding.2/

Moreover, the legality of the utility purchase agreement is relevant if only because the City's right to pledge the system revenues and right to seek validation of that pledge are rights derived from and founded upon the utility agreement; if the utility agreement is illegal, no right founded upon it can be enforced, sanctioned or validated in a court of law. Local No. 234, etc. v. Henley & Beckwith, Inc., 66 So.2d 818, 821 (Fla. 1953).

The City's argument that an illegal purchase agreement has been put to rest in a prior validation action is also without merit. An agreement which violates a statute or is contrary to public policy, whether in its formation or performance, is illegal, void, and unenforceable between the parties. Local No. 234, etc. v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953); Thomas v. Ratner, 462 So.2d 1157, 1159 (Fla. 3rd DCA 1984); I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp., 600 F.Supp. 92 (S.D. Fla. 1984). And when a contract or agreement is tainted with such illegality, a court has no power to ratify or sanction it, and "no alleged right founded upon the contract or agreement can be enforced in a court of justice." Local No. 234,

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2/ The City has concedes in its Answer Brief that the authority to pledge the system revenues is an issue properly before this court: "The issues properly before the Trial Court in the instant validation proceeding were: . . . (iii) the City's authority to pledge the 1994A Assessments and other security to secure repayment of the 1994A Bonds;" Appellee's Brief at 16.

66 So.2d at 821. Rather, a court has "the affirmative duty of refusing to sustain that which by the valid statutes of the jurisdiction, or by the constitution, has been declared repugnant to public policy." Id.

Accordingly, a party who has entered into an illegal contract cannot claim, seek to claim, or show a possible right to claim any rights based on that illegal agreement. Local No. 234, 66 So.2d at 823. A contract in violation of statute or public policy "may not be made the basis of any action either in law or equity." Id. In any prior proceeding, therefore, the illegality of the utility purchase agreement prevented the City from having, and a court from sustaining, a right or cause of action for validation of the acquisition agreement with St. Lucie County.3/

Lastly, the City argues that the legality of the utility acquisition and the purchase agreement is moot. For the same reasons that the issue is relevant, it is also not moot. The City has sought validation and approval of its legal authority to

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3/ The City's argument is that even if the utility purchase agreement was illegal and void, it was given legal effect through the prior bond validation proceeding. Appellee's Brief at 16. However, a court is without the power (i.e., lacks subject matter jurisdiction) to sanction or sustain any rights founded upon an illegal contract. Regardless of the hardship it may cause, "[l]ife cannot be breathed into a void contract." City of Miami v. Benson, 63 So.2d 916 (Fla. 1953). Further, permitting the use of a bond validation proceeding to ratify illegal contracts, in violation of statute and the Constitution, is against public policy, and allows the Judiciary to impermissibly usurp the legislature's power generally to set that public policy. The City fails to cite any authority for the proposition that a court may ratify a void contract, in derogation of statute or the Constitution.

pledge the utility system revenues, and thereby, has put at issue legality of that pledge and the proceedings upon which the City's legal authority for that pledge were derived.

In support of its mootness claim, the City argues that it owns the system and has issued revenue bonds. A claim of mootness is not available in the context of a void agreement which can never be made legal or recognized by the courts. In addition, One who enters into a contract or undertaking which violates a statute or public policy owes to the public a continuing duty of withdrawing from such an agreement. Local No. 234, etc. v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953).

II. THE FINAL JUDGEMENT VALIDATING THE BONDS MUST BE REVERSED BECAUSE THE ASSESSMENTS ARE INCONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN

The City does not cite any statute or provision of the comprehensive plan in support of its contention that the expansion is consistent with the plan. Instead, the City relies on the "uncontroverted" testimony of former Assistant Director of Planning, John Sickler. It is alleged that Mr. Sickler's testimony demonstrated that Appellant's numerous citations to the Comprehensive Plan were "misguided." However, an examination of Mr. Sickler's testimony reveals that he himself was advising the city based on mistaken beliefs and misinterpretation of clearly worded provisions of the Comprehensive plan.

Mr. Sickler's relies on two sentences in the comprehensive plan for the proposition that a capital program for providing central utilities may be extended irrespective of the Urban Service Area. The first, a sentence in the text of the Future Land Use Element, is a statement that special assessments may be considered to finance urban services outside of defined growth areas. This statement is contained under the heading <u>"Platted Lands"</u> and relates to a discussion of platted land only. Attachment A. It is inapplicable to this case which involves the extension of utilities to <u>non-platted</u> land outside the urban service area (approximately 40% of Phase I).

Further, Mr. Sickler's special assessment exception theory must also be rejected because it renders the entire Urban Service Area concept meaningless. Under Mr. Sickler's theory, the City

would be allowed to disregard comprehensive plan goals and policies relating to orderly growth and the prevention of urban sprawl, even when acting pursuant to a longterm capital program to provide central urban services and extend the infrastructure.

The City's and Mr. Sickler's reliance on Goal 9.1 of the capital Improvement Element is also mistaken. Goal 9.1 provides:

> THE CITY SHALL UNDERTAKE ACTIONS TO ADEQUATELY PROVIDE NEEDED PUBLIC FACILITIES FOR BOTH EXISTING AND FUTURE RESIDENTS IN A TIMELY AND EFFICIENT MANNER CONSISTENT WITH AVAILABLE RESOURCES THAT WILL PROMOTE ORDERLY GROWTH.

City of Port St. Lucie Comprehensive Plan, Goal 9.1, page 23. Consistent with the Urban Service Area requirement, the Goal requires that Public Facilities are provided in a manner that will promote orderly growth. The function of the Urban Service Area Map in the Comprehensive Plan is to delineate those areas where Urban Services (Central Water and Sewer, etc.) will be provided for the same purpose as that contained in Goal 9.1 of promoting orderly growth and preventing urban sprawl. Appellant's Appendix p. 300. Policy 9.1.1.4, which is established to achieve Goal 9.1, provides that the City is to "Permit only those proposed locations of public facilities and utilities which are in the urban Service Area." City of Port St. Lucie Comprehensive Plan, page 9-23; Attachment B. Consequently, Goal 9.1, the provision relied upon by Mr. Sickler, provides direct support for Appellant's position that the extension of central utilities into vast non-urban service areas is illegal.

III. THE REFERENDUM PROCEDURES SET FORTH IN THE PORT ST. LUCIE CITY CHARTER AND THE ACTS OF DECEPTION AND THREATS OF CRIMINAL AND CIVIL LIABILITY MADE BY THE CITY CLERK VIOLATE THE RIGHTS OF THE PETITIONER'S UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, § 5 OF THE FLORIDA CONSTITUTION

The City claims that the issue of the constitutionality of Article VII was not presented to the trial court is not true. On the second day of testimony, Intervenor's moved to amend their pleadings to conform to the evidence, which was granted without objection. Intervenors presented the Judge with the Amended pleading which specifically addressed all sections of Article VII. Attachment C. Intervenors also orally informed the court that they were specifically challenging the Constitutionality of the Charter provision requiring the ordinances be attached to each petition page.4/

Given that this action this action involves the first of a nine phase project, it would seem that the City and the taxpayer's interests are more properly served by obtaining a ruling on an issue which may recur.

4/ This matter is contained in the portion of the record not yet transcribed.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully request this Honorable Court to reverse the lower court's Final Judgement validating the Special Assessments and the Series 1994A Bonds and order the Bonds not validated.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof has been furnished to the following attorneys: Roger G. Orr, Esquire, City Attorney, 121 S.W. Port St. Lucie Boulevard, Port St. Lucie, Florida, by U.S. Mail on the 23 day of March, 1995.

By: _____

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