IN THE SUPREME COURT OF THE STATE OF FLORIDA

Martin Kessler,
Appellant

v.

The City of Winter Park
Appellee
_____/

SUPREME COURT
CASE No. 89,501

LOWER TRIBUNAL
CASE No. C196 - 4803

COVER SHEET

TYPE OF BRIEF: REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Comes now the Appellant and replies with argument and direct rebuttal to the issues in Appellee's Answer Brief.

1 APPELLANT'S SUMMARY OF HIS ARGUMENT

1. Appellee's argument that the Final Judgment for validation meets the test established by the Authorities rests upon a spurious parallel to the cases cited rendering the Final Judgment erroneous as a matter of law. Appellant avers the lower court was overly accommodating in applying the law to Appellee's evidence for Appellant clearly shows at length Appellee's preponderance of the "evidence", is inconsistent, misleading, and incorrect in many respects.

2. Appellee offers an astonishing substitute theory of justification by asserting our system of political democracy makes each citizen , not an elected government, responsible for knowing if a ballot is defective or not, notwithstanding ***information*** in ***the public records or newspapers.*** In this connection, Appellant respectfully directs the court's

attention to Appellant's Initial Brief (Second Amended), Page 7, Paragraph 2 d. and **2 e.**

3. Appellee perpetuates the fraud that the **$8** Million purchase price of the golf course was ***justified*** by professional appraisals and wrongfully asserts the wisdom of its purchase is immune from the doctrine of judicial review.

4. Appellee's fails to see the critical difference between the Referendum Ordinance No.1237 and the Bond Resolution No.1636 ; the former, containing the Ballot Summary on which the voters cast their ballots, and the latter, 21 days later, the Resolution to sell bonds. This error leads to pure confusion with consequent distortion and damage to its broader argument.

5. Finally, Appellee fails to grasp the legal import of Section 100.341, ***Florida Statutes***, while simultaneously claiming to be in compliance with the statute's obvious requirements. Appellant finds this incomprehensible.

II AS TO APPELLEE'S SUMMARY OF THE CASE AND THE FACTS

1. Appellee asserts Appellant " omits important facts " but does not explain the omissions, and immediately says " the city agrees with the substance of most of Kessler's stated facts" but claims they are **"incomplete,** confusing and disorganized" again without citing specific examples.

III THE FINAL JUDGMENT IS ERRONEOUS AS A MATTER OF LAW

1. Appellee's evidence on which the Final Judgment based its validation is a spurious parallel to **the** cases selected

as a defense. It is a fact that neither Appellee nor any major media made a pointed effort to advise the electorate of material information, which may be sufficient to meet the test of two cases cited by the lower court in support of the validation, *Grapeland* Haigths Civic *Ass'n v.City of Miami, 267* So.2nd.324 (Fla.1972) and *Winterfield v.Town of Palm Beach,* 455 So.2nd.359,361(Fla. 1984)

2. The Final Judgment held the ballot was not defective or misleading in material facts because such information was already known in public documents and local newspapers; and, it held, the officers and employees of the Plaintiff disseminated information to the electors advocating and soliciting their approval for the sale of bonds.

3. Appellant argues there was no information disseminated by the *city* that gave the electorate material facts. What the city did give was misleading and fraudulent, as we shall see. The city made no clear showing that the material facts were " highly publicized by public media" and the voters were "fully advised", as was observed in *Grapeland* Heigths. In the instant case, no commercial media - print, radio, or television - undertook the public service of informing the electors of material details by publishing (say) special full page inserts or "Sunday" supplements, with specially prepared maps and diagrams, and objectively reporting fairly on all the issues in an upcoming referendum, to support Appellee's claim that material details were "in all the newspapers and public records". In this case, neither

the city nor anyone else prepared and distributed specially prepared proposals to all citizens so the electors would be well-informed , as the court so held in ***Grapeland Heigths.***

4. In the instant case, Appellee did *not* prepare information leaflets that contained all facts, ***material*** or ***otherwise,*** to thoroughly inform the electorate fully and without coercion, for otherwise it might have met the test of ***Winterfield v. Town of Palm Beach,*** 455 ***So.*** 2nd. 363(Fla.1984).What Appellee offers by his **"evidence"** is a sham of what should have been produced and carried out to meet the test of ***Grapeland Heigths*** and ***Winterfield*** to justify paragraph 11 and 13 of the Final Judgment. Appellant avers this reliance is erroneous as a matter of law.

> **"Where** discrepancies on a bond referendum ballot mislead the voters, or ***fail*** to ***adequately inform them of the project,*** the ballot is subject to invalidation." ***Winterfield*** v. Town ***of Palm Beach,*** 455 So.2nd. 359,361 (Fla. 1984)[Italics Added].

5. Appellee claims that since all aspects of the proposed purchase **was** in newspapers and minutes of commission meetings " Consequently, ..it was not necessary that the city mention the ***$8*** Million purchase price..the use of other funds to assist in financing the purchase ..in the Proposition. The residents .. were already well informed on those **matters".** [Page 22] They were, Appellant will show, misinformed, noninformed and malinformed.

IV THE EVIDENCE AND THE IMPLIED ASSUMPTION OF VALIDITY

1. Appellee is overwhelmingly motivated to convince this court to believe that a self-serving collection of newspaper clippings, minutes of commission meetings and city **"house** organs" [the **"evidence"**] can serve to affirm the Judgment of the Lower Court. To sustain such **a** conclusion the trial judge needed to make the heroic ***assumption*** that (1) every voter did indeed ***see and read*** the evidence, (2) that they ***fully understood*** the subjects discussed and, most important, Were able **to** ***(3) comprehended the related technical issues*** involving a complex Option Contract, **(4)** that they had available to them the appraisals and understood the **"justification"** for the purchase price as the fair market value of the golf course, and, furthermore, (5) believed what they read to be error-free ***and unimpeachable.***

V THE CITY COMMISSION MINUTES AS EVIDENCE

1. Appellee, **"to** assist the court **",** summarizes selections **from** his evidence. The evidence is of city commission meetings, during which the commissioners discussed a myriad of topics that are the inner workings of municipal governance in a city of 25,000 people, in addition to the discussions held on the issues concerning the purchase of the golf course property and the alternatives available for financing the cost of the project from time to time.

2. What ***is*** this compelling **"evidence"?** The minutes of commission meetings is the transcribed recording by a city clerk of the commissioner's discussions and any other item

worthy to memorialize. The *city* does *not expect 10,000 citizens to attend bi-weekly meetings to become "informed".* Only a few citizens customarily attend commission meetings and then only if they have some particular issue affecting their relation with the city. Moreover, These sessions are not validated for accuracy until **two** weeks after any given meeting when they are ratified by the Mayor and are *mailed to* a *selected few.* The **"evidence"** of city officials debating material facts among themselves is one thing, putting the information they talk about in a ballot is another!

VI NEWSPAPER CLIPPINGS AS EVIDENCE

1. Appellee highlights several clippings which reported on a city election in which the Appellant was a novice candidate. The Appellee misses the point: The issue for argument is did the *ballot for the referendum* , not the *ballot* for *the election* for *city commissioner,* contain material facts for the voters to consider when voting in secret.

2. Most of the this "evidence" is clippings of reporters, whose assignment was to cover city hall and publish quotations from conversations the reporter aggressively solicited. Sometimes the stories were correct; sometimes incorrect. How is a voter to know the difference? We cannot assume everything that appears in print is accurate. Newspapers, after all, are not ballots.

3. The one *most eminent of all newspaper clippings,* which is worthy to highlight, was published in the *Orlando* ***Sentinel,*** and shown in Appendix to Appellee's Answer Brief as No.B-19,

It is written by a most vocal advocate in support of the referendum, the Mayor of the city. Here the Mayor is given the unique opportunity, to "explain" the critical issues and facts to inform the electorate just a few weeks before the referendum. What do we find? NOT one material fact is mentioned: (a) The $8 Million cost of the project is absent. (b) He trivializes and misstates the cost.(b) He is silent on the decision to use $3 Million of emergency reserves, as if the loss of $3,000,000of reserves is costless. (c) He plays to the fear of residential development on the golf course,(e) He appeals to the art patrons by gratuitously implying the seller would re-invest its proceeds into an art museum (f) He falsely claims that the proceeds of the purchase will remain to be 'Ire-invested in the community", as against an "out-of-town" developer descending rapaciously upon the city and abscond with the money.

4. Appellant avers this is high misrepresentation and unjust coercion. This reply should quiet Appellee's complaint that Appellant charged the city was not neutral in its biased dissemination of information and that the mayor's advocacy misled the voters and improperly influenced the outcome of the referendum by his coercive statements.

5. Appellant can point to many other incorrect newspaper statements. A brief sample: The Observer's Editorial writes: "The Morse Foundation has accepted an offer from the city for $8 million which is the appraised value of the golf course property in question." That is not true,

The newspaper's report is wronu. Another example is taken from Appellee's Appendix, Tab B, page B-1, which says: " Under the agreement, the city will have the option to acquire the golf course property for $8 million, although the value estimated by the foundation's appraiser was $8,930,000." That was not the value of the golf course property. The newspaper is wrong. Furthermore, we also read " Hal Kantar, the city's lawyer who negotiated the golf course contract, said the Foundation would not sell for less than $8 Million" That is not true. newspaper is wrong.

VII CITY PUBLICATIONS AS EVIDENCE

1. Appellee uses the April Update publication as evidence to show it affirmatively informed all citizens, especially those who did not attend city commission meetings, of material facts for the referendum in June. The Update is the city's primary method to inform a voter. The Appellee claims in his Answer " the city disseminated informational articles in the February and April 1996 editions of the Update, a bi- monthly periodical prepared by employees of the city and circulated to 10,000 residences within the city." This publication could have affirmatively educated the voter on "the most important issue facing the citizens". What do we find? In the February issue the citizen is advised to wait upon the April issue which will provide "detailed information" and "cost analysis" and the "impact" of the citizen's decision and again falsely alludes to the fear of development if the property is not purchased.

2. In The April issue, The ***cost*** of *the project* is nowhere to be found. What is misleadingly provided is an arithmetical example for each citizen to calculate the "Greenspace Property Tax payment" to satisfy **a** debt service of a **$5** million bond issue. The clear implication is $5 Million is to be the **"Greenspace"** cost. ***But the city knew the project was under contract for $8,000,000.*** Nothing is said Of depleting city reserves of ***$3*** Million. And NO ***mention*** of ***a*** **golf *course!*** This information was NOT in the *Update*. What **exactly** did the ***Update*** say to its 10,000 citizens? The ***Update*** only said: **"** the average annual payment made by the city on $5 Million borrowed to pay for ***the purchase of the*** Green Space at current interest rates would be approximately $402,190 **per** year." THIS IS GROSSLY **MISLEADING AND NOT** TRUE. ***Appellee knew the $5 Million is only part of the purchase price.*** Appellant must conclude, therefore, the Appellee's official documentation , the ***Update,*** is affirmatively ***misleading. Metropolitan Dade County v. Dexter Lehtinen, 528*** So.2nd.394 (Fla.1988)

3. The **argument** can no longer be seriously maintained as Appellee **claims:"** In the instant case the city undertook ***every means at its disposal*** to adequately inform the voters of the issues surrounding the proposed purchase of the golf **course."** [Page ***25***, Italics added]

VIII APPELLE'S THEORY ON THE POLITICAL SYSTEM OF DEMOCRACY

1. Appellee raises a most astonishing theory: namely, it's **not** its fault if a ballot is defective, and if a citizen raises **a** complaint, the fault rests with the citizen for his failure to discharge his duty as an elector in a democratic society. Appellee writes as follows:

> "Kessler fails to understand that in our system of democracy it is the ultimate responsibility of each voter to inform himself of the issues in an election so he can make an intelligent choice when casting his **vote** at the polling place. He is charged with the knowledge of information in the public domain, even if he chooses to ignore it. Therefore, one should not be heard to complain about the results of an election in which he has participated, if he has failed to take advantage of information easily available through normal means of **communication."** [Page 26]

2. Is Appellee here suggesting that if the lower court's judgment is overturned, that an alternative defense can be raised by relying on a theory of democracy which assumes an individual citizen is responsibility for becoming informed of issues in an election, " through normal means of communication ", rather than looking to his government for information on how to vote intelligently? The Appellee misses the point: What if the information disseminated is incorrect, misleading, or not disseminated?"

3. Our system of democracy does indeed presuppose citizen responsibility to **"inform** himself of the issues in an election" provided, however, it can be assumed - as a **first** principle - that elected public officials , who are charged with a concomitant responsibility **"to** inform the **electors"** [Section 100.341, *Florida* ***Statutes***], are trustworthy,

ethical and it would be unthinkable to suppose politicians would ever engage in misleading tricks, schemes or other misadventures and devices to defraud the public. So, Appellant avers, it is *first* the responsibility of the government to affirmatively act and inform, and then the citizen to respond with their approval or disapproval. If the government fails to act, then it is the right of the citizen to petition and take the initiative. That's how our system of democracy works! Appellee cannot ***be held harmless because we live in a democracy!***

IX APPELLEE CONFUSES AN ORDINANCE WITH A RESOLUTION

1. Appellee fails to distinguish the **"Proposition",** found within the Ordinance No.2137, (The Referendum Ordinance) and Resolution No. 1636,(The Bond Resolution) Appellee Says , [Page 15] the **"Proposition was** submitted for approval of a general obligation bond issue by the city to finance part ***of the cost of*** **acquiring** ***the golf*** course ***property;..."*** [Emphasis added] THIS IS NOT TRUE. Ordinance No.2137 clearly states the purpose of the bond proceeds is "TO FINANCE THE COST OF **THE ACQUISITION"** or **"TO** FINANCE THE ACQUISITION..(collectively, the **"PROJECT")"**

2. It was not until 21 days ***AFTER*** the referendum, in Resolution No.1636, that Appellee informs the electorate of the material facts never before disseminated to the voters. Appellee is misleading this court - as the citizens have been misled - to believe the Proposition was **"merely"** a

part of the total financing package, but a voter would be at a loss to determine that by reading his ballot!

X APPELLEE MISUNDERSTANDS **SECTION 100.341, *FLORIDA STATUTES***

1. Appellee refers **to *State v. Florida State Turnpike Authority*, 134 *So.* 2nd.12(Fla.1961)** as his authority for the details he feels are permissible and on which he relied to satisfy the explicit language of Section **100.341, *Florida Statutes*.** With no disrespect, we just don't know what it will take for the Appellee to understand that the meaning of the ballot language calling for **"...together** with other details to necessary to inform the **electorate."** must mean **"material"** details , otherwise what are we to take those words to mean!! [***See*** Appellee's extended commentary in the Transcript Page 60 Line 6 to Page 62, Line **25.1** Appellee also [Page 23] refers to the authority of ***Advisory Opinion*, 529** So.2nd. ***228*,** which held a ballot "need not explain every detail or ramification" of a proposed amendment to the constitution. But a proper reading of the Court's remarks would be rendered as saying a ballot summary need not explain every ***non-material*** detail or ***non-material*** ramification of ***a*** proposition. The court's language should not be selectively misconstrued as to what the court obviously intended their wards to mean.

XI FRAUDULENT JUSTIFICATION OF THE *$8* MILLION PURCHASE PRICE

1. While Appellee claims the ***$8*** Million purchase price **was** justified it is strange that nowhere in Appellee's prepared Brief does the word **"appraisal"** appear as ***justification*** for

the purchase price of $8 Million .The Appellee boasts this value was the subject of through debate in 14 commission meetings and in public discussion prior to the referendum. It turns out value of The Golf Course was never debated. When Appellee speaks of the $8 Million purchase price and the justification therefore,[Page 21] be it noted that the purchase price was an arbitrary decision by the city, but publicly represented as if the $8 Million price is the bona fide value of the golf course, provided no one detected the sham or trick between the contract's deed reservation and an appraisal based on an assumed residential development.

XII APPELLEE IS SUBJECT TO THE DOCTRINE OF JUDICIAL REVIEW

1. Appellee asserts that matters dealing with the political and business wisdom of its projects is beyond the scope of bond validation hearings. THIS IS NOT TRUE. Where fraud and coercion or illegality are alleged to have occurred, a court can and should interpose its ultimate and final authority. Without the potential for legal oversight and redress, there is no limit to the tricks, schemes and illegal devices elected officials may concoct to perpetrate a fraud an the electorate or convert law to their own purposes. This fundamental principal, established in Marbury v. Madison (1803) as the doctrine of judicial review, is self-evident to ensure popular government. Numerous authorities have consistently held that "Republics regard the elective franchise as sacred, and the courts should not set aside an election .....unless fraud has been perpetrated or

corruption or coercion practiced to a degree to have affected *the result". Winterfield v.* Town of *Palm* Beach, 455 So.2nd. 359,361 (Fla. 1984) as quoted in Carn v. Moore, 74 Fla.77,88-89, 76 So. 337,340 (1917), and, Town of Medley *v.* State, 162 So.2nd. 258,259 (Fla.1964)[Italics added by Appellant and also by Florida Supreme Court in *Lodwick v. Palm* Beach County, 506,So.2nd.408 (Fla.1987) and ,*Lodwick* v. *School District* of *Palm* Beach County, 506 So.2nd. 409 (Fla. 1987)and *Lalor* v. Dade *County,*258 So.2nd 843, and City of Deland v. *Fearington, et.al.,*108 Fla. 498 (1933)and Dulany *v.The* City of *Miami Beach,*96 So.2nd. 552.and *People* Against Tax. Rev. *v.* County of Leon, 583 So.2nd. 1376 (Fla. 1991)

XIII REPLY TO ITEMS APPELLEE FINDS PARTICULARLY TROUBLESOME

1. Appellee finds fault with Appellant's Initial Brief on pages 25, 26, and 27. Appellant believed he made it clear in his Reply to Appellee's Motion To Strike he did not submit evidence that could have been submitted but relied instead on the evidence submitted by the Appellee.

XIV APPELLANT'S CONCLUSION

1. If there is anything to be learned in this 'case, it is that in our system of democracy, law gives to government the responsibility of informing the electorate fairly of all facts on issues of great import. This is precisely the meaning to be attached to the two cases cited in support of the validation. Appellee's Answer did not answer the issue of materiality. The Final Judgment's error is found in the lower court's acceptance of evidence which is not in

conformity to the cases cited, and on which the lower court relied and inappropriately held the Appellee did not need to ***distribute material facts*** to the voters, notwithstanding this is a fundamental responsibility of government. Whenever a ballot fails to provide material details necessary to adequately inform the electorate on the measure before him, what is before him is unfair.

> " A ballot summary may be defective if it omits ***material*** facts necessary to make the summary not misleading" [Italics Added] Advisory ***Opinion To The Attorney General - Limited Political Terms In Certain Elected Offices*** 592 So. 2nd 228(Supreme Court of Florida 1991)

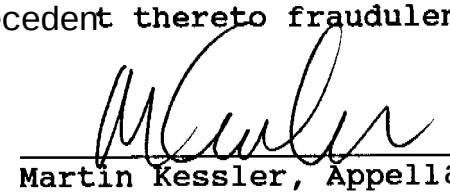
XV THE REMEDY SOUGHT

WHEREAS, Appellant has shown the evidence for validation was defective and erroneous, and

WHEREAS, Appellant has shown the lower court relied and ruled upon defective evidence, and

WHEREAS, Appellant has shown the case law relied upon by the lower court was inappropriately applied,

THEREFORE, Appellant prays this court attend to his appeal and grant the remedy to vacate the lower court's Final Judgment for Validation and order null and void the referendum as a precedent thereto fraudulent and invalid.



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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing has been sent by U.S. Mail on April 25, 1997 to:

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