

IN THE SUPREME COURT
STATE OF FLORIDA

SUZANNE M. BOSCHEN,
Defendant/Appellant,

vs.

Circuit Civil Case No. 99-3622-CI-20

CITY OF CLEARWATER, a municipal
corporation and public body corporate and
politic of the State of Florida,
Plaintiff/Appellee.

**ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
PINELLAS COUNTY, STATE OF FLORIDA**

Hon. Charles W. Cope

AMENDED
INITIAL BRIEF OF APPELLANT

PATRICK T. MAGUIRE, ESQ.
Attorney for Appellant

308 N. Belcher Road
Clearwater, FL 33765
Florida Bar No. 266371
(727) 442-3838

TABLE OF CONTENTS

TABLE OF CITATIONS	3
PRELIMINARY STATEMENT	4
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	7
ISSUE ON APPEAL	10
SUMMARY OF THE ARGUMENT	10
ARGUMENT I	11
ARGUMENT II	17
CONCLUSION	21
CERTIFICATE OF SERVICE	22
APPENDIX	

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Easterlin v. City of New Port Richey</u>	12
105 So. 2nd 361 (Fla. 1958)	
<u>City of Jacksonville v. Savannah Machine & Foundry Company</u>	13,17 47
So.2nd 634 (Fla. 1950)	
<u>Leon County v. State</u>	14 165
So. 666 (1936)	
<u>Merrill v. St. Petersburg</u>	11
109 Sp. 315 (1926)	
<u>Nuveen v. Quincy</u>	11
156 So. 153 (Fla. 1934)	
<u>Posey v. Wakulla County</u>	14. 3
So.2nd 799 (Fla. 1941)	
<u>State of Florida v. Boca Raton</u>	12,14.
172 So.2nd 230 (Fla 1965)	
<u>State v. Broward County</u>	15 54
So.2nd 512 (Fla. 1951)	
<u>State v. Florida State Improvement Commission</u>	12 60
So.2nd 747 (Fla. 1952)	
<u>State of Florida v. Manatee</u>	12,14.
93 So.2nd 381 (Fla. 1957)	
<u>State v. Sarasota County</u>	19
549 So.2nd 659 (Fla. 1989)	
<u>State v. City of St. Petersburg.</u>	13,17
198 So. 837 (Fla. 1940)	

PRELIMINARY STATEMENT

This is an appeal taken pursuant to Rule 9.030(a)(1)(B)(i) Rules of Appellate Procedure. This initial brief of Appellant is served with Appendix in accordance with Rule 9.110(i) Rules of Appellate Procedure. Reference to the appendix shall be in the following form (A-).

STATEMENT OF THE CASE

1. Appellee, City of Clearwater, filed its Complaint for Validation with the Clerk of the Circuit Court for Pinellas County, Florida, on May 25, 1999. (A-1)

2. The Complaint for Validation by the City of Clearwater joined the State of Florida and the Taxpayers, Property Owners and Citizens of the City of Clearwater, Florida, including non-residents owning property or subject to taxation therein, and Appellant Suzanne M. Boschen. (A-1)

3. The Trial Court issued its Order to Show Cause in the case below on May 25, 1999. (A-2).

4. On June 14, Appellant served her Answer and Affirmative Defenses. (A-3)

5. On August 25, 1999, Appellee served its Trial Memorandum on Appellant. (A-4)

6. On September 3, 1999, Defendant State of Florida filed its Response to Order to Show Cause. (A-5)

7. On September 7, 1999, Appellant Suzanne M. Boschen, served her Memorandum of Law. (A-6)

8. On September 7, 1999, an Order to Show Cause hearing was held before the Honorable Charles W. Cope. On September 10, 1999, the Honorable Charles W.

Cope entered a Final Judgment in this cause. (A-7)

9. On October 8, 1999, Appellant filed her Notice of Appeal in this cause. (A-8)

STATEMENT OF THE FACTS

1. Appellee, on May 6, 1999, adopted Resolution No. 99-28 (the project resolution) providing for the sale of not to exceed \$12,000,000.00 infrastructure sales tax revenue bonds, approving the Series 1999 project and authorizing the public sale of the bonds. (A-1, Ex.C)

2. The Charter of the City of Clearwater provides:

“ARTICLE IX. FISCAL MANAGEMENT PROCEDURE.

“The fiscal management procedure shall include provisions relating to the operating budget, capital budget and capital program, providing for hearings on the budget, capital budget and capital program and the amendment of the budget following a adoption. Such ordinance shall in addition contain a provision requiring that revenue bonds for projects in excess of one million dollars Shall be put to public referendum with the exception of revenue bonds for public health, safety or industrial development and revenue bonds for refunding.” (A-9, Appellee’s Trial Exhibit C)

3. Appellee failed to hold a public referendum for the issuance of the revenue bonds for the series 1999 Project.

4. Appellee attempted to have Article IX of the City Charter repealed in order to remove the referendum requirement by ballot initiative submitted to the voters of the City of Clearwater on March 9, 1999, as Referendum Question No. XIII. (A-10)

5. On March 9, 1999, the citizens of Clearwater rejected the Appellee’s proposed repeal of Article IX of the City Charter by a vote of 9,020 to 4,636. (A-10)

6. The primary purpose of the project is economic redevelopment of the beach,

not maximizing traffic flow. (A-11)

7. The project has twin principles: A. The place to have a quality experience, and B. A sense of arrival at the beach. (A-11)

8. The point of arrival would be a large pond with fountain structure in the middle of the Roundabout. (A-12, pg. 1)

9. The City of Clearwater Beach traffic study dated October 1998 provides as follows:

A. The transportation improvements considered were developed primarily to support and enhance the economic redevelopment potential for the beach area. (A-12, pg. 3)

B. Development of a Roundabout, replacing the signalized intersection of Mandalay and Pier 60/Causeway, represents a sub-option which could be incorporated as part of the Gateway plans for the beach area. From an overall operation perspective, traffic conditions would be equivalent to traditional signalized control. (A-12, pg. 65)

C. The results of the level of service analysis indicates there are currently no major operational deficiencies on the roadway system. (A-12, pg 11)

D. The analysis of existing conditions indicates from an operational perspective, traffic in the study area is accommodated at acceptable levels of service.

Therefore, the transportation improvements investigated were primarily designed to support and enhance economic redevelopment and create a better street environment for pedestrians while maintaining the existing levels of service. (A-12, pg. 11)

E. In general, the uninterrupted flow characteristic of a Roundabout is less “pedestrian friendly” than a typical traffic signal. Consolidation of the Pier 60 Drive/Causeway Boulevard one way pair to a two way (four lane) facility is incorporated as part of the beach alternative. While acceptable levels of service are expected to be maintained, the proposed two way plan will not be as efficient as the current one way system. (A-12, pg. 65)

10. Future levels of service for the next twenty years do not warrant or justify the road improvements proposed for the project. (A-13)

11. Of the actual construction cost associated with the project of \$7.2 million dollars, over half is allocated to the construction of a fountain (\$2,100,000) and landscaping (approximately \$1,700,000). Only about \$2,100,000 would be for non-essential road work. (A-14)

ISSUE ON APPEAL

Where the City Charter requires a public referendum for all revenue bond projects in excess of \$1,000,000, except for those for public health and safety, did the Trial Court err in finding that the City has authority to issue revenue bonds without public referendum approval where

the project consists primarily of the construction of a fountain, landscaping and non-essential road work?

SUMMARY OF ARGUMENT

The project for which the City of Clearwater seeks to issue revenue bonds does not fall within the public health and safety exception from the referendum requirement set forth in Article IX of the City of Clearwater's Charter. It is Appellant's position that the public health and safety exception to the Charter requirement of a referendum applies only to essential government functions. That a project primarily consisting of a fountain and landscaping and non-essential road work which is intended to provide a quality experience, a sense of arrival at the beach, and support economic redevelopment of the beach without maximizing traffic flow is not an essential governmental function. As a matter of law, the proposed project does not fall within the exception to the referendum requirements of the City of Clearwater' Charter. There was no competent evidence to support the Trial Court's finding that the project constitutes an essential government function.

ISSUE

WHERE THE CITY CHARTER REQUIRES A PUBLIC REFERENDUM FOR ALL REVENUE BOND PROJECTS IN EXCESS OF \$1,000,000, EXCEPT FOR THOSE FOR PUBLIC HEALTH AND SAFETY, DID THE TRIAL COURT ERR IN FINDING THAT THE CITY HAS AUTHORITY

TO ISSUE REVENUE BONDS WITHOUT PUBLIC REFERENDUM WHERE THE PROJECT CONSISTS PRIMARILY OF THE CONSTRUCTION OF A FOUNTAIN, LANDSCAPING AND NON-ESSENTIAL ROAD WORK?

ARGUMENT I

AS A MATTER OF LAW, A PROJECT CONSISTING PRIMARILY OF A FOUNTAIN AND LANDSCAPING AND NONESSENTIAL ROAD WORK DOES NOT FALL WITHIN THE PUBLIC HEALTH AND SAFETY EXCEPTION OF ARTICLE IX OF THE CITY OF CLEARWATER'S CHARTER.

The Charter of the City of Clearwater contains the following provision:

“The fiscal management procedure shall include provisions relating the operating budget, capital program, providing for hearings on the budget, capital budget and capital program and the amendment of the budget following adoption. Such ordinance shall, in addition, contain a provision requiring that revenue bonds for projects in excess of \$1,000,000.00 Shall be put to public referendum with exception of revenue bonds for public health, safety or industrial development and revenue bonds for refunding.” Article IX, City of Clearwater, City Charter.

Municipalities do not have inherent authority to incur bonded indebtedness.

Merrill vs. St. Petersburg, 109 So. 315 (1926). They have only such authority as the legislature expressly or by necessary implication confers on them. Nuveen vs. Quincy, 156 So. 153 (Fla. 1934). All doubts as to existence of such power being resolved against the municipality and in favor of the taxpayer and voter. State of Florida vs. Boca Raton, 172 So.2nd 230 (Fla. 1965).

The limitation contained in Article IX of the City's Charter is a limitation on

the City's authority to issue these bonds. State of Florida vs. Boca Raton, supra. Easterlin vs. City of New Port Richey, 105 So.2nd 361 (Fla. 1958). Article IX requires that revenue bonds for projects in excess of \$1,000,000.00 be approved by referendum of the voters. That language applies to all municipal projects.

Article IX provides an exception to the referendum requirement for projects for "public health and safety". Since all bonds for "municipal projects in excess of \$1,000,000.00" need to be approved by referendum, the exception for health and safety contemplates a more limited and narrower scope of project. Otherwise, the requirement of a referendum would become nothing more than an obsolete password. State of Florida vs. Manatee, 93 So.2nd 381 (Fla. 1957).

"Public health and safety" within the meaning of Article IX of the City of Clearwater's Charter must be interpreted as creating an exception only for such health and safety projects as are essential government purposes. (Emphasis supplied) State of Florida vs. Manatee, supra. State vs. Florida State Improvement Commission, 60 so.2d 747 (Fla. 1952).

The City is proposing to issue revenue bonds to construct a fountain, do extensive landscaping and do non-essential road work. The primary purpose of the project is to (provide):

A. "A place to have a quality experience". (A-11) and,

B. “A sense of arrival at the beach. (A-11) and,

C. “... Economic redevelopment of the beach, not maximizing traffic flow”.

(A-11)

While these may be worthwhile municipal purposes, they are clearly not an essential government function within the contemplation of the exception to Article IX of the City’s Charter.

Even the cases cited by the Appellee in its Trial Memorandum, City of Jacksonville vs. Savannah Machine & Foundry Company, 47 So.2d 634 (Fla. 1950), and State vs. City of St. Petersburg, 198 So. 837 (Fla. 1940), establish that to justify the issuance of the bonds for health and safety, they must be for “essential governmental functions”(emphasis added). In those cases, the City provided fire protection services and provided water services to the citizens. Obviously, providing water, fire, and police protection are of such a general essential nature of government that they are essential to the public health and safety.

However, mere municipal or governmental purposes which are not essential, such as fountains, landscaping and nonessential road work, are not of such an essential or imperative nature as to bring them within the exception for public health and safety. The test is the essentiality of project, i.e., “...would City government cease to exist if the improvement is not provided”. State vs. Manatee, supra. Doubt concerning the

requirement of an election as a condition precedent to official action in issuing any bonds should be resolved in favor of allowing the people to decide it. Statutes imposing taxes should be construed most strongly against government and most liberally in favor of taxpayers. State vs. City of Boca Raton, supra.

There is an analogous exception to the Constitutional requirement of electoral approval for political subdivision to issue a bond to finance essential governmental needs. Leon County vs. State, 165 So. 666 (1936). Posey vs. Wakulla County, 3 So.2d 799 (Fla. 1941). The situation before this Court is analogous to the Constitutional requirement for electorate approval. The City Charter of the City of Clearwater is the constitution by which authority the City of Clearwater operates. There is a Charter limitation requiring referendum approval of bonds for projects in excess of \$1,000,000.00. There is an exception to that requirement for projects for health and safety. As in the Constitutional cases, the exception to the requirement for referendum is only for those projects which constitute “essential governmental necessities”. State vs. Broward County, 54 So. 2d 512 (Fla. 1951).

Essential governmental functions have been found to be the construction, furnishing, and repair of Courthouses, governmental office buildings, jails, children’s homes, and health centers and construction of incinerators, and the construction and

safe operation of airports (Miami International Airport), and the need to meet current governmental expenses. Courts have refused to extend this doctrine to County Hospitals, since unlike a Courthouse, the need for such building may be supplied by private enterprise. Voting machines are not essential governmental necessities. State vs. Broward County, supra.

While the City and citizens may benefit from the project because of an enhanced pedestrian environment or improved air quality, those objectives were not and are not the primary purpose of the project. The City having established that the primary purpose of the project is for beautification and to help support economic development of Clearwater Beach, the mere fact that there is some ancillary pedestrian sidewalk improvement and air quality improvement does not cause the project to fall within the public health and safety exception.

While the City Commission may have found that the project is in “furtherance” of the public health and safety, that finding is in of itself not sufficient. To be exempted from the referendum requirement of Article IX, it would be necessary for the City to find, and that finding be supported by competent substantial evidence, that the project is essential to the public health and safety of the citizens of the City of Clearwater.

ARGUMENT II

APPELLEE FAILED TO ESTABLISH BY COMPETENT SUBSTANTIAL EVIDENCE THAT THE PROJECT FOR WHICH REVENUE BONDS ARE SOUGHT TO BE ISSUED CONSTITUTED AN ESSENTIAL GOVERNMENTAL FUNCTION.

Appellee failed to present any competent substantial evidence that road conditions or economic conditions on Clearwater Beach warranted the issuance of revenue bonds without public referendum. (Transcript in to to; transcript unavailable at time of service, will be provided as Supplemental Appendix.)

Appellee, in the Trial Court below, presented evidence describing the project and giving general justification for the project. However, the evidence below fails to establish that there was an essential governmental imperative for the project. (See City of Jacksonville vs. Savannah Machine & Foundry Company, supra, and State vs. City of St. Petersburg, supra.) There was no competent substantial evidence presented before the Trial Court that the road system and pedestrian environment was in such dire need of the project so as to warrant the City avoiding the referendum requirement of Article IX of the City's Charter. On the contrary, the City's own traffic study established:

A. The transportation improvements considered were developed primarily to support and enhance the economic redevelopment potential for the beach area. (A-12, pg. 3)

B. Development of a Roundabout, replacing the signalized intersection of Mandalay and Pier 60/Causeway, represents a sub-option which could be incorporated as part of the Gateway plans for the beach area. From an overall operation

perspective, traffic conditions would be equivalent to traditional signalized control. (A-12, pg.65)

C. The results of the level of service analysis indicates there are currently no major operation deficiencies on the roadway system. (A-12, pg. 11)

D. The analysis of existing conditions indicates from an operational perspective, traffic in the study area is accommodated at acceptable levels of service. Therefore, the transportation improvements investigated were primarily designed to support and enhance economic redevelopment and create a better street environment for pedestrians while maintaining the existing levels of service. (A-12, pg.11)

E. In General, the uninterrupted flow characteristic of a Roundabout is less “pedestrian friendly” than a typical traffic signal. Consolidation of the Pier 60 Drive/Causeway Boulevard one way pair to a two way (four lane) facility is incorporated as part of the beach alternative. While acceptable levels of service are expected to be maintained, the proposed two way plan will not be as efficient as the current one way system. (A-12, pg.65)

Also, future levels of service for the next twenty years would not warrant or justify the road improvements proposed for the project. (A-13)

Likewise, Appellee failed to present any competent substantial evidence that the economic vitality of Clearwater Beach was in such dire condition that the City’s

need for the project caused such a governmental imperative as to warrant the City ignoring the referendum requirement of Article IX of the City's Charter. While it is clear that the City wishes to support and enhance the economic environment of Clearwater Beach, that is clearly not an essential governmental function, warranting the avoidance of the referendum requirement of Article IX of the City of Clearwater's Charter.

In the Trial Court below, the Appellee has the burden of proof to establish it had authority to issue the bonds. State of Florida v. Sarasota County, 549 So.2nd 659 (Fla. 1989). That burden of proof would necessarily require a showing by competent substantial evidence to bring Appellee within the public health and safety exception of Article IX of the City of Clearwater's Charter. While the City's resolution may have stated that such a project is in furtherance of the public health and safety, there was no competent substantial evidence to support a finding that the proposed project for a fountain, landscaping and nonessential road work constituted an essential governmental function. (T. - in to to) In fact, the evidence presented below established that the existing road system was functioning adequately, and the proposed road system may not be as efficient. (A-12)

Additionally, if the proposed project is intended to support economic redevelopment at Clearwater Beach, there was no competent substantial evidence

presented that there was or is a need for such support or that the proposed project would necessarily contribute to that economic redevelopment. (T. - in to to)

CONCLUSION

In the absence of a showing that the proposed project of the City of Clearwater constitutes an essential governmental necessity, the requested bond validation should have been denied since there was no referendum approval of the citizens of the City

of Clearwater.

Respectfully submitted,

PATRICK T. MAGUIRE, ESQ.

Attorney for Appellant

308 N. Belcher Road

Clearwater, FL 33765

(727) 442-3838

Florida Bar No. 266371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to C. MARIE KING, ESQ., Asst. State Attorney, P. O. Box 5028, Clearwater, FL 33758; ROBERT C. REID, ESQ., 201 S. Monroe Street, Suite 500, Tallahassee, FL 32301, and to PAUL RICHARD HULL, ESQ., Asst. City Attorney, City of Clearwater, P. O. Box

4748, Clearwater, FL 33758, by U.S. Mail, this _____ day of _____,
1999.

PATRICK T. MAGUIRE, ESQ.