IN THE FLORIDA SUPREME COURT

CITY OF OLDSMAR, : Case No. SC00-2695
Appellant
Pinellas Court No. 00-4479-CI-21
V. Bond Validation

STATE OF FLORIDA, :
and the taxpayers,
property owners and
citizens of City of Oldsmar,
including nonresidents owning
property in, or subject to
taxation by, City of Oldsmar,
and State of Florida,
Department of Transportation,
Appellees

BRIEF OF APPELLEE,
STATE OF FLORIDA

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PRELIMINARY MATTERS

Appellant, the City of Oldsmar, will be referred to herein as the City. Appellee, the State of Florida, will be referred to as the State or the State Attorney. Appellee, the State Department of Transportation, was granted intervention and will be referred to as the Department. The Joint Project Agreement contract between the City and the Department, which is the subject of the Complaint, will be referred to as the JPA contract. The transcript of the hearing on the date set for the State's having been ordered to show cause why the Complaint should not be granted appears as exhibit 4 to the City's Initial Brief and will be cited as "T" followed by the page number.

STATEMENT OF CASE AND FACTS

The State Attorney accepts the City's statement of the case and facts with the additions and correction that the State Attorney was ordered, pursuant to Sec. 75.05, Fla. Stat., to show cause on August 24, 2000, why the relief sought should not be granted. The Order to Show Cause is attached as State Attorney's Exhibit 1. The State Attorney's Response to Order to Show Cause was filed August 23, 2000. A copy is attached as State Attorney's Exhibit 2. The State Attorney's Response to the Order to Show Cause why the Complaint should not be granted prayed that the Ch. 75 proceeding be dismissed as not a proper Ch. 75 proceeding and as not naming the correct parties as defendants. The State Department of Transportation filed on August 23, 2000, its Motion to Intervene, to Dismiss, or Alternatively, to Abate, based on the pendency of

the same matter in the Hillsborough County civil case of Kimmins Contracting Corp. v. Department of Transportation, 99-2257, in which the Department had sued the City in a Third-Party Complaint. A copy is attached as State Attorney's Exhibit 3. The City argued against abatement. T61-67.

During the hearing on the date scheduled for the State to show cause why the JPA should not be declared void as violative of Art. 7, sec. 12, Fla. Const. and secs. 180.03, 04, Fla. Stat., the City instrument or obligation, T14-15, 24, 68-69, and therefore the proper subject of a Ch. 75 proceeding for bond validation. T40-45, 48-49, 52-62. The State Attorney's Office and DOT argued that the JPA is a contract pursuant to Sec. 339.12, Fla. Stat., and that the City had previously relied, in the pending Hillsborough case, on its right, as provided in Sec. 337.19, Fla. Stat, to sue on that contract, and could not use Ch. 75 to seek to invalidate or get out of that contract. T27-28, 34-37, 39, 71-74.

The City admits that its JPA contract with the Department, attached as appendix ex. 2 to the City's Initial Brief, was signed on December 1, 1995, a date over six years ago. After having been granted intervention and pursuant to its motion to dismiss, the Department sought to introduce certified copies of documents from the pending Hillsborough suit. There being no objection, the court accepted the exhibits into evidence and took judicial notice thereof. T30-32. The City does not mention the filing date of its Complaint of June 26, 2000, five-and-one-half years after the date of the contract, nor attach a filed copy as an exhibit.

The court found, and the City readily admitted when revealed by the Department, that the City had raised Art VII, Sec. 12, Fla. Const., in its motion for summary judgment as a defense in the pending Hillsborough County case. The City explained that it filed the Ch. 75 bond validation complaint in Pinellas County, only after losing summary judgment in the pending Hillsborough County lawsuit, as an attempt to have the City's legal issues resolved more expeditiously by an appellate court than could otherwise be accompliahed in the Hillsborough County case. T48-51. The Department characterized this motive in language suggesting forum shopping, T29-30, 33, and the City answered this allegation only by saying there was a new judge assigned in the Hillsborough suit, after recusal of the judge who had denied the City's Motion for Summary Judgment, and no new rulings against the City had yet been made. T69. On the court's inquiry of the difference between a summary judgment and bond validation proceeding, the City admitted that both were summary proceedings. T50.

JURISDICTIONAL STATEMENT

If ever there were a question as to this Court's original appellate jurisdiction in a Ch. 75 proceeding, this case would present such question. The City invokes this Court's jurisdiction as mandatory, pursuant to Sec. 75.08, Fla. Stat., for the sole reason that the City chose to file its Complaint as a Ch. 75 proceeding. The State Attorney and the Department, as the intervening Defendant, argued that the Complaint did not invoke the court's jurisdiction pursuant to Ch. 75, and the court agreed on

the unique facts of this case. Because the legislature gave any party who is "dissatisfied with the final judgment" the right to appeal to this Court, Sec. 75.08, Fla. Stat., it would appear that the City has the right of review in this Court of the order of dismissal in Pinellas County, although they will have to appeal to the Second District Court of Appeal on any adverse final order in the prior-filed Hillsborough County suit.

SUMMARY OF ARGUMENT

The court did not err in dismissing the Complaint on the agreed facts that the City was seeking to invalidate the six-year-old JPA contract, which was already being litigated in Hillsborough County, where the City had unsuccessfully raised the same argument for summary judgment it was attempting to litigate in the Pinellas County bond validation proceeding. The court's finding was uncontested that no notice of the Pinellas case was provided by the City to the parties in the Hillsborough case, although a favorable ruling in the Pinellas suit might preclude a judgment against the City, or prevent their being a party, in the Hillsborough suit. On these facts and findings, the court properly found that the proceeding was not a Ch. 75 proceeding and that the City was estopped from seeking to invoke the court's jurisdiction pursuant to Ch. 75, Fla. Stat. The question of applicability of Art. VII, sec. 12 to the JPA contract is not determinative of applicability of Ch. 75 to these proceedings. Government agencies' financing may be structured to avoid either provision.

ARGUMENT

ISSUE I. WHETHER THE TRIAL COURT ERRED IN DISMISSING THE CITY'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

A. WHETHER THE JPA CONTRACT IS A BOND OR CERTIFICATE OF INDEBTEDNESS SUBJECT TO ARTICLE VII, SEC. 12, FLA. CONST., AND CH. 75, FLA. STAT.

B. WHETHER THE JPA CONTRACT VIOLATES ART. VII, SEC. 12, FLA. CONST.

C. WHETHER THE JPA CONTRACT CREATES A SECURED DEBT IN VIOLATION OF ART. VII, SEC. 12, FLA. CONST.

D. WHETHER THE PINELLAS COUNTY BOND VALIDATION PROCEEDING WAS THE ONLY APPROPRIATE FORUM TO OBTAIN A JUDICIAL RULING ON WHETHER THE JPA CONTRACT VIOLATES ART. VII, SEC. 12, FLA. CONST.

ISSUE II. WHETHER THE COURT ERRED IN GRANTING DISMISSAL ON THE DOCTRINE OF COLLATERAL ESTOPPEL.
(Issues combined as not separated by the lower court.)

The facts of this case are not in dispute. Although the City had not revealed in the Complaint the existence of the pending Hillsborough suit on inquiry by the court, the City readily admitted the facts of that pending litigation, T46-51, as presented to the court by the Department in its Motion to Intervene and during the hearing, including the Department's introduction of certified copies of the Hillsborough pleadings. T18-22, 30-32. Cf. McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So. 2d 214 (Fla. 2d DCA 1998), affirmative defenses inapplicable to motion to dismiss where defendant did not move pleading into evidence nor court properly take judicial notice. (The City's representation at p.14 of its Initial Brief of the court's inquiry at T45-51 as an expression of disdain is totally unsupported on the record, either on the face of the transcript or

during the live proceedings. Rather, the record reflects only the court's inquiry for clarification of the issues and of the City's position, after the court heard from the Department of the pending suit in Hillsborough County, a matter which had not been apparent on the face of the Complaint or its attachments.)

On the court's inquiry for clarification, the City readily admitted that the debt at issue was the JPA contract the City had signed with the Department, that it was the same matter pending in the Hillsborough suit where the City had already lost motion for summary judgment, that the City sought to invalidate the JPA as unconstitutional for omitting the approval of the taxpayers, and that unconstitutionality of the JPA contract was a valid defense in the pending Hillsborough suit. T45-51. The facts at issue for the motions to intervene and dismiss not being in dispute, the standard of review for consideration of the purely legal question of the propriety of granting the motion to dismiss is de novo. Sarkis v. Pafford Oil Co., Inc., 697 So. 2d 524, 526 (Fla. 1st DCA 1997). The court did not err in dismissing the City's Complaint because there is no legal basis for the City to file pursuant to Ch. 75 to invalidate its contract with the Department, signed five-and-one-half years ago pursuant to the authority of sec. 339.12, Fla. Stat. It is obvious, both from the court's inquiry and oral ruling, that the court did not separate the issues of jurisdiction and estoppel. At the conclusion of the hearing, the court ruled orally as follows:

The Court having considered arguments that were presented, the Court is going to rule that collateral estoppel does apply.

This Court does not believe this Court has jurisdiction to proceed on the matter. This Court does not see that it is a Chapter 75 proceeding, that is the contract matter has been litigated in Hillsborough County. The JPA entered into between the City and the Department of Transportation was for work done in the City of Oldsmar.

Work has resulted in a lawsuit in the circuit court of the Thirteenth Judicial Circuit. I believe the Hillsborough case number is 99-02257. The City of Oldsmar has been brought into the Hillsborough lawsuit, has filed pleadings. And from the pleading standpoint, participated actively as a party in that lawsuit.

The City of Oldsmar has raised in the Hillsborough case a defense, the same argument the city is attempting to litigate in Pinellas County in our court case number 00-4479. The Pinellas County issues regarding the validity have been litigated in Hillsborough County.

There was a motion for summary judgment in Hillsborough County that was denied and that circuit court case is ongoing. There was then filed by the City -– there was an effort by the City to have the Pinellas County courts proceed as a bond validation under Chapter 75 on behalf of the citizens of the City of Oldsmar so they would have an opportunity to attempt to invalidate the agreement that the City has entered into with the Department of Transportation.

Said agreement subjects the City to potential adverse consequences in the Hillsborough County circuit case. And there was no notice given to the parties in the Hillsborough Circuit Court case to this proceeding.

The proceeding in the Pinellas Circuit Court, if favorable to the City of Oldsmar may preclude any judgment against the City in the Hillsborough Circuit Court case, or even preclude them from being a participant as a party.

The Court is going to rule in this case that there is collateral estoppel. A defense has been validly raised and it needs to be litigated in the Hillsborough Circuit Court. This Court doesn’t have authority to proceed.

T75-77. The court's written ruling that the "JPA is not a bond or certificate of indebtedness subject to Article 7, section 12, of the Florida Constitution and Chapter 75 of the Florida Statutes," is made in the context of the State's Response to Order to Show Cause, the Department's Motion to Dismiss and the hearing thereon, and on the undisputed facts that the contract, which is the subject of a pending suit in Hillsborough County, was five-and-one-half-years old before the Complaint was filed. On the totality of these circumstances, the court's order of dismissal should be affirmed.

The City readily admitted to the lower court that it had filed its Complaint to invalidate the previously issued and existing JPA obligation. T10-11, 13, 46. The City admitted, on the court's inquiry, that it filed to invalidate the JPA contract only after being counter-sued by the Department in the Hillsborough suit. T46-47. The City having already availed itself of the remedies provided in Sec. 337.19, Fla. Stat., to sue the Department on the contract (City's counter claim at City's ap.ex. 3B), it has acquiesced to the Hillsborough County forum and should be precluded from invoking a second forum in Pinellas County on the same matter.

The City's contention that it should be allowed, pursuant to Ch. 75, Fla. Stat., to invalidate its five-and-one-half-year old contract with the Department is not supported on the law. The City has demonstrated no legislative intent that Ch. 75 includes a government agency's right to seek invalidation to avoid a prior-incurred debt obligation. To the contrary, the Chapter is

entitled “Bond Validation.”

Although claiming the existence of precedent for a complaint for invalidation, T14, the City cited none to the lower court and cites none to this Court. During the show-cause hearing, the City said it had two examples of public entities attacking their own bonds. T59-60. However, neither case was brought by the governmental agency. In Andrews v. City of Winter Haven, 3 So. 2d 805 (Fla. 1941), a bondholder brought suit for declaratory relief. In Frankenmuth Mut. Ins. Co. v. Magaha, 769 So. 2d 1012 (Fla. 2000), referred to during the hearing as the Escambia County case, the insurance company filed for declaratory relief. Neither of these cases was a Ch. 75 bond validation case.

The City misconstrues Secs. 75.02 and 75.09, Fla. Stat., in claiming that the purpose of a Ch. 75 proceeding “is to resolve all potential questions regarding the validity of the public debt in question.” City’s Initial Brief p.15. The plain language of Sec. 75.09 is more narrow and states only that a final judgment validating bonds is conclusive as to the matters adjudicated. The City relies on no final judgment validating bonds. Contrary to the City’s representation, Sec. 75.02 does not provide that “a complaint to determine the validity of municipal bonds or certificates of indebtedness shall be filed....” City’s Initial Brief p.14. Rather, the section provides that a municipality “may determine its authority to incur bonded debt or issue certificates of debt” by filing a complaint. Emphasis added. The City, rather, seeks to determine that it had no authority

to have incurred five-and-one-half years earlier the debt reflected by the JPA contract. As pointed out by the Department during the hearing, the City has issued no bonds pursuant to the contract. T27.

Case law relied on by the City does not support its right to file a Ch. 75 Bond Validation proceeding to invalidate a contract which was five-and-one-half-years old and which had not been originally validated. Traditionally, and usually, the validation proceeding is invoked by a municipality which is "desiring to incur `any bonded debt or to issue certificates of indebtedness,'" and wishes to determine its authority to do so, "by filing a petition against the state... prior to their issue by the affected municipality." State v. City of Miami, 152 So. 6, 7-8 (Fla. 1933), emphasis added.

In State v. City of Miami, 152 So. 6 (Fla. 1933), relied on by the City, the city had sought to validate proposed water revenue certificates. In GRW Corp. v. Dept of Corrections, 642 So. 2d 718 (Fla. 1994), the Department had sought to validate a proposed lease-purchase agreement to finance construction of a correctional facility. In State v. Brevard County, 539 So. 2d 461 (Fla. 1989), the county had sought to validate a proposed lease-purchase agreement for equipment. In State v. School Bd. of Sarasota County, 561 So. 2d 549 (Fla. 1990), the school board had sought to validate the issuance of proposed bonds for a ground lease to finance construction of school facilities. In Orange County Civil Facilities Authority v. State, 286 So. 2d 193 (Fla. 1973), the

Authority had sought to validate proposed bonds to enlarge its civic auditorium. The financing arrangement included a "Cooperation Agreement" between the Authority and the County, relied on by the court to deny the validation, but is not addressed in the appellate opinion as being an independent subject of validation. In State v. Tampa Sports Authority, 188 So. 2d 795 (Fla. 1996), the Authority had sought to validate proposed stadium revenue bonds. The financing arrangement included cooperation agreements with the city and county, but is not addressed in the appellate opinion as being an independent subject of validation.

These cases, relied on by the City, support the court's order of dismissal because they represent timely validation proceedings filed prior to the issuance of the indebtedness sought to be validated.

The City relies on only two cases in which validation was sought after incurring the debt obligation: State v. City of Daytona Beach, 431 So. 2d 981 (Fla. 1983), and State v. School Bd. of Sarasota Co., 561 So. 2d 549 (Fla. 1990). In both, supporting agreements for already-issued bonds were sought to be validated, an interlocal agreement in the former and a lease-purchase agreement in the latter. There is no analogy to the present case. Although the City attempted to refer to the JPA contract as a bond and the Department as the bondholder, the Department denied it. T27. No bonds were previously validated and the JPA contract is not a supporting agreement for previously-issued bonds. The recognized purpose of Ch. 75 proceedings: "to assure marketability of the

financing instrument," GRW Corp. v. Department of Corrections, 642 So. 2d 718, 720 (Fla. 1994), is inapplicable to the five-and-one-half-year old contract between the City and the Department.

The City's claim that Ch. 75 "provides anyone who has standing with a method to determine whether any debt incurred by a public entity complies with Article VII, Section 12, of the Florida Constitution" (City's Initial Brief p.15) is not legally correct nor supported by the cases relied on by the City of State v. Suwanee Co. Dev. Auth., 122 So. 2d 190, 193 (Fla. 1960), and St. v. Brevard Co., 539 So. 2d 461 (Fla. 1989), which are both validation proceedings. Only a government agency may file a Complaint pursuant to Ch. 75 and may do so only seeking to validate bonds or certificates of indebtedness. A defendant, with standing, may challenge the government entity's right to incur the debt, but may do so pursuant to Ch. 75 only after a complaint to validate is filed by the government agency. Otherwise, a plaintiff must seek injunctive or other equitable relief to challenge a government agency's assumption of debt.

Hollywood, Inc., v. Broward County, 90 So. 2d 47 (Fla. 1956), relied on by the City, was not a validation proceeding, but a taxpayer's class suit for declaratory decree to rescind the county's land acquisition. The City assured the court it was not seeking a declaratory decree. T13. Similarly, Weinberger v. Bd. Pub. Instruc. of St. Johns Co., 112 So. 2d 253 (Fla. 1927); Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 2d 356 (Fla. 1936); and Betz v. Jacksonville Transportation Authority, 277

So. 2d 769 (Fla. 1973), relied on by the City, were not validation proceedings, but suits for injunctive relief to prevent the school district's issuing special tax school district bonds; the city's issuing sewer revenue bonds pursuant to city ordinance without referendum (or validation); and the Authority's purchase of a private bus system, respectively. Similarly, Frankenmuth Mut. Ins. Co. v. Magaha (Fla. 2000), relied on by the City, was not a validation case, but a suit against the county for payment on a lease-purchase agreement.

These cases relied on by the City do not support its position that the court erred in dismissing the invalidation Complaint. They support the court's order of dismissal because they represent the right of others to sue a governmental entity in a proceeding other than a Ch. 75 proceeding. These cases support the court's order dismissing the City's Ch. 75 Complaint on the authority that the matter was already pending in another court as an action on the contract.

Whether the City might have sought to validate the JPA contract is a hypothetical question which was not addressed in the court below and which is, therefore, inappropriate and unnecessary to reach on appeal. See Metro Dade Co. v. Chase Fed. Housing Corp., 737 So. 2d 494, 498 n.7 (Fla. 1999). It is irrelevant to the court's order of dismissal whether the JPA contract might initially have been the subject of a Ch. 75 bond validation proceeding filed by the City, and its legality construed pursuant thereto.

Article VII, Section 12

These four subissues pertaining to applicability of Art. VII, Sec. 12 do not support reversal of the Pinellas County court's order of dismissal because applicability of Art. VII, Sec. 12 is not determinative of applicability of Ch. 75 to these proceedings. Chapter 166 allows a municipality to incur debt without Ch. 75 validation proceedings, and this Court has recognized that government documents of indebtedness are not necessarily subject to the referendum requirement of Art. VII, Sec. 12 (or its predecessor, Art IX, Sec. 6). See State v. Miami Beach Redevelopment Agency, 392 So. 2d 875, 895 (Fla. 1980); DeSha v. City of Waldo, 444 So. 2d 16, 18 (Fla. 1984). In the Hillsborough County case, the court has ruled that applicability of Art. VII, Sec. 12 is a matter of fact yet to be resolved. City's ap.ex. 3D.

The City takes an inconsistent position from that taken by the City in the Hillsborough suit in now claiming that the Pinellas County bond validation was the only appropriate forum for a judicial ruling as to whether the JPA contract violates Art. VII, Sec. 12. The City previously sought to have the Hillsborough County court make that finding when it filed its motion for summary judgment. City's appendix ex. 3C. The City admitted that it had not yet exhausted its remedies as to the Hillsborough suit. T50. The City apparently (from the face of the pleadings) did not raise in Hillsborough County the defense that the JPA contract could only be challenged on a Ch. 75 bond validation proceeding filed in Pinellas County. The City is not entitled to an appellate decision

in its favor based on its own inconsistent position in a court below. See McPhee v. State, 254 So. 2d 406 (Fla. 1st DCA 1971); McCrae v. State, 395 So. 2d 1145, 1152 (Fla. 1980), finding that "[a] defendant cannot take advantage on appeal of a situation which he has created at trial."

This Court has previously held that a bond validation proceeding can be an inappropriate forum for raising issues pertaining to a contract. In St. v. Sunrise Lakes Phase II Spec. Rec. Dist., 383 So. 2d 631, 633 (Fla. 1980), the Court held that the operating contract for the recreational facility was not a proper subject of the Ch. 75 proceedings, but collateral to the bond validation proceeding because it "involves other parties and clearly cannot be properly resolved in a bond validation proceeding." Similarly, in McCoy Restaurants, Inc., v. City of Orlando, 392 So. 2d 252 (Fla. 1980), the Court held that the lease agreement contract between the parties was collateral to, and not the proper subject of, the bond validation proceeding.

The trial court did not err, on the posture of this case, in dismissing the Ch. 75 bond validation proceeding for lack of jurisdiction.

Estoppel

The Department argued that collateral estoppel barred the City's Complaint for invalidation because the City had already lost motion for summary judgment in the Hillsborough case, based on the same issue. T28-32.

Whether collateral estoppel, equitable estoppel, or abatement

is the correct terminology, the City does not, as asserted in the Department's Motion to Dismiss, or Alternatively, to Abate (Appendix exhibit 6 to the City's Initial Brief), enjoy the right to litigate its contract with the Department in two courts simultaneously.

The future collateral estoppel effect of a ruling on the case between the same parties on the same issue pending in another forum was relied on in Madison v. Williams Island Country Club, Ltd., 606 So. 2d 687, 690 (Fla. 3d DCA 1992), to reject hearing an issue on appeal. Future collateral estoppel, because the pending arbitration results would later apply to bind the parties to the suit on payment of a surety bond, was relied on in Kidder Elec. of Fla., Inc. v. U.S. Fidelity & Guaranty Co., 530 So. 2d 475, 476 (Fla. 5th DCA 1988), to stay the suit during pendency of the arbitration proceeding. That the trial court in the instant case similarly relied on future collateral estoppel is apparent from findings in the court's order. The trial court's findings included that the City "faces potential adverse financial consequences" should it "lose the pending litigation in Hillsborough Circuit Court" and that a result favorable to the City in the Ch. 75 proceeding would preclude a judgment against it in the Hillsborough case. City's Appendix ex. 7 to its Initial Brief.

Estoppel will apply to prevent an appellant from relying on a position contrary to that taken in the court below. See Pollock v. Bryson, 450 So. 2d 1183, 1186 (Fla. 2d DCA 1984), citing McCrae and McPhee, supra. The Pinellas County court's reliance on

estoppel, to prevent the City's relitigating in Pinellas County the issue of the applicability of Art. VII, Sec. 12, to the JPA contract after raising it on motion for summary judgment in Hillsborough County, is a similar application of estoppel to prevent a party from taking advantage of his own-induced error.

Absent equitable exception, venue lies in the court where parties have first filed and perfected service of process. Mabie v. Garden St. Management Corp., 397 So. 2d 920 (Fla. 1981). Equitable estoppel will apply to prevent a party from relying on deceit to avoid this general rule. See Triad Discount Buying Services, Inc. v. Special Data Processing Corp., 761 So. 2d 1181 (Fla. 4th DCA 2000). After the Department made the court aware of the pending Hillsborough County suit, the court did not err in relying on estoppel to prevent the City's litigating in two courts at the same time the issue of the applicability of Art. VII, Sec. 12 to the JPA contract.

Although abatement, sought by the Department as an alternative to dismissal, may be a proper remedy to stay a second proceeding during pendency of the prior-perfected proceeding (see CO Motors, Ltd., v. Andrews Automotive Corp., 730 So. 2d 417 (Fla. 5th DCA 1999)), in this case, the City argued against abatement, T61-67, and would now be precluded from asserting that the court erred in rejecting that alternative. The "principle of priority," that the first court in which suit was perfected retains jurisdiction, see Hirsch v. DiGaetano, 732 So. 2d 1177, 1178 (Fla. 5th DCA 1999), was

honored, and the court's order dismissing the Ch. 75 proceeding should be upheld.

ISSUE III. WHETHER THE COURT ERRED IN GRANTING THE DEPARTMENT'S MOTION TO INTERVENE.

The City's appellate position that the court erred in granting the intervention is contrary to its position below, where it recognized the court's discretion and said it did not mind the Department's presence so long as it did not delay the proceeding. T23-24. After first saying that it was opposed to the motion to intervene, the City argued only that the Department was not an indispensable party and that it "would resist the intervention, particularly if it's going to delay this proceeding...." T15, 24.

The Department presented its factual argument of being the stake-holder on the contract and supported it with documentation of the contract and pending case in Hillsborough County. City's Initial Brief ex. 2-3, 4 at pp.18-22, 30-32.

The trial court did not abuse its discretion in granting the motion of the Department to intervene. The standard of review for discretionary decisions is a test of reasonableness based on the totality of the circumstances. Sekot Laboratories, Inc., v. Gleason, 585 So. 2d 286, 289 (Fla. 3d DCA 1990). "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980).

Although it is within the sound discretion of the court to refuse intervention of a party moving to intervene, intervention

should be liberally allowed, and equitable interests may require allowing intervention. In Union Central Life Ins. Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992), relied on by the City, the Court held that the trial court had abused its discretion, pursuant to Rule 1.230, Fla.R.Civ.Proc., in refusing intervention by the contract insurer and that the contractual language could be pertinent to the consideration. In John G. Grubbs, Inc., v. Suncoast Excavating, Inc., 594 So. 2d 346 (Fla. 5th DCA 1992), the court found sufficient interest in pending litigation to avoid his contract with the county to require granting the contractor's motion to intervene.

Denial of a motion to intervene has been upheld when an existing party to the suit is found to have the capability of adequately protecting the interests of those seeking intervention. See Florida Wildlife Federation, Inc., v. Bd. of Trustees of Int. Imp. Trust Fund, 707 So. 2d 841 (Fla. 5th DCA 1998), relied on by the City. The City argues that the State Attorney is capable of protecting the interests of the Department in a Chapter 75 bond validation proceeding. However, it is the State's position that the City's suit was not one permitted by Chapter 75 for reasons unique to the suit already pending between the City and the Department based on a contract between the two. City's Appendix ex. 3 to its Initial Brief.

In both Union Central and Florida Wildlife, the courts looked to 1918 precedent of the Florida Supreme Court for a

definition of an interest sufficient to require granting intervention: "the interest necessary to entitle the right to intervene must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." Florida Wildlife at 842 citing Morgareidge v. Howey, 75 Fla. 234, 78 So. 14 (1918). Because of the suit already pending in Hillsborough County between the City and the Department on the same contract sought to be invalidated by the City in the instant case, the Department would gain or lose by effect of the judgment in this case.

The City does not address that Sec. 75.07, Fla. Stat., provides the statutory right to intervene in a Ch. 75 proceeding. "Any property owner, taxpayer, citizen or person interested may become a party to the action...." In Rich v. State, 663 So. 2d 1321, 1324 (Fla. 1995), the Court defined "person interested," for purposes of intervention in Sec. 75.07, as "anyone who has a justiciable interest in a bond validation proceeding because he or she stands to gain or lose something as a direct result of the bond issuance." The Department's interest meets the test for intervention in a bond proceeding used in Rich v. State, 663 So. 2d 1321 (Fla. 1995), because they would not be in the same position as before if the complaint were granted.

Regardless of the extent of the State Attorney's representation of the Department within its duty to represent the

citizens in a Ch. 75 bond validation proceeding (see State's Response to Order to Show Cause, attached), the jurisdiction of the contract suit pending between the City and Department in Hillsborough County is not within the jurisdiction of the State Attorney for the Sixth Judicial Circuit, comprising Pinellas and Pasco Counties. The trial court found that the City did not provide notice of the Ch. 75 proceeding to parties in the Hillsborough case. City's Appendix ex. 7 to its Initial Brief. Nor did the City serve the State Attorney for the Thirteenth Judicial Circuit, comprised of Hillsborough County, as would appear to be required by Sec. 75.05, Fla. Stat., when the proceeding affects more than one circuit. Failure of the moving party to provide notice to a party with an interest in assets was the basis for allowing intervention in State Dept. Legal Affairs v. Rains, 654 So. 2d 1254 (Fla. 2d DCA 1995).

In reversing the order denying intervention by the patient's HMO in a products liability action, the Fifth District in Humana Health Plans v. Lawton, 675 So. 2d 1382 (Fla. 5th DCA 1996), equated the right to intervene with the right to be heard, a due process right protected by both the State and U.S. Constitutions.

Based on Rule 1.230, Sec. 75.07, and case law precedent, the court did not abuse its discretion in granting the Department's intervention and the due process right to be heard.

CONCLUSION

WHEREFORE, the Order Dismissing the Complaint should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellee has been furnished by U.S. mail to George E. Spofford, IV, Post Office Box 3333, Tampa, Florida 33601-3333; and to Marianne Trussell, Dep. Gen. Counsel, Dept. of Transportation MS 58, 605 Suwanee Street, Tallahassee, Florida 32399-6544, this day of , 2001.

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CERTIFICATION OF TYPE SIZE AND STYLE

Undersigned Assistant certifies that the size and style of type used in this brief is Courier New, 12 point or larger, a font that is not proportionately spaced and does not exceed 10 characters per inch.

By:
C. Marie King

CMK/0117MW40

IN THE FLORIDA SUPREME COURT

CITY OF OLDSMAR, : Case No. SC00-2695
Appellant
Pinellas Court No. 00-4479-CI-21
V. : Bond Validation

STATE OF FLORIDA, :
and the taxpayers,
property owners and
citizens of City of Oldsmar,
including nonresidents owning
property in, or subject to
taxation by, City of Oldsmar,
and State of Florida,
Department of Transportation,
Appellees

STATE ATTORNEY'S INDEX OF EXHIBITS

1. Order to Show Cause.

2. State Attorney's Response to Order to Show Cause.

3. Department's Motion to Intervene, to Dismiss or to Abate.