

IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

THE CITY OF OLDSMAR,

Plaintiff-Appellant,

v.

Case No.

THE STATE OF FLORIDA, and the  
taxpayers, property owners and citizens  
of the City of Oldsmar, Florida, including  
non-residents owning property in, or subject  
to taxation by, the City of Oldsmar, and  
STATE OF FLORIDA, DEPARTMENT OF  
TRANSPORTATION,

L.T. No. 00-004479-CI-21

Defendants-Appellees.

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ON DIRECT APPEAL FROM THE CIRCUIT COURT  
IN AND FOR PINELLAS COUNTY, FLORIDA

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INITIAL BRIEF OF APPELLANT,  
CITY OF OLDSMAR

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## **STATEMENT OF THE CASE AND FACTS**

This appeal addresses the dismissal of a bond validation lawsuit filed by the City of Oldsmar, Florida (“City”), in which the City sought a judicial determination whether a debt obligation entered into by the City violated Article VII, Section 12 of the Florida Constitution. The debt obligation in question arises out of a written Joint Project Agreement (“JPA”) between the City and the State of Florida, Department of Transportation (“FDOT”). Pursuant to the JPA, the FDOT agreed to pay for certain construction work to be performed for the City’s benefit, and the City agreed to reimburse the FDOT the amounts paid by the FDOT on the City’s behalf. The City contends that the JPA constitutes a long term debt (bond or certificate of indebtedness) governed by Article VII, Section 12 of the Florida Constitution, and as such is void because the JPA was never approved by a referendum vote of the City’s citizens.

In an effort to obtain a judicial determination regarding whether the JPA is void, the City filed a bond validation suit in Pinellas County Circuit Court pursuant to Chapter 75, Florida Statutes, naming as party defendants the State of Florida, and the taxpayers, property owners and citizens of the City of Oldsmar, Florida, including non-residents owning property in, or subject to taxation by, the City of Oldsmar. The Office of the State Attorney filed a response to the City’s Complaint and appeared on behalf of the named defendants. The FDOT intervened in the Pinellas County suit,

and the FDOT and named defendants moved to dismiss the suit for lack of subject matter jurisdiction. The defendants argued that the JPA was merely a contract, not a “bond or certificate of indebtedness,” and therefore, neither Article VII, Section 12 of the Florida Constitution or Chapter 75, Florida Statutes were implicated. The Pinellas County Circuit Court dismissed the bond validation suit on the grounds that the court lacked subject matter jurisdiction because, in the court’s opinion, the JPA was not a bond or certificate of indebtedness subject to Article VII, Section 12 of the Florida Constitution, or Chapter 75, Florida Statutes. The Trial Court also ruled that the City was collaterally estopped from bringing the Pinellas County lawsuit because there was (and is) a lawsuit currently pending in Hillsborough County in which the City is arguing that the JPA violates Article VII, Section 12 of the Florida Constitution as an affirmative defense.

Following the Trial Court’s dismissal, the City timely brought this appeal. The City contends in this appeal: that the Pinellas County Circuit Court erred when it dismissed the suit because the Trial Court did have jurisdiction; that the Trial Court erred when it dismissed the suit on the alternative grounds of collateral estoppel because there was no final adjudication in the Hillsborough County suit; and, that the Trial Court erred when it allowed the FDOT to intervene because the FDOT is not an indispensable party to the litigation.

The Florida Supreme Court has mandatory jurisdiction to hear this appeal

pursuant to Section 75.08, Florida Statutes, which states that all appeals of suits brought pursuant to Chapter 75 shall be decided by the Florida Supreme Court.

The material facts in this case are as follows:

In 1995, the State of Florida Department of Transportation ("FDOT") began negotiations with various parties regarding a roadway improvement project on State Road 584 in Pinellas County, Florida, FDOT Project No. 15080-3510(6514), WPI No. 7116900, SR 584 (the "Project"). Within the Project's boundaries were certain utility lines (water and sewer lines) owned by the City that were to be adjusted or relocated during the construction of the roadway project.

On December 1, 1995, the City and FDOT entered into a Joint Project Agreement ("JPA") that was drafted by the FDOT. (Complaint, ¶6, Appendix Tab 1.)

<sup>1</sup> The JPA provided that the FDOT would see that the necessary adjustments and relocations of the City's utilities would be performed by the contractor hired by the FDOT to build the Project. (Complaint, ¶8, Appendix Tab 1; JPA ¶¶8, 11 & 12, Appendix Tab 2.)

<sup>2</sup> The JPA also provided that the City would pay the FDOT for the work performed

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<sup>1</sup> This appeal arises out of a successful Motion to Dismiss. In considering a Motion to Dismiss, the allegations of the Complaint are to be considered as being true.

<sup>2</sup> The JPA is part of the record below as Exhibit B to the City's Complaint. Given the importance of the JPA as the integral part of this appeal, for convenience the JPA is also included as a separate part of the Appendix at Appendix Tab 2.

on the City's utilities. (Complaint, ¶¶7 & 8, Appendix Tab 1, Appendix Tab 2.) The JPA provided that the City would pay the FDOT \$1,094,817.19 in advance of the construction which would be used by the FDOT to pay the FDOT's contractor to perform the work on the City's utilities. (Complaint ¶¶8 & 9, Appendix Tab 1; JPA ¶1, Appendix Tab 2.)

The significant payment provision for purposes of this appeal is JPA paragraph 11 which states that the FDOT will pay all utility construction expenses and damages in excess of the \$1,094,817.19 advanced by the City, and at the end of the 715 day project, the City will be required to reimburse the FDOT all amounts advanced by the FDOT, plus interest. (JPA ¶11, Appendix Tab 2.) The JPA also states that the City must indemnify the FDOT all damages and attorney's fees the City incurs as a result of the FDOT's involvement with the City's utility work. (JPA ¶¶10, 12, Appendix Tab 2.)

The City did not conduct a referendum obtaining voter approval of the JPA debt obligation. (Complaint ¶16, Appendix Tab 1.) The JPA lacks any prohibition against the use of City ad valorem taxes to pay the financial obligations arising out of the JPA. (Complaint ¶14, Appendix Tab 1.) The JPA lacks any provision restricting payment of JPA financial obligations to revenues of the Project. (Complaint ¶14, Appendix Tab 1.) The JPA lacks any provision restricting payment of JPA financial obligations to funds appropriated by the City specifically for that

purpose on an annual basis. (Complaint ¶14, Appendix Tab 1.) The City is a municipality with taxing powers as contemplated by Article 7, Section 12 of the Florida Constitution.

The FDOT entered into a construction contract with Kimmins Contracting Corp. (“Kimmins”) to build the Project which included the City utility work that the FDOT had agreed to perform pursuant to the JPA. (Hillsborough County Circuit Court Third Party Complaint, Appendix Tab 3A.)

<sup>3</sup> Prior to the start of the work, the City paid the FDOT the agreed upon \$1,094,817.19 for the utility work specified in the JPA. (Complaint, ¶8, Appendix Tab 1.)

On March 19, 1999, Kimmins sued FDOT in Hillsborough County in Case No. 99-2257, Division A, alleging that Kimmins incurred delays and costs on the Project as a result of certain acts and omissions by FDOT, including substantial changes, revisions, errors, and omissions in the specifications and the design of the Project.

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<sup>3</sup> At the August 24, 2000 hearing below, the FDOT submitted certain documents from Hillsborough County Circuit Court Case No. 99-2257 which were made part of the record below. The records from the Hillsborough County Case are included in the Appendix to this Brief at Tab 3 at the following sub-tabs: A) Third Party Complaint; B) City’s Answer, Affirmative Defenses, Counterclaim and Demand for Trial; C) City’s Motion for Summary Judgment; D) Order Denying Motion for Summary Judgment; E) City’s Motion for Reconsideration; F) FDOT’s Memorandum Opposing City’s Motion for Reconsideration; and, G) Order Denying Motion for Reconsideration.

(Hillsborough County Circuit Court Third Party Complaint, Appendix Tab 3A.) Kimmins is seeking an increase in the contract price of approximately \$6,000,000 from the FDOT. (Transcript of August 24, 2000 hearing, p. 21, Appendix Tab 4.) The FDOT brought a third party suit against the City seeking reimbursement for all funds paid to Kimmins in excess of the original JPA price, plus interest and attorney's fees, above and beyond the \$1,094,817.79 JPA price originally paid to the FDOT. (Hillsborough County Circuit Court Third Party Complaint, Appendix Tab 3A.) The FDOT contends that it is entitled to be reimbursed by the City for payments that the FDOT has already made to Kimmins in excess of the \$1,094,817.79 previously paid by the City. (See Hillsborough County Third Party Complaint ¶30, Appendix Tab 3A.)

On February 25, 2000, the City filed a motion for summary judgment in the Hillsborough County case against the FDOT on the basis that the JPA violates Article VII, Section 12 of the Florida Constitution and is void *ab initio*. (Appendix Tab 3C.) The Hillsborough County Circuit Court denied the City's Motion for Summary Judgment on the grounds that the court believed that factual issues remained to be determined which prevented summary judgment. (Hillsborough County Circuit Court Order, Appendix Tab 3D.) The Hillsborough County lawsuit is still pending.

The City then filed the bond validation proceeding in Pinellas County under Case No. 00-004479-CI-21, which is the subject of this appeal. (Appendix Tab 1.)

Pursuant to Chapter 75, Florida Statutes, notice of the bond validation suit was published. (Appendix Tab 5.) The bond validation trial was scheduled for August 24, 2000, and immediately prior to the trial, the Trial Court heard motions that resulted in the dismissal of the Complaint. (Hearing Transcript dated August 24, 2000, Appendix Tab 4.) On November 27, 2000, the Pinellas County Circuit Court entered an Order dismissing the City's Complaint on the grounds that (1) the Trial Court lacked jurisdiction and (2) that the Pinellas County suit was barred by the collateral estoppel effect of the Hillsborough County Circuit Court's denial of the City's Motion for Summary Judgment. (Appendix Tab 6.) The Pinellas County Circuit Court also granted the FDOT's Motion to Intervene. (Appendix Tab 6.)

The Pinellas County Circuit Court Order of Dismissal was executed on November 27, 2000, and the City timely filed its Notice of Appeal on December 5, 2000. (Appendix Tab 7.)

## SUMMARY OF THE ARGUMENT

The Trial Court erred in dismissing the City's bond validation suit for lack of subject matter jurisdiction. The JPA violates Article VII, Section 12 of the Florida Constitution because it constitutes a long-term debt incurred by the City without a referendum. The City's Complaint asserts that the Pinellas County Circuit Court had subject matter jurisdiction pursuant to Chapter 75, Florida Statutes, which states that the trial court for the County within which the City is located shall have jurisdiction over litigation brought to determine the validity of public bonds and certificates of indebtedness. The Trial Court erroneously ruled that the JPA was not a bond or certificate of indebtedness, and therefore Chapter 75, Florida Statutes did not apply. The JPA is a bond or certificate of indebtedness that involves a long-term pledge of the City's ad valorem taxes, and as such, is subject to the provisions of Chapter 75. The JPA provides that if the expense to construct the City's utilities exceeds \$1,094,817.19, then the FDOT shall pay all costs in excess of \$1,094,817.19, and at the end of the 715 day construction project, the City shall reimburse the FDOT for all costs, damages and attorney's fees, plus interest. Accordingly, the JPA constitutes a long-term debt obligation of the City. Furthermore, the JPA does not contain the judicially prescribed "savings clauses" necessary to prohibit a judgment creditor from coercing the use of ad valorem taxes to repay a debt obligation. Absent from the JPA

are savings clauses that: expressly prohibit the use of ad valorem taxes; expressly limit payment of the obligation to appropriations made during an annual budget period; or expressly state that payment of the JPA debt shall solely be from project revenues. Absent the savings clauses, the JPA directly implicates the use of ad valorem taxes. Moreover, due to the critical importance of providing sewer and water service to the City's citizens, even if the saving provisions were present, the City would face the insurmountable moral obligation to repay the FDOT from ad valorem taxes or risk loss of the City's utilities. The JPA and Florida Statutes, Sections 337.403 and 337.404, also create an unlawful security interest that would create an insurmountable moral obligation to repay the FDOT from ad valorem taxes or risk loss of City property.

A capital improvement contract (such as the JPA) entered into by a municipality requiring payment over a period greater than one year, and in which funding does, or could come from, ad valorem revenues is an obligation within the scope of Article VII, Section 12 of the Florida Constitution, thereby requiring a referendum of eligible voters. The JPA and the debt obligation incurred by the City as a result of the JPA were not subject to a public referendum of the citizens of Oldsmar, Florida. Therefore, the JPA violates the referendum requirement of Article VII, Section 12 of the Florida Constitution and is void.

Prior to entering into the JPA with the City, the FDOT was aware that a joint

project agreement would be subject to the constraints of Article VII, Section 12 of the Florida Constitution. Nonetheless, despite knowledge that the JPA would be subject to Article VII, Section 12, the FDOT failed to include in the JPA any of the judicially recognized savings provisions such as a non-appropriation clause or prohibition against the use of ad valorem taxes.

A determination made pursuant to Chapter 75, Florida Statutes, is the only way for all actual and potential challenges regarding the validity of the JPA and any payments made thereunder can be resolved. Absent a determination pursuant to Chapter 75, if the FDOT obtains a judgment against the City in the Hillsborough County suit, any citizen of the City can bring suit to prohibit payment of the judgment as an unlawful debt. Accordingly, judicial efficiency dictates that all challenges to the validity of the JPA be resolved now, rather than after incurring the expense of the Hillsborough County trial.

The Trial Court also erred in dismissing the City's Complaint on the grounds that the City was collaterally estopped from asserting the constitutional invalidity of the JPA. Although the City asserted that the JPA violated Article VII, Section 12 of the Florida Constitution as a defense in the Hillsborough County case, the Hillsborough County Court never rendered a final adjudication on the merits of that issue. The Hillsborough County Court merely denied the City's Motion for Summary Judgment on the grounds that issues of fact were present. The Hillsborough County

Case is still pending. Therefore, the City's bond validation suit in Pinellas County is not barred by the doctrine of collateral estoppel.

\_\_\_\_\_The Trial Court also erred in granting the FDOT's motion to intervene on the grounds that the FDOT, the bondholder, is the real party in interest and indispensable party. This Court has held that a bondholder is not an indispensable party to a bond validation proceeding.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CITY'S BOND VALIDATION COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

Pursuant to Chapter 75, Florida Statutes, the City of Oldsmar (“City”) filed a Complaint in the Circuit Court in Pinellas County, Florida, seeking a judicial determination whether the Joint Project Agreement (“JPA”) between the City and the FDOT was an invalid debt under Article VII, Section 12 of the Florida Constitution.

<sup>4</sup> The Trial Court dismissed the Complaint on the grounds that the JPA was not a bond or certificate of indebtedness, and therefore, the Trial Court ruled that it lacked subject matter jurisdiction because Article VII, Section 12 was not implicated. The Trial Court erred when it determined that the JPA was not a bond or certificate of indebtedness subject to Article VII, Section 12, and erred when it dismissed the

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<sup>4</sup> Article VII, Section 12 of the Florida Constitution provides that a municipality with ad valorem taxing powers may not incur long-term debt that may expose ad valorem taxes to liability for the debt, unless the municipality’s electorate has approved the debt via referendum. Article VII, Section 12 states, in pertinent part,

Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only: . . . when approved by vote of the electors who are owners of freeholds . . . .

Complaint for lack of jurisdiction.<sup>5</sup>

The transcript of the hearing which culminated with the dismissal reveals that the Trial Court did not understand that essentially any municipal debt can be subject to Article VII, Section 12. (Transcript of August 24, 2000 hearing, pp. 46-49, Appendix Tab 5.) The Trial Court viewed the JPA as merely a contract, rather than a formal “bond or certificate of indebtedness,” and ruled that Article VII, Section 12, thus, did not apply. (Order, ¶1, Appendix Tab 6.) The Trial Court’s narrow (and incorrect) definition of a bond or certificate of indebtedness was

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<sup>5</sup> It is apparent from the wording of the Trial Court’s November 27, 2000 Order (Appendix Tab 9) that the City’s complaint was dismissed for lack of subject matter jurisdiction and not for lack of personal jurisdiction. However, in an abundance of caution, the City contends that the Trial Court clearly had personal jurisdiction over all named defendants and intervening defendants. The Trial Court obtained personal jurisdiction over the defendants upon the City’s publishing notice of the suit pursuant to §75.06, Florida Statutes. (See Appendix Tab 5.) Notwithstanding paragraph 6 of the Trial Court’s November 27, 2000 Order, the City did provide notice to all necessary parties pursuant to Florida Statutes, Chapter 75. Furthermore, as discussed in greater detail in Section III of this brief, the FDOT is not an indispensable party to this action, and by actively participating in the suit, the FDOT waived any claim it may have had based on lack of personal jurisdiction. See Romellotti v. Hanover Amgro Ins. Co., 652 So.2d 414 (Fla. 5th DCA 1995)(The defense of lack of personal jurisdiction must be raised at the first opportunity or it is waived); Coto-Ojeda v. Samuel, 642 So.2d 587 (Fla. 3d DCA 1994)(When a party appears in court to contest subject matter jurisdiction, that party has entered a general appearance which results in waiver of the defense of lack of personal jurisdiction.).

further colored by the Trial Court’s express disdain for the seemingly harsh result sought by the City, which was invalidation of the JPA. (Transcript pp. 45-51, Appendix Tab 4.) The confluence of the Trial Court’s definition of a bond and its disdain for the relief sought, resulted in the Complaint being dismissed in error. The JPA is not an archtypical “bond or certificate of indebtedness,” but, as established below, the JPA irrefutably is a debt that is subject to the constraints of Article VII, and although invalidation of the JPA may appear harsh, that result is mandated by the Florida Constitution.

In testing any scheme of public financing, doubts as to whether the scheme violates the Constitution are to be resolved against the scheme and in favor of invalidation. See Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956); Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936); Spearman Brewing Co. v. City of Pensacola, 187 So. 365, 367 (Fla. 1939)(“[A]ny reasonable doubt that evidences of indebtedness may be issued without the approval of a majority of the voters at an election for the purpose will be resolved against the validity of such instruments.”)

Section 75.01 of the Florida Statutes provides that circuit courts have jurisdiction to test the validity of bonds and certificates of indebtedness and all matters connected therewith. Section 75.02 of the Florida Statutes provides that a complaint to determine the validity of municipal bonds or certificates of indebtedness shall be

filed with the circuit court in the county where the municipality is located. The purpose of a lawsuit brought pursuant to Chapter 75, Florida Statutes is to resolve all potential questions regarding the validity of the public debt in question. See §75.09, Fla. Stat. (2000).

A bond validation proceeding brought pursuant to Chapter 75, Florida Statutes, 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. See State v. Suwannee County Development Authority, 122 So.2d 190, 193 (Fla. 1960)(The intended purpose of a validation suit "is to enable the state and citizens involved to determine whether the issuing agency has the authority to issue the bonds or certificates of indebtedness, and the authority to expend the proceeds for the purpose contemplated.") In State v. Brevard County, 539 So.2d 461 (Fla. 1989), the State challenged the validity of certain lease-purchase agreements evidencing county debt. This Court determined that Chapter 75, Florida Statutes, was applicable and the Court did have jurisdiction to test whether the lease-purchase agreements violated Article VII, Section 12, stating:

“[J]urisdiction lies because the entire thrust of the state’s argument is that by entering into the equipment leasing arrangement . . . the county is doing indirectly that what it cannot do directly without meeting the referendum requirement of Article VII, Section 12 of the Florida Constitution.” Id. at 462.

In the instant case, the City sought to utilize Chapter 75 in the identical

manner and for the same purpose as the parties did in Brevard County, i.e., to test the constitutional validity of the City's debt obligation evidenced by a non-traditional "bond."

In its Complaint, the City expressly asserted that: the City is a municipality located in Pinellas County, Florida (See Complaint ¶2, Appendix Tab 1); the Pinellas County Circuit Court had jurisdiction pursuant to Chapter 75, Florida Statutes (See Complaint ¶1, Appendix Tab 1); that the JPA attached as an exhibit to the Complaint constitutes a long-term bond or certificate of indebtedness subject to Article VII, Section 12 of the Florida Constitution and to Chapter 75, Florida Statutes (See Complaint ¶15, Appendix Tab 1); and, that the City was seeking a judicial determination regarding the validity of the JPA (See Complaint, Appendix Tab 1). Therefore, the Complaint contains the necessary allegations to establish that the Pinellas County Circuit Court had subject matter jurisdiction pursuant to Chapter 75, Florida Statutes.

When considering a motion to dismiss, the trial court is restricted to the four corners of the complaint, and must accept the plaintiff's allegations as true in determining whether jurisdiction has been invoked properly. In addition, all factual inferences should be resolved in the plaintiff's favor. Wilson v. News-Press Publishing Co., 738 So.2d 1000 (Fla. 2d DCA 1999); Mettler, Inc. v. Ellen Tracy, Inc., 648 So.2d 253 (Fla. 2d DCA 1994). The Trial Court below reviewed the JPA, and

determined as a matter of law that the JPA was not a bond or certificate of indebtedness, contrary to the allegations in the Complaint. In doing so, the Trial Court erred.

The City is entitled to *de novo* review by the Florida Supreme Court of the Trial Court's interpretation of the JPA. See Florida Constitution, Article V, Section 3(b)(2); DEC Electric, Inc. v. Rapheal Construction Corp., 558 So.2d 427 (Fla. 1990); Coleman v. B.R. Chamberlain & Sons, Inc., 766 So.2d 427 (Fla. 5th DCA 2000). The City respectfully submits that upon *de novo* consideration, the Supreme Court should rule, as a matter of law, that the JPA is a bond or certificate of indebtedness subject to Article VII, Section 12, and thus, the Trial Court's dismissal should be reversed. Furthermore, upon review of the JPA, this Court should rule that because the JPA lacks any of the judicially recognized savings provisions, payment of the JPA debt is payable from City ad valorem taxes, and unless there was a voter referendum approving the JPA, the JPA violates Article VII, Section 12 of the Florida Constitution. See Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012, 1026 n.15 (Fla. 2000). Accordingly, the City respectfully submits that the Supreme Court should reverse the Trial Court's dismissal for lack of jurisdiction, and remand for an evidentiary finding to determine whether a referendum is lacking, as alleged by the City in its Complaint.

The argument set forth below establishes that the JPA is a bond or certificate

of indebtedness subject to §75.01, Florida Statutes, and Article VII, Section 12 of the Florida Constitution, and that a bond validation proceeding before the Trial Court is the only forum available to the City to obtain a complete adjudication of the validity of the JPA.

**A. The Joint Project Agreement is a bond or certificate of indebtedness subject to Article VII, Section 12 of the Florida Constitution and Chapter 75, Florida Statutes.**

In determining whether a public debt is encompassed by Article VII, Section 12 of the Florida Constitution, the definition of "bond" or "certificate of indebtedness" is liberally construed to encompass essentially any form of public debt. Section 166.01, Part II, Florida Statutes (2000), entitled, "Municipal Borrowing," defines "bond" as "bonds, debentures, notes, certificates of indebtedness, mortgage certificates, or other obligations or evidences of indebtedness of any type or character." (emphasis added)

In State v. City of Miami, 152 So. 6 (Fla. 1933), the State asserted that Article IX, Section 6 only applied to traditional bonds.

<sup>6</sup> In response to the challenge to jurisdiction, this Court explained that:

“Our conclusion on the proposition of jurisdiction is that the statutory proceedings for validation of bonded debts and certificates of

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<sup>6</sup> Article IX, Section 6 of the Florida Constitution (1885) cited in Hollywood and elsewhere herein is the predecessor of Article VII, Section 12 (1968), and for the purposes of this appeal is the same.

indebtedness authorized by sections to which reference has hereinbefore been made are broad enough to include every form of proposed bonded debt, as well as every form of proposed certificate of indebtedness, negotiable or non-negotiable, limited or general, which a county, municipality, taxing district, or other political subdivision may undertake to issue under purported authority of law.”

Id. at 8 (emphasis added).

Similarly, this Court, in Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936), defined a “bond” subject to Article IX, Section 6, as any promise to pay a debt. This Court further stated that whether the debt obligation is governed by Article IX, Section 6 does not depend on “whether the proposed promises to be issued by the city are ‘bonds’ within a narrow meaning of the term having relation to form and name and verbal construction, but whether the ‘project’ contemplates the incurring of an indebtedness. . . .” Id. at 362.

In Betz v. Jacksonville Transportation Authority, 277 So.2d 769 (Fla. 1973), this Court considered whether contracts to acquire and manage a bus transportation system violated Article VII, Section 12. This Court ultimately deemed the agreements to be constitutional, but observed that, if the contracts at issue “either directly or indirectly or contingently bound the City of Jacksonville or the citizens thereof to pay the deferred management fees from ad valorem revenues . . . the same would be invalid in the absence of a requisite approving referendum vote.” Id. at 722.

In Hollywood, Inc. v. Broward County, 90 So.2d 47 (Fla. 1956), this Court stated that, "A scheme of financing which directly or indirectly obligates a taxing unit such as a county to pay a sum with interest extending over a period of years, is in effect an attempt to create a binding, continuing, interest-bearing contract obligation to pay money in the future, which violates the intent of the provisions of Section 6 of Article IX of the Constitution...." In Hollywood, this Court held that the trial court erred when it dismissed the complaint which sufficiently alleged a potential violation of Article IX, Section 6.

Other examples of non-traditional bonds or certificates of indebtedness subject to constitutional restriction include: GRW Corp. v. Department of Corrections, 642 So.2d 718 (Fla. 1994)(agreeing that a lease and a management agreement are subject to Article VII, Section 12); State v. Brevard County, 539 So.2d 461, 462 (Fla. 1989)(acknowledging that Chapter 75, Florida Statutes, is appropriate to test the validity of an equipment lease); State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990)(acknowledging that Chapter 75, Florida Statutes, is appropriate to test the validity of ground lease and agreements which are evidence of School Board's debt); Orange County Civil Facilities Authority v. State, 286 So.2d 193 (Fla. 1973)(validating interlocal agreement pursuant to Chapter 75, Florida Statutes); State v. Tampa Sports Authority, 188 So.2d 795 (Fla. 1966)(validating agreements pursuant to Chapter 75, Florida Statutes); State v. City of Daytona Beach, 431 So.2d

981 (Fla. 1983)(holding that interlocal agreement obligating city to pay county annual payments to finance a county construction project is a bond or certificate of indebtedness); Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012 (Fla. 2000)(holding that a multi-year computer lease is a certificate of indebtedness subject to Article VII, Section 12).

The Florida State Attorney General has consistently followed, and cited with approval, the foregoing precedents. See, e.g., Op. Att’y Gen. Fla. 80-25 (1980)(Any contractual device for the present funding of tax revenue contemplated to be raised or made available for reimbursement in future years is a bond within the purview of the Florida Constitution.); Op. Att’y Gen. Fla. 89-58 (1989)(Any long term contractual debt that could be paid from ad valorem taxes is subject to Art. VII, Section 12.) Moreover, the Florida State Attorney General has recognized that a municipality’s agreement to indemnify creates a municipal debt. Op. Att’y Gen. Fla. 84-103 (1984).

Paragraph 11 of the JPA at issue here provides that “upon final payment to the contractor for the entire project ... [the City] will reimburse the FDOT....” for all construction costs that are incurred by the FDOT in connection with the FDOT's reconstruction of the City’s utilities in excess of the \$1,094,817.79 advanced by the City, plus interest. (Appendix Tab 2, emphasis added.) Paragraphs 11 and 8 of the JPA provide that the reimbursement was to be paid after the 715 day Project is completed. (See

Complaint, ¶9, Appendix Tab 1; JPA ¶11, Appendix Tab 2.) Paragraph 10 of the JPA purportedly obligates the City to indemnify, defend, save, and hold harmless the FDOT for all claims and damages arising out of the parties' participation in the JPA. And, paragraph 12 of the JPA purportedly makes the City liable to reimburse the FDOT for attorneys' fees and court costs incurred by the FDOT. The JPA is nothing more than a means for the City to finance the cost of the construction by postponing for at least 715 days all expenses in excess of the \$1,094,817.79 advanced by the City. As such, the JPA is a debt obligation "maturing more than twelve months after issuance,"<sup>7</sup> and is subject to Article VII, Section 12 of the Florida Constitution.

**B. The Joint Project Agreement violates Article VII, Section 12 of the Florida Constitution because the JPA lacks all of the judicially recognized savings provisions.**

Any long-term funding device, i.e., a debt obligation extending over 12 months, whereby a municipality directly or indirectly pledges its ad valorem taxing power without the approval of its electorate is in violation of Article VII, Section 12. State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963). A public debt can avoid the public referendum

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<sup>7</sup> A public debt is issued at the time the debt instrument is delivered. See City of Jacksonville v. Renfro, 136 So. 254 (Fla. 1931). A public debt matures at the time the payment is due. See Klein v. City of New Smyrna Beach, 152 So.2d 466 (Fla. 1963); Black's Law Dictionary 280 (6th ed. 1991); State ex. rel. Woman's Catholic Order of Foresters v. City of Ft. Myers, 196 So. 705 (Fla. 1940).

Accordingly, because payment of the JPA debt is due more than 12 months after the issuance of the debt, the JPA obligation is one "maturing more than twelve months after issuance." See also State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990); and Betz v. Jacksonville Transportation Authority, 277 So.2d 769 (Fla. 1973), wherein this Court deemed a management agreement to be a long-term debt because it exceeded one year.

requirement if the bond or certificate expressly recites at least one of several possible "savings provisions."<sup>8</sup> For example, a referendum is not required if the debt instrument expressly states that it will be paid solely from non-ad valorem tax revenues generated by the project being

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<sup>8</sup> Courts apply a “bright-line test” when evaluating whether a public debt obligation violates Article VII, Section 12 of the Florida Constitution. If a public debt instrument does not contain an express savings provision such as an express prohibition against the use of ad valorem taxes, then a referendum is required because the debt is deemed a general obligation, i.e., the “bright line” is the presence of the express savings provision.

However, even if the instrument does expressly contain a savings clause, a referendum may still be required if payment of the debt with non-ad valorem tax funds will have “more than an incidental impact” on the debtor such that ad valorem taxes will need to be levied. See County of Volusia v. State, 417 So.2d 968 (Fla. 1982); Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012 (Fla. 2000). The “more than an incidental impact test,” has no application under the facts of this case, however, because the JPA does not contain a savings clause, and thus, fails the “bright-line test.” Accordingly, the JPA is a general obligation of the City and has a direct impact on ad valorem tax revenues. There is no need to go beyond the JPA to determine whether the JPA will have “more than an incidental impact,” because absent a savings clause, the JPA is by definition a general obligation of the City.

It is now widely recognized that the easiest method to avoid the referendum requirement of Article VII, Section 12, is to include in the debt instrument an express non-appropriation clause or a prohibition against the use of ad valorem taxes. Accordingly, nearly all decisions reported in Florida within the past 30 years deal with a debt instrument that contains one or more savings provision. In the presence of one or more savings provision, there is no need for the Court to apply or discuss the “bright line test,” and most reported decisions of recent vintage discuss and apply the “more than incidental impact test” of necessity. The “bright line test” is still valid, and should be dusted off for those rare occasions, like this one, where the drafter of a debt instrument neglected to include a savings provision. The bright line test can be applied as a matter of law, i.e., either the instrument includes a savings provision, or it does not. The “more than an incidental impact test,” however, can require a factual inquiry which requires a trial.

financed with the debt instrument, e.g., a revenue bond/certificate. Similarly, a referendum is not required if the debt instrument expressly states that it will be paid from sources other than ad valorem tax revenues and ad valorem taxes shall not under any circumstances be available to pay the debt. A third savings provision is one that expressly states that payment shall only be from appropriations budgeted on an annual basis, i.e. the debt instrument contains a non-appropriation clause.<sup>9</sup>

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<sup>9</sup> If the debt instrument expressly limits payment to appropriations budgeted each year, i.e., contains an express, non-appropriation clause, then the obligation is by definition not a long-term debt. Absent a non-appropriation clause, a municipality loses full budgetary flexibility and obligates itself to future expenditures. A majority of the states, including Florida, have constitutional or statutory limitations upon borrowing by local governments. The purpose of a debt limitation is to safeguard the general funds and property of a municipality from a situation whereby the holders of public debt could at some time after the issuance thereof, force an increase in the taxes of, or foreclose on the general assets and property of the issuing public corporation to obtain payment of the principal or interest thereon. See Chester James Antinue, Local Government Law, §15.46, 15-94 (citing Redondo Beach v. Taxpayers, 352 P.2d 170 (Cal. 1960)). The intent of the prohibition of Art. VII, Section 12 is to prevent a public owner from entering into contracts today that obligate the payment of funds in future year(s). A non-appropriation clause provides the City with full budgetary flexibility by allowing the City to choose each year whether to incur the debt, or do without the service.

In the instant case, via the JPA, the City advanced the FDOT \$1,094,817.79 and arguably promised that whatever cost over runs, attorneys' fees, damages, and interest the FDOT incurred above and beyond the \$1,094,817.79 advanced by the City, would be paid by the City. In reality, via the JPA, the City unwittingly gave the FDOT a signed open check that the FDOT could tender for payment 4 years or more in the future. In doing so, the City lost its ability for full budgetary flexibility in the future. Under the reading of the JPA advanced by the FDOT, the City has no option, but to pay the FDOT's demand when tendered, regardless of the condition of the City's other budgetary obligations or desires. The purpose of a non-appropriation clause is to allow a municipality full budgetary flexibility on an annual basis. Flexibility is lacking here.

In Neff v. City of Jacksonville, 190 So. 468, 473 (Fla. 1939), this Court held that a contract to construct and operate an electric power plant required a referendum because it did not “affirmatively appear on the record that the obligation will not pledge or obligate the taxing power [of the City].”

In City of Orlando v. State, 67 So.2d 673 (Fla. 1953), this Court affirmed validation of city paving contracts because the contracts expressly prohibited use of ad valorem taxes to pay the city’s debt. The Court distinguished the City of Orlando’s debts from the paving contracts in CloverLeaf v. City of Jacksonville, 199 So. 923 (Fla. 1941) because in CloverLeaf, there was no indication in the debt instrument regarding the source of payment. This Court stated in City of Orlando that where the invalid CloverLeaf contracts failed to identify a non-ad valorem tax source of payment, in the City of Orlando case, “there is no such uncertainty.... Payment from any other source is positively prohibited. The general credit of the city cannot therefore in any conceivable eventuality become involved, nor can its

taxing power ever be called into play to liquidate the obligation.” City of Orlando, 67 So.2d at 674.

In Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936), this Court considered a scheme to finance the construction of a public waterworks. The Court identified the following “features which the borrowing plan must contain to be legal: the anticipated revenues from the system of waterworks only and solely should be pledged, and the contractual terms of the certificates must affirmatively negate any and all legal obligation on the part of the City for the payment of the same as an indebtedness against anything except the special funds if, when as realized and available for that purpose.” Id. at 365 (emphasis added).

In contrast, Article VII, Section 12 did not require the debts to be invalidated in State v. Alachua County, 335 So.2d 554, 558 (Fla. 1976), because the debt instruments “clearly disclaim any pledge of ad valorem taxation for payment of the bonds....”

This Court stated in State v. City of Tampa, 3 So.2d 484, 485 (Fla. 1941), that the debt instrument “should definitely state that the payment of principal and interest of such indebtedness will be paid solely from the net receipts from the operation....”

In State v. City of Miami, 27 So.2d 118, 124 (Fla. 1946), this Court held that, “We have repeatedly held that [the referendum requirement]...is not violated by the issuance without an election of revenue bonds or revenue certificates of a municipality which are payable solely from the revenues of the utility to be enlarged, acquired, or constructed...and in which the bonds or certificates it was specifically provided that no taxing power of the municipality should ever be resorted to for their payment....” (emphasis added).

In Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012, 1024 (Fla. 2000), Justice

Lewis, writing for the Court, recently acknowledged that "...[non-appropriation clauses] are essential to prevent long-term municipal financing arrangements from being classified as debt under state law, thus triggering state-law requirements such as voter referendum."

In Florida Attorney General Opinion 80-09, the Attorney General opined that a City may not finance the purchase of a computer absent a referendum if the contract does not "contain any disclaimer as to the city obligating its credit or taxing power to secure the performance of the terms of the contract." The Attorney General acknowledged that a contract's failure to specify which funds are to be used and failure to state that the City's taxing power is not being exposed is a fatal flaw in the agreement. In that same opinion, the Attorney General further stated that a referendum would be required because, "No provision is made in the instant agreement as to which funds are to be appropriated, budgeted for, or used in making the contractually required payments, nor is there any disclaimer as to the city's obligating its credit or taxing power to secure performance of the terms of the contract . . . Such liability or judgment would constitute a debt of the city, jeopardizing the city's general credit and funds."

Nothing within the JPA that is the subject of this appeal, or the City's enabling resolution authorizing execution of the JPA, Oldsmar City Ordinance 95-32 (Exhibit "A" to Complaint, Appendix Tab 1):

- prohibits the use of ad valorem taxes to pay the City's debts arising out of the JPA;
- identifies the source of funds for payment of the City's JPA debts;
- restricts the source of payment of the City's JPA debts to revenue generated by the utility work or any specific non-ad valorem tax revenue sources; or,
- limits the City's JPA debt obligations to appropriations voluntarily made on an annual

basis.

As such, the JPA constitutes a long-term general obligation of the City, and all City revenues, including ad valorem taxes are available to any JPA creditor to satisfy the JPA debt. The FDOT's JPA clearly violates Article VII, Section 12 of the Florida Constitution, unless there was a referendum approving the debt (which there was not, as plead by the City).

The City recognizes that the relief ultimately sought, invalidation of the JPA, appears to be harsh.<sup>10</sup> However, as recognized by the United States District Court in Frankenmuth Mut. Ins. Corp. v. Ernie Lee Magaha, 1996 WL 571042 (N.D. Fla. 1996), parties contracting with municipal corporations are deemed to be on notice of any limitations on the corporation's power to contract. There, the court observed that, the underlying purpose of the rule, that parties contracting with a municipality do so at their own peril, is that taxpayers should not be held accountable on a contract unless the contract has been entered into according to the strict letter of the law. Otherwise, absent strict adherence to that rule of law,

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<sup>10</sup> If the JPA violates Article VII, Section 12, the JPA is an unenforceable contract and, as a matter of law, the JPA is void *ab initio*. See Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012 (Fla. 2000); P.C.B. Partnership v. City of Largo, 549 So.2d 738 (Fla. 2d DCA 1989); City of Panama City v. T&A Utilities, 606 So.2d 744 (Fla. 1st DCA 1992), rev. denied, 618 So.2d 211 (Fla. 1993); Weinberger v. Board of Public Instruction, 112 So. 253 (Fla. 1927)(When such bonds have not been authorized by a two-thirds vote as required by the Constitution such bonds are void *ab initio*.); Andrews v. City of Winter Haven, 3 So.2d 805 (Fla. 1941)(City of Winter Haven avoided deferred payments due under invalid bonds issued by City).

Moreover, the doctrine of equitable estoppel will not permit the enforcement of a void agreement. As stated in P.C.B. Partnership, 549 So.2d at 742, "A party entering into a contract with a municipality is bound to know the extent of the municipality's power to contract, and the municipality will not be estopped to assert the invalidity of a contract which it had no power to execute." See also Frankenmuth, 769 So.2d at 1012.

the taxpayers could be subject to unlimited liability resulting from illegal contracts entered into by their elected representatives, whether unwittingly, or intentionally. See also Ramsey v. City of Kissimmee, 190 So. 474 (Fla. 1939).

The apparent harshness of the result mandated by the Constitution in this appeal is ameliorated by the fact that the FDOT actually was aware of its peril prior to executing the JPA. The FDOT drafted the JPA, and prior to entering into the JPA with the City, the FDOT was aware that its participation with municipalities in Joint Project Agreements was subject to the constraints of Article VII, Section 12. In fact, prior to entering into this JPA with the City, the FDOT inserted a savings provision in at least one other joint project agreement to avoid the constitutional infirmities of this JPA. See St. Lucie County v. Town of St. Lucie Village, 603 So.2d 1289 (Fla. 4th DCA 1992).

In St. Lucie County, the FDOT entered into a joint project agreement with the St. Lucie Airport Authority whereby the FDOT agreed to advance funds to the Authority for the acquisition of land desired by the Authority. The joint project agreement obligated the Authority to reimburse the FDOT within ten years or less. The trial court granted summary judgment and ruled that the joint project agreement was a void contractual debt in violation of Article VII, Section 12. The Airport Authority appealed the summary judgment, and during the pendency of the appeal the FDOT and Airport Authority amended their joint project agreement to include the following savings provision:

“...[The] reimbursement obligation shall be payable solely from the non-ad valorem revenues of the Agency and shall not be or constitute a general obligation or indebtedness of the Agency or a bond within the meaning of any constitutional or statutory provision.”

Id. at 1291. By adding the savings provision prohibiting the use of ad valorem taxes, the

FDOT cured the Article VII, Section 12 defect in the St. Lucie County joint project agreement, and the appellate court reversed the summary judgment because the joint project agreement was no longer defective.

In the instant case, if the FDOT had included in this JPA a savings provision similar to that added in St. Lucie County, then the JPA at issue here also would not be in violation of Article VII, Section 12. It is not known why the FDOT elected not to use the St. Lucie County savings provision in the JPA at issue in this appeal. The FDOT also could have avoided running afoul of Article VII, Section 12 by: including a non-appropriation clause in the JPA; requiring that the City actually advance funds before the FDOT incurred construction costs purportedly on behalf of the City in excess of the initial \$1,094,817.79 paid by the City; and/or refusing to allow the FDOT's contractor to perform any work that would result in contract billings attributable to the City that exceed the amount of funds paid in advance by the City. The FDOT is charged with determining whether the JPA it drafted is legal, and the FDOT had the knowledge and the ability to cure the constitutional defect contained in the JPA. The FDOT failed in both regards when it repeated here its mistakes committed in the St. Lucie case. The City and its taxpayers should not bear the expense of the FDOT's failure to include even one of the judicially recognized savings provisions to avoid a referendum, and Florida law mandates that the burden of such error be borne by the FDOT.

**C. The Joint Project Agreement creates a secured debt in violation of Article VII, Section 12.**

The JPA also violates Article VII, Section 12 of the Florida Constitution because the JPA provides the FDOT with an unconstitutional lien and ability to foreclose on all assets of the City.

In Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), this Court invalidated a provision within a debt instrument that gave the creditor the right to foreclose on property owned by the Florida Institute of Technology. This Court held that the county would feel morally compelled to levy taxes or to appropriate funds to prevent the loss of the mortgaged property through foreclosure. Therefore, the mortgage right was illegal. See also Op. Att'y Gen. Fla. 98-71 (1998)(The creation of a security interest in real or personal property has long been recognized by the Florida Supreme Court as a violation of Article VII, Section 12 of the Florida Constitution.)

In the instant case, Chapter 337, Florida Statutes, provides the FDOT with an express lien on all City property to secure debts incurred by the FDOT in relocating City utilities. Section 337.403(3) provides that if the City fails to comply with an order from the FDOT to relocate City utilities located within an FDOT right of way, then the FDOT may incur the expense and assess the expense against the City. Section 337.403, Florida Statutes, in turn states that if the FDOT incurs expenses as a result of a utility's failure to relocate its utilities in accordance with an FDOT order, then the expense incurred by the FDOT shall be a lien against the utility's property. Accordingly, the FDOT's ability to impose a lien pursuant to Chapter 337 and the JPA, is a security interest which violates Article VII, Section 12 of the Florida Constitution.

The lien right is unconstitutional because, by it, the City can be compelled morally and legally to appropriate funds from ad valorem taxes or make future appropriations to satisfy the FDOT's statutory lien. See State v. Brevard County, 539 So.2d 461 (Fla. 1989); State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990); Frankenmuth, 769 So.2d at 1012(holding that a county's lease agreement morally compelled county to pledge ad valorem

taxes to fulfill the obligations of the lease). See also State v. City of Miami, 152 So. 6 (Fla. 1933), overruled on other grounds by, State v. County of Dade, 234 So.2d 651 (Fla. 1970)(operating and maintaining municipal utilities is an indispensable public service). Absent a referendum whereby the citizens of the City knowingly granted the FDOT the right to seize property to satisfy the JPA debt, the instrument, and arguably the statute itself,<sup>11</sup> are unconstitutional.

**D. The Pinellas County Circuit Court bond validation proceeding was the only appropriate forum to obtain a judicial ruling on whether the Joint Project Agreement violates Article VII, Section 12 of the Florida Constitution.**

The only way to resolve the issue of the JPA's constitutional validity as to all parties that have standing to object to the JPA or payments made under the JPA, is through a Chapter 75 bond validation proceeding heard in Pinellas County, Florida. §75.09, Fla. Stat. (2000). See also Bessemer Properties, Inc. v. City of Opalocka, 74 So.2d 296 (Fla. 1954).

In Bessemer, this Court held that a declaratory judgment action was not the correct avenue to test the enforceability of bonds or certificates of indebtedness, and expressly held that the city in that case should have used a Chapter 75 proceeding to test the validity of its debt obligation. In that case, the purpose of the suit was to validate certificates of indebtedness for use in obtaining real property and to construct a jail, city hall, and other facilities. The city apparently was concerned about the enforceability of the debt agreement absent a referendum, and sought a judicial determination of its validity via declaratory decree. The Court expressly held that proceedings to test the validity of public debt should be brought

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<sup>11</sup> Sections 337.403 and 337.404, Florida Statutes, also are the functional equivalents of the “non-substitution clause” deemed unconstitutional in Frankenmuth, 769 So.2d at 1012.

under the provisions of Florida Statutes, Chapter 75, in part, because any proceeding other than a Chapter 75 suit would not bind the citizens and taxpayers, or other interested parties who were not parties to the suit. See also People Against Tax Revenue Management v. County of Leon, 583 So.2d 1373 (Fla. 1991)(Chapter 75, Florida Statutes, clearly contemplates that a bond validation proceeding is a proper proceeding for quieting all legal and factual issues that may cast doubt on the legal validity of a bond issue.)

In the instant case, if a final adjudication is rendered in the Hillsborough County lawsuit regarding the enforceability of the JPA, it will only bind the City, the FDOT, and Kimmins, i.e. the parties to that suit. If Kimmins and the FDOT ultimately obtain a judgment against the City in the Hillsborough County litigation, any citizen of the City would be free to bring suit prohibiting payment of the judgment on the grounds that the debt arises out of the void JPA. However, if the validity of the JPA is determined in a bond validation proceeding, then, pursuant to §75.09, Florida Statutes, the Court's determination will be conclusive as to all persons and all matters or claims arising out of the JPA, whether in the Hillsborough County case or elsewhere. See North Shore Bank v. Town of Surfside, 72 So.2d 659 (Fla. 1954). Absent adjudication in a Chapter 75 lawsuit, the FDOT and City will be exposed to additional litigation to resolve the enforceability of the JPA. Accordingly, it would be a waste of judicial resources to wait until after the Hillsborough County lawsuit is over to determine whether the JPA is enforceable. The Trial Court was, and is, the only appropriate jurisdiction to test the validity of the JPA. The Trial Court erred when it ruled that the matter was best decided in the Hillsborough County lawsuit.

**II. THE TRIAL COURT ERRED WHEN IT DISMISSED THE CITY'S BOND VALIDATION COMPLAINT ON THE GROUNDS THAT IT**

**WAS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.**

The City's Complaint should not have been dismissed on the grounds of collateral estoppel. The essential elements for the doctrine of collateral estoppel to apply, are: that the parties and issues be identical, that the particular matter be fully litigated and determined in a contest, which has resulted in a final decision of a court of competent jurisdiction. Department of Health and Rehabilitative Services v. B.J.M., 656 So.2d 906 (Fla. 1995); Mobil Oil Corp. v. Shevin, 354 So.2d 372 (Fla. 1977).

The Hillsborough County Court's denial of the City's motion for a partial summary judgment clearly did not totally dispose of an entire case as to any party, and a final judgment has not been entered in that case allowing the City to seek an appeal. Therefore, the order denying the motion for partial summary judgment was not an appealable order. See Welch v. RTC, 590 So.2d 1098 (Fla. 5th DCA 1991); Gries Investment Co. v. Shelton, 388 So.2d 1281 (Fla. 3d DCA 1980); Gause v. First Bank of Marianna, 442 So.2d 1062 (Fla. 1st DCA 1983).

The Hillsborough County lawsuit which the Trial Court believed warranted collateral estoppel, is still pending and there has been no final adjudication in that matter. The Defendants in this case argued at the motion to dismiss hearing before the Trial Court that the Hillsborough County Court's denial of the City's motion for summary judgment was preclusive as to the Pinellas County lawsuit. A denial of a summary judgment, much less one based on a finding that material issues of fact exist, is not a final adjudication and cannot support collateral estoppel. Weigh Less for Life, Inc. v. Barnett Bank of Orange Park, 399 So.2d 88 (Fla. 1st DCA 1981); Steinhardt v. Steinhardt, 445 So.2d 352 (Fla. 3d DCA 1984); Board of Education of Center Cass School District No. 66 v. Sanders, 515 N.E. 2d 280 (Ill.

App. Ct. 1987)(Collateral estoppel is not applicable, because a denial of summary judgment is not a final judgment on the merits.)

Therefore, the Trial Court erred in applying collateral estoppel because the Article VII, Section 12 issue was not fully litigated and there was no final adjudication in the Hillsborough County case. The court in the Hillsborough County case simply denied the City's motion on the grounds that there were genuine issues of fact. (Appendix Tab 3D.) The Trial Court erred in dismissing the City's Complaint based on the doctrine of collateral estoppel.

### **III. THE TRIAL COURT ERRED IN GRANTING THE FDOT'S MOTION TO INTERVENE IN THE BOND VALIDATION PROCEEDING.**

Whether to allow intervention is subject to the sound discretion of the trial court. This Court, in Union Central Life Ins. Co. v. Carlisle, 593 So.2d 505 (Fla. 1992), identified the two-prong test to determine whether or not a trial court should grant a motion to intervene. First, the trial court must determine that the interest asserted by the intervenor is appropriate to support intervention. Second, the court "must exercise its sound discretion to determine whether to permit intervention." Id. at 507. See also Florida Wildlife Federation, Inc. v. Board of Trustees of Internal Imp., 707 So.2d 841 (Fla. 5th DCA 1998).

In its Order dated November 29, 2000, the Trial Court granted the FDOT's Motion to Intervene on the basis that the FDOT was the real party in interest, and an indispensable party. (See Transcript of August 24, 2000, Appendix Tab 4.) In doing so, the Trial Court abused its discretion.

The FDOT is not the real party in interest, or an indispensable party to this action. The only necessary parties to a Chapter 75 bond validation proceeding are the bond-issuing entity and the State. See State of Florida v. Osceola County, 752 So.2d 530 (Fla. 1999); Broward

County v. State, 515 So.2d 1273 (Fla. 1987).

In Broward County, this Court held that bondholders were not necessary parties in a bond validation proceeding, and this Court stated that "the only parties absolutely necessary to a bond validation are the issuing entity and, if the conditions necessitating a defense are met, the state." 515 So.2d at 1274.

In this action, the City sued the State of Florida and provided notice by publication as required by §75.06, Florida Statutes. (Appendix Tab 5.) The FDOT was not included as a named party, because under Chapter 75, the City was not required to name the bondholder, FDOT, in the action. Furthermore, Chapter 75, Florida Statutes, provides that it is the State Attorney's role to represent the interests of the State, taxpayers, property owners and citizens of the City of Oldsmar. See §75.05, Fla. Stat. (2000). It is the Pinellas County State Attorney's Office that is charged with responsibility for analyzing the JPA and making an evaluation regarding whether the JPA violates Article VII, Section 12. The State Attorney's Office is charged with ensuring that the restrictions of the Constitution are followed and enforced in a bond validation suit. The State Attorney's Office is assigned that role because it is not motivated by personal gain or loss. In contrast, the FDOT and its counsel are motivated by the desire to enforce the debt obligation, regardless of whether it is in violation of the Florida Constitution. By allowing the FDOT to intervene and assume the defense of the action, the Trial Court allowed the FDOT to usurp the role delegated to the State Attorney by the Legislature in §75.05, Florida Statutes. The FDOT assumed the statutorily prescribed role of the State Attorney. Therefore, the Trial Court erred and abused its discretion in granting the FDOT's motion to intervene on the basis that the FDOT is the real party in interest and an indispensable party to the bond validation proceeding.

## CONCLUSION

The Trial Court clearly erred when it dismissed the City's Complaint for lack of jurisdiction, and alternatively, because the doctrine of collateral estoppel applied. The City respectfully requests that the Supreme Court reverse the Trial Court, and rule, as a matter of law, that:

The JPA constitutes a bond or certificate of indebtedness that is subject to Article VII, Section 12 of the Florida Constitution and Chapter 75, Florida Statutes;

As a bond or certificate of indebtedness, the dismissal by the Trial Court is reversed because the Trial Court clearly had jurisdiction; and

Collateral estoppel has no application and cannot serve as a bar because there has been no final adjudication in the Hillsborough County lawsuit.

The City also respectfully requests that the Supreme Court rule, as a matter of law, that, because the JPA lacks any of the judicially recognized savings provisions, Article VII, Section 12 mandates that the JPA be approved in a referendum, and absent a referendum, the JPA violates Article VII, Section 12 and is void. The Trial Court's dismissal should be reversed and the case remanded with directions that the City is entitled to a factual determination regarding the existence of a referendum.

Upon reversal and remand, the Trial Court should be instructed not to allow the FDOT to intervene, because the State Attorney's Office is the entity charged with opposing the City's Complaint, if such opposition is warranted in the opinion of the State Attorney.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to C. Marie King, Assistant State Attorney, Pinellas County, P.O. Box 5028, Clearwater, FL 33758; Raymond C. "Chet" Conklin, Florida Department of Transportation, Hayden Burns Building, MS-58, 605 Suwannee Street, Mail Station 58, Tallahassee, Florida 32399-0458; and to Marianne A. Trussell, Deputy General Counsel, Florida Department of Transportation, Haydon Burns Building, MS-58, 605 Suwannee Street, Tallahassee, FL 32399-0458 on this 5th day of January, 2001.

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Attorney

**CERTIFICATE OF STYLE & TYPE OF PRINT**

I HEREBY CERTIFY that the foregoing Initial Brief was typed in Type Style Times New Roman, Type Size 14.

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Attorney