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IN THE FLORIDA SUPREME COURT

Case No. 69,785
Cir. Civ. 86-5568-16

MAR 4 1987
CLERK, SUPREME COURT
By ________
Deputy Clerk

State of Florida,
Appellant, Defendant

v.

Housing Finance Authority of Pinellas County, Florida, a Public Body Corporate and Politic,
Appellee, Plaintiff

BOND VALIDATION
FROM PINELLAS COUNTY

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE FACTS

Appellant objects that Appellee's statement of the facts includes speculation and argument in addition to facts from the record before the Court.

Specifically, Appellant objects to characterization words "attempting," p. 2 of Appellee's Brief; "expressed concern," p. 4; "conjured up a situation," p. 5; and "exhibited some concern" p. 6. Appellant also objects to argument contained in the statement of facts specifically appearing at p. 5: "Such reasoning ignores the clear obligation imposed by ...."; and p. 6: "The Assistant State Attorney's emphasis of the language or such other percentage as the issuer may approve (Appellant's Initial Brief, p. 8) is misplaced."

These things are not facts but proper only for argument and will be answered in the argument portion of this reply brief.

ARGUMENT

ISSUE I. THE COURT ERRED IN VALIDATING THE BONDS BECAUSE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE ISSUING AUTHORITY'S FINDING OF PUBLIC PURPOSE

Appellee apparently rejects Apellant's case law for the standard of review for sufficiency of the evidence to support a final judgment of bond validation. Appellee ignores that case law and cites instead three bond cases from pre 1929. Obviously those cases are superseded by this Court's modern case law addressing the specific issue of the standard of review for the issuing authority's findings. When specifically challenged, as in the instant case, the reviewing court will require substantial competent evidence in the record to uphold the issuing authority's findings of public purpose. State v. City of Pensacola, 397 So.2d 922 (Fla. 1981); see also Int'l Bros. of Elec. Workers, Local Union No. 177 v. Jacksonville Port Authority, 424 So.2d 753 (Fla. 1982); State v. City of Riviera, 397 So.2d 685 (Fla. 1981).

Contrary to Appellee's contention, this is not a "less stringent standard" but one putting the burden on Appellee to show sufficient evidence on the record while Appellee would put that burden on the Appellant to show an abuse of discretion by the Appellee regardless of any lack of evidence on the record.

Appellee not only ignores Appellant's case law on the applicable standard of review for bond validation orders but also cites case law inapplicable to bond validations. Union Trust Co. v. Baker, 143 So.2d 565 (Fla. 2d DCA 1962), is a probate appeal on the issue of widow's right to dower. Lalow v. Codomo 101 So.2d 390 (Fla. 1958), is an appeal of a broker's awarded commission from his employees. Appellant's case law is both more recent and specifically on topic of appellate review of bond validation orders.

Appellee's pre 1929 cases address whether the issuing authority has abused its discretion in the amount of bond issued. The amount of the bond issue in the instant case was of concern to the trial judge who mistakenly believed he had no authority to reduce the amount on the facts presented. In Lewis v. Leon County, 107 So. 146 (Fla. 1926), the Court found "strongly persuasive" that the county commissioners had not abused their discretion on the amount of the road bond, on the decree of the circuit judge, and on the approving referendum vote of the electorate. Appellees do not enjoy this additional support in the instant case. In Getzen v. Sumter County, 103 So. 104 (Fla. 1925), cited in Lewis, supra, the court more specifically addressed the same issue and noted that the Florida Constitution did not permit an excessive bond amount, even if approved on referendum, because the minority retained rights in preventing such an abuse of the taxing power.

> "The constitution does not contemplate or permit an abuse of the taxing power, and the intent of the statute, which is the essence of the law, is that bonds shall be issued only in such amounts as the public purpose reasonably requires, with due regard to the organic rights of taxpayers to protect their property from any arbitrary and unreasonable exercise of governmental authority." Getzen at 107.

Regardless of the instant bond issue not being an ad valorem bond, Florida's Constitution (revised since the Getzen case) continues to require a public purpose for the government to have the right to issue a bond, and an excessive amount continues not to be in the public interest.

Appellant did not, as claimed by Appellee, attempt "to show that the market analysis had not even included all projects financed by the authority," (Appellee's brief p. 13) but that Mr. Scussel picked and chose between available rental units to make his statistical report come out the way he, and his client, the Housing Authority, wanted it to come out. Appellant relies on Mr. Scussel's report alone to show that large numbers of available rental units were not included in his calculations of the county's vacancy rate and rental unit needs. It was not the exclusion of unconstructed rental units that Appellant demonstrated in questioning Mr. Scussel on cross-examination, but the exclusion of partially constructed apartment complexes with large numbers of available rental

units and the exclusion of entire rental units that was shown. App. 8, p. 10-12, App. 9, p. 57-61.

ISSUE II. THE COURT ERRED IN VALIDATING THE BONDS WITHOUT THE FORM OF THE MORTGAGE OR OTHER SECURITY DEVICE WHICH IS REQUIRED BY SEC. 159.612(2), FLA. STATS. (1985), TO SECURE PAYMENT OF THE BONDS.

Section 159.612, Fla. Stats., requires that any bonds issued by a housing finance authority be revenue bonds (Sec. 159.612(1)), and that they "shall be secured by a mortgage or other security device." Sec. 159.612(2). The judgment of validation, App. 1, does not require that the bonds be secured by a mortgage or other security device. See especially App. 1, para. 9 and 22. The form of the bond as appearing in the bond resolution 86-7, App. C, ex. C., p. 18, recites that the bonds are secured by the Indenture of Trust. The bond resolution recites that the form of any mortgage or security device agreement, "_if any_, shall be approved by subsequent resolution of the Authority ...." App. C, ex. C., p. 29, emphasis added. The bond resolution does not require that the bonds be secured by a mortgage or other security device. The trust indenture does not, in its present form, require that the bonds be secured by a mortgage or other security device, and can be changed in any respect.

Appellee's Brief makes it clear that the Authority's bond resolution does not specify that a mortgage or other loan will secure the bonds and sets up no requirements, conditions or specifications therefore. Appellee's facts admit that the

Trustee is directed by the Resolution to approve only such forms of mortgage or security agreements as the Trustee decides may be proper; if any, should be added. Appellee's brief p. 6, citing App. 2, ex. C., p. 29. This shows that the Authority has abdicated its responsibility to see even that the mortgage, or security device, is ever in existence, let alone in an acceptable form. Appellee's brief continues to point out that any such mortgages or security devices that may ever exist must be held in trust for the bondholders. Appellee's brief p. 6, citing App. 2, ex. C., p. 31. Appellee's brief continues that the "form" of trust indenture pledges for the benefit of the bondholders, the receipts from "any" mortgage loans or security devices; _if_ any, should be added. Appellee's brief p. 6, citing App. 2, ex. C., App. A, pp. 2 & 3. It is very telling that Appellee refers only to the "form" of trust indenture, because that "form" can be changed completely after validation. Appellee then adds, citing to the transcript of the validation hearing, App. 7, pp. 68 & 69, that bond counsel testified that the bonds could not be closed without necessary mortgages or other security devices. Appellee's brief p. 6. Bond counsel's opinion as to marketability is, of course, not a requirement for an otherwise missing obligation in the bond proceedings.

The State contends that this is not a collateral matter; that the proceedings do not show that these bonds must be

secured by mortgage or other security devices; and that the order of validation must, therefore, be reversed.

CONCLUSION

Wherefore, the court erred in validating the bonds on an insufficient showing of need and as not secured by mortgage or other security device, as required by law. The order of validation should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Dennis Ruppel of Johnson, Blakely, Pope, Bokor and Ruppel, P.A., 911 Chestnut Street, Clearwater, Florida 33517, and Lucy H. Harris, Esquire, Bryant, Miller and Olive, P.A., 201 South Monroe Street, Suite 500, Tallahassee, Florida 32301, this 2 day of March, 1987.

C. Marie King
C. Marie King
Assistant State Attorney

KING/6-16/0227KH(30-41)