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CASE NO. 70,169

State of Florida :
 Appellant, Defendant :
 v. : Bond Validation Appeal from
 : the Circuit Court of the
 : Fourteenth Judicial Circuit
 City of Panama City Beach, : in and for Bay County,
 Florida : Florida
 Appellee, Plaintiff :
 _____ : Cir. Civ. 87-104

APPELLEE'S BRIEF

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STATEMENT OF CASE AND FACTS

Appellee agrees with the Statement of Case and Facts as set forth in the Brief of Appellant, State of Florida, and adopts reference to Appellant's Appendix in this Brief of Appellee, City of Panama City Beach, Florida. However, the Appellee wishes to amplify that not only will the Investment Agreement produce "guaranteed investment earnings" for the benefit and security of the Bondholders, it will result in the Bonds being rated investment grade and conferred a high rating classification by national rating services (App. 5, p.23).

SUMMARY OF ARGUMENT

The Circuit Court should be upheld in the validation of the Bonds because the issuance of the Bonds in the manner proposed by the City pertains to the performance of municipal functions and the rendering of municipal services not otherwise prohibited by law, all as contemplated by Article VIII, Section 2 of the Florida Constitution and authorized by Section 166.111, Florida Statutes (1985). Furthermore, no municipal property is pledged to the payment of the Bonds. The Bonds are "revenue bonds" within the meaning of Section 166.101, Florida Statutes (1985), because the Investment Agreement by terms of the City's Bond Resolution becomes part of the trust estate granted to the Bondholders pursuant to a Trust Indenture in which the City has no beneficial interest and thus, no property right.

Because the proposed financing plan results in the City's acquiring municipal assets admitted by Appellant to be for the use and benefit of the public, it is a municipal function with no suggestion or connotation of being abusive and, accordingly, not subject to judicial review.

The trial court did not err in validating the Bonds insomuch as the Investment Agreement does not constitute "surplus funds" within the meaning of Section 166.261, Florida Statutes (1985). The funds held in trust by a corporate trustee solely for the

benefit of the Bondholders who will have absolute claim as to the corpus and income therefrom, will not be held or controlled by the Appellee and therefore, are not required to be invested pursuant to Section 166.261, Florida Statutes (1985).

ARGUMENT

ISSUE I. THE CITY, AS A MUNICIPAL PURPOSE, MAY ISSUE TAXABLE BONDS FOR THE SOLE PURPOSE OF INVESTING THE PROCEEDS OF SUCH BONDS IN PRUDENT INVESTMENTS PLACED IN TRUST FOR THE BENEFICIAL OWNERSHIP OF THE BONDHOLDERS THE PRINCIPAL AND INTEREST OF WHICH INVESTMENTS ARE SUFFICIENT TO PAY PRINCIPAL AND INTEREST ON THE BONDS WHEN DUE AND SUFFICIENT TO CREATE AN INVESTMENT INCOME SURPLUS, WHICH SURPLUS MAY BE USED TO PROVIDE PUBLIC PURPOSES OF THE CITY.

Upon the issuance of the Bonds the City will obtain moneys sufficient to pay for public parks and recreational facilities that it may not otherwise possess or to fund a self-insurance program and, thus, be relieved of premium payment obligations by pursuing a "riskless transaction" to it. The Bondholders are secured only by an Investment Agreement and earnings therefrom for payment of principal of and interest on their Bonds, which limited source of repayment is accepted by the Bondholders in the purchase of the Bonds. No other assets, revenues or taxes of the City are pledged or made available to the payment of the Bonds, either legally or morally (App.5, p.17). The risk of the transaction is properly with the Bondholders who contracted for it, an investment risk perceived as minimal on their part, considering the proposed rating on the proposed Bonds. Consequently, the City obtains public assets for public purposes by serving merely as a conduit in the financing. Nevertheless, whether the proposed financing is fiscally sound or wise is beyond judicial review. See State v.

City of Sunrise, 354 So.2d 1206 (Fla. 1978), where at Page 1209
the Court said:

. . . In reaching this determination we recognize that our present authority to review such bonds is sharply limited, almost to the point of insignificance. Our decision cannot reach the question of whether the revenue bond plan presently before us is fiscally sound, or whether double advance refunding is a wise method of financing municipal undertakings.

The State does not disagree that public recreational facilities and a self-insurance program are municipal purposes, but suggests that because they are not obtained directly with Bond proceeds but rather indirectly from earnings derived from the investments of such Bond proceeds, the municipal purpose of the proposed financing fails. Therefore, it must be the means and not the results that the State finds objectionable as failing to satisfy a public purpose. Furthermore, the State contends that the potential threat that the quality of the investment obtained with Bond proceeds could be reduced may lead to abuses of the proposed form of financing. While it may be argued that any investment being held in trust for the benefit of a Bondholder is an accepted Bondholder risk of which he or she has notice, nevertheless, it would seem that it is not the potential for future theoretical abuse, but the exercise of actual abuse and the failure of the City to fulfill a municipal purpose which should be the focus of inquiry in this appeal. Neither of these is present in the instant matter.

The Court has approved the issuance of taxable bonds by governmental units in the State and taxable status of the interest on the Bonds is not raised as an issue by the Appellant although discussed in the Amicus Curiae Brief filed in the Circuit Court proceedings. See State v. Division of Bond Finance, 495 So.2d 183 (Fla. 1986).

Article VIII, Section 2 of the Florida Constitution provides that:

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law...

The clear question of Constitutional concern revolves around whether or not the financing plan falls within governmental, corporate or proprietary powers of the City and whether or not the financing involves non-abusive conduct of municipal governments, the performance of a municipal function, or the rendering of municipal services, directly or indirectly, and, further, whether or not authority for the financing is otherwise provided or prohibited by law.

Generally, if an organic law is not violated, a legislative determination that a bond issue is for a public or, specifically, a municipal purpose will not be disturbed by the courts unless clearly arbitrary, unreasonable, or a clear abuse of discretion. See 42 Florida Jurisprudence, Second Series (1983), Sections 58

and 59; State v. Daytona Beach Racing and Recreational Facilities District, 80 So.2d 39 (Fla. 1956).

This Court in considering the perimeters of Article VIII, Section 2 of the State Constitution as to municipal power, stated in Lake Worth Utilities Authority v. City of Lake Worth, 468 So.2d 215 (Fla. 1985) at page 217:

[2,3] The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs. But "inherent" is not to be confused with "absolute" or even with "supreme" in this context. The legislature's retained power is now one of limitation rather than one of grace, but it remains an all-pervasive power, nonetheless.

[4] Thus, the words "except as otherwise provided by law" must be read as modifying the entire sentence preceding it. Such a reading is supported by historical analysis, grammatical precepts, and common sense. It finds further support in the commentary to the 1968 Florida Constitution provided by the reporter for the Constitutional Revision Commission, Talbot "Sandy" D'Alemberte:

The provisions in the subsection were new with the Revision Commission proposal, but the 1885 Constitution granted the power to the legislature to prescribe the jurisdiction and powers of municipalities by law in Article VIII, Section 8. The apparent difference is that under the new language, all municipalities have governmental, corporate and proprietary powers unless provided otherwise by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law. (Emphasis supplied).

Rightfully, the State does not contend that the issuance of the Bonds is prohibited because "otherwise provided by law."

Since the purpose of the financing is to acquire municipal assets for public benefit, the financing must have a practical

relation to a public purpose which transcends into a legal public purpose under the precepts of Lake Worth Utilities, supra, and State v. City of Pensacola, 397 So.2d 922 (Fla. 1981).

Chapter 166, Florida Statutes (1985) in implementing Article VIII, Section 2 provides:

(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

(4) . . . the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter...

Again, Appellant does not assert that an express general or special law prohibits the proposed financing, but Appellee herein asserts that Chapter 166, Florida Statutes (1985), particularly Sections 166.021, 166.101(4), 166.111, and 166.121 thereof, specifically permits the financing.

The cited sections are stated for convenience as follows:

166.021 POWERS.-

(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

. . .

166.101(4) The term "revenue bonds" means obligations of the municipality which are payable from revenues derived from sources other than ad valorem taxes on real or tangible personal property and which do not pledge the property, credit, or general tax revenue of the municipality.

166.111 Authority to borrow.- The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in s. 166.101 from time to time to finance the undertaking of any capital or other project for the purposes permitted by the State Constitution and may pledge the funds, credit, property, and taxing power of the municipality for the payment of such debt and bonds.

166.121 Issuance of bonds.-

(1) Bonds issued under this part shall be authorized by resolution or ordinance of the governing body and, if required by the State Constitution, by affirmative vote of the electors of the municipality. Such bonds may be issued in one or more series and shall bear such date or dates, be payable upon demand or mature at such time or times, bear interest at such rate or rates, be in such denomination or denominations, be in such form, registered or not, with or without coupon, carry such conversion or registration privileges, have such rank or priority, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms or redemption, with or without premium, be secured in such manner, and have such other characteristics as may be provided by such resolution or ordinance or trust indenture or mortgage issued pursuant thereto.

(2) The governing body of a municipality shall determine the terms and manner of sale and distribution or other disposition of any and all Bonds it may issue and shall have any and all powers necessary or convenient to such disposition.

In response to arguments contained in Appellant's Brief, we call to the Court's attention that within the meaning of "revenue bonds" the instant Bonds are not payable from ad valorem taxes and the City has not pledged property, credit, or general tax revenues of the City insomuch as the only pledged revenues and property for payment of the Bonds is the Trust Estate, i.e., the Investment

Agreement and income earned thereon; therefore, the Bonds are qualified "revenue bonds" within the meaning of the Statute.

The City contends the instant financing is no different in principle than the financing approved in State v. Broward County 468 So.2d 965 (Fla. 1985). In the Broward County case this Court approved the issuance by a county of bonds under Section 161.111, Florida Statutes, and the investment of a portion of the bond proceeds in Governmental Obligations as security for the payment of principal of and interest on the bonds, the Court stating at Page 967:

This change in the tax law placed the entire project in jeopardy. In response, the County developed a two-step plan of financing. Because it was vital that the bonds be issued by December 31, 1984, the County would first issue revenue bonds under chapter 166 and secure the payment of principal and interest by investing the bond proceeds in United States securities. The County would then continue to proceed with the project. In the second phase, if the resource recovery plants are sold, leased, or operated by a private vendor, the present revenue bonds would be converted after notice and a full validation hearing to industrial development revenue bonds under chapter 159. If, however, the project is abandoned for any reason, the County proposed to redeem these revenue bonds, and any deficiency would be paid by the issuance of special obligation bonds.

It is important to note at this point that we review only the issuance of revenue bonds by the County under section 166.111, Florida Statutes (1983), despite any future intention of the County to convert these bonds to industrial development revenue bonds authorized and secured under chapter 159, part II. Subsequent aspects of this financing plan are not before this court, and the County's authority to issue chapter 159 bonds is not determined at this time.

To implement the first part of this complex financing scheme, the Board of County Commissioners met again on September 4, 1984, held a public hearing, and adopted Resolution

The County then filed its complaint, seeking validation of these revenue bonds pursuant to the above resolution.

The Trial Court found:

. . . 5. The County is authorized under Section 166.111, Florida Statutes, to issue the bonds secured as to the payment of principal and interest by a pledge of the principal and interest coming due on Government Obligations (as defined in the Resolution) to be purchased from a portion of the proceeds of the Bonds.

Certainly, what a county can do under Section 166.111, Florida Statutes, a city can do.

ISSUE II. BOND PROCEEDS ARE NOT "SURPLUS PUBLIC FUNDS" WITHIN THE MEANING OF SECTION 166.261, FLORIDA STATUTES, BEING INVESTED PURSUANT TO A TRUST INDENTURE IN AN INVESTMENT AGREEMENT FOR THE BENEFIT OF BONDHOLDERS AND NOT THE CITY.

Section 166.261, Florida Statutes, sets forth permitted investments for "surplus public funds" as such term is defined in the Statute, unless other types of investments are otherwise authorized by law or ordinance.

Section 166.261 provides in relevant parts as follows:

(1) Unless otherwise authorized by law or by ordinance, the governing body of each municipality shall, by resolution to be adopted from time to time, invest and reinvest any surplus public funds in its control or possession in: . . .

(2)(a) Every security purchased by any such governing body under this section shall be properly earmarked and immediately placed for safekeeping in a safety-deposit box in a bank or institution carrying adequate safety-deposit box insurance within the county in which the municipality is situated; and no withdrawal of such securities, in whole or in part, shall be made from such safety-deposit box except upon authority evidenced by resolution of the governing body of the municipality.

(3) When the money invested in such securities is needed in whole or in part for the purposes originally intended, the governing body of the municipality is authorized to sell such security or securities at the then prevailing market price and to pay the proceeds of such sale into the proper account or fund of the municipality.

(4) For the purposes of this section, the term "surplus funds" is defined as funds in any general or special account or fund of the municipality, held or controlled by the governing body of the municipality, which funds are not reasonably contemplated to be needed for the purposes intended within a reasonable time from the date of such investment.

