

**IN THE SUPREME COURT
STATE OF FLORIDA**

**SUZANNE M. BOSCHEN,
Appellant,**

vs.

**CASE NO. 96, 874
Circuit Civil Case No. 99-3622-CI-20**

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

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
SUPPLEMENTAL STATEMENT OF THE FACTS	2
APPELLANT’S REPLY TO APPELLEE’S ARGUMENT I	4
APPELLANT’S REPLY TO APPELLEE’S ARGUMENT II	7
CONCLUSION	12
CERTIFICATE OF SERVICE	13
CERTIFICATION RE: RULE 9.210(A)(2)	14
SUPPLEMENTAL APPENDIX	SA
APPELLEE’S TRIAL EXHIBIT 1D, MARCH 4, 1999	

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>City of Jacksonville v. Savannah Machine & Foundry Company,</u> 47 So.2d 634 (Fla. 1950)	8
<u>State v. City of St. Petersburg,</u> 198 So. 837 (Fla. 1940)	8
<u>State of Florida v. Manatee,</u> 93 So.2d 381 (Fla. 1957)	5

PRELIMINARY STATEMENT

References to the Transcript attached to the Amended Initial Brief of Appellant will be cited by the symbol “T” followed the Page Number.

References to the Appendix attached hereto shall be cited as the Appellant’s Supplemental Appendix “SA”.

SUPPLEMENTAL STATEMENT OF THE FACTS

Appellee, the City of Clearwater, was not under any judicial order, State or Federal regulation, to implement the Beach Entryway project. (T-66; 1.19 through 22). The Cidra model which is the basis for the Florida Design Consult Report and the Congestion Mitigation Air Quality Report do not factor in pedestrians. (T-58, 1.18 through 23).

Appellee's director of Public Works admitted that as of the date of the Clearwater Beach traffic study, the levels of service for traffic operations were acceptable. (T-56, 1.8-14).

Both the DKS traffic study and an independent review of the City's studies indicate that the interjection of pedestrians into the Cidra model, the Florida Design Consultant Report and the Congestion Mitigation Air Quality Report would result in lowering the service in the Roundabout by two levels. (T-84-85).

The intersection which is to be improved is not ranked as one of the top ten accident locations of the City. (T-22, 1.13 through 22). The testimony of the Public Works director that the project is primarily for transportation purposes (T-53, 1.22- through T-54, 1.6) is inconsistent with the primary design purposes of

the project, which are stated to be for economic redevelopment of the Beach and not maximizing traffic flow. (T-57, l. 6 through 23).

APPELLANT’S REPLY TO APPELLEE’S ARGUMENT I

STATEMENT OF THE ARGUMENT

IN THE ABSENCE OF THE REVENUE BONDS BEING FOR AN “ESSENTIAL GOVERNMENT FUNCTION”, A REFERENDUM IS REQUIRED TO AUTHORIZE THE ISSUANCE OF THE REVENUE BONDS.

Appellant in these proceedings has only challenged the authority of the City Commission to issue the subject bonds.

Appellant has never argued that there is a Florida State Constitutional limitation on the authority of the City to issue the subject bonds.

Appellant readily concedes that the project is a legitimate municipal purpose.

Appellee’s discussion of the historical background of the “Essential Government Function” doctrine as effected by the 1968 Constitutional Revisions on municipal bonds only serves to emphasize the Appellant’s position. Absent a charter of limitation, Appellee would be within its authority to issue the bonds which are the subject matter of these proceedings. However, there is a clear limitation set forth in the Charter of the City of Clearwater, which is analogous to the “essential governmental function” doctrine.

4.

While Appellee might be correct in stating that by 1978, “... the concept of

an “essential governmental purpose” exception to the public referendum requirement, although widely recognized, had been rendered obsolete in light of the 1968 Florida Constitution Revisions ...”, Appellee fails to acknowledge that the citizens of the City of Clearwater elected to retain the “essential governmental purpose” doctrine by adopting Article IX of the City’s Charter on December 12, 1978. The limitation as expressed in Article IX of the Charter of the City of Clearwater is an unequivocal reservation of the power in the voters of the City of Clearwater to approve all revenue bonds at referendum for projects in excess of One Million (\$1,000,000.00) Dollars, and only in the event that the project meets the “essential governmental purpose” test is the public referendum requirement excepted.

It is not the Trial Court or this Court’s place to substitute their wisdom for that of the voters. State of Florida v. Manatee, 93 So.2d 381 (Fla. 1957). The voters of the City of Clearwater have chosen to reserve to themselves certain powers to approve by referendum revenue bonds except in the event that the project is for an “essential governmental purpose”. To ignore the express language of Article IX of the City Charter would essentially be a rewriting of the Charter by the Court.

5.

Appellee’s primary argument is that as long as a project is for a municipal purpose, it meets the exception of being for health and safety. If that were the case,

then there would be no requirement of a referendum for any revenue bonds for any project in excess of One Million (\$1,000,000.00) Dollars in the City of Clearwater, so long as the project were for a municipal purpose..

It is Appellant's position that the attempt to issue bonds for the subject project without voter approval is an ultra vires act of the City.

APPELLANT'S REPLY TO APPELLEE'S ARGUMENT II

WHILE THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE BEACH ENTRYWAY PROJECT IS A LEGITIMATE MUNICIPAL PURPOSE, THERE IS NO COMPETENT SUBSTANTIAL EVIDENCE TO ESTABLISH THAT THE PROJECT CONSTITUTES AN ESSENTIAL GOVERNMENT PROJECT.

Appellee, in the trial court, had the burden of proof of establishing that the Beach Entryway Project falls within the health and safety exception to the requirement that all revenue bond projects in excess of One Million (\$1,000,000.00) Dollars need referendum approval.

As was pointed out in the Supplemental Statement of Facts Appellee was not under any judicial order, State or Federal regulation, to implement the Beach Entryway Project. (T-66; 1.19-22). The level of service analysis of the Florida Design Consult Report and the Congestion Mitigation Air Quality Report was flawed due to the failure to factor in pedestrians. (T-58; 1.18-23). Appellee's director of Public Works admitted that as of the date of the Clearwater Beach Traffic Study, the levels of service for traffic operations were acceptable. (T-56, 1. 8-14). And finally, the intersection which is to be improved does not rank as one of the top ten accident locations in the City. (T-22, 1. 13-22).

7.

The record also reflects that the transportation improvements considered were

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

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

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

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

In general, the uninterrupted flow characteristic of a Roundabout is less “pedestrian friendly” than a typical traffic signal. Consolidation of the Pier 60/Causeway Boulevard one way pair to a two way (four land) facility is

8.

incorporated as part of the beach alternative. While acceptable levels of service are expected to be maintained, the proposed two way plan will not be as efficient as the

current one way system. (A-12, pg. 65)

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

Based upon the foregoing facts, it is abundantly clear that the project is not of an essential nature. It is elective and not necessary.

It is clear that Article IX of the City's Charter contemplates something more than the mere "furtherance of health and safety" to exempt the project from referendum.

Also, completely absent from the Answer Brief of Appellee, is the citation of any facts or evidence supporting the need for the project for purposes of enhancing the economic redevelopment of Clearwater Beach. There is no evidence or fact in the record supporting the project from the economic redevelopment standpoint. Appellant's argument relies solely on justification arising out of the traffic element of the project. The record is devoid of any evidence to support the project on an economic redevelopment basis. (R-intoto) Further, the bond issuance is for Twelve Million (\$12,000,000.00) Dollars. Appellee's evidence presented in the trial court indicated that the cost of the

9.

project is Eight Million One Hundred Thirty-seven Thousand Seven Hundred Twenty-five Dollars and 86 cents (\$8,137,725.86). Appellee has failed to present

competent substantial evidence to justify revenue bonds in the amount of Twelve Million (\$12,000,000.00) Dollars.

Appellant concedes that the project is a legitimate municipal project. Appellee can certainly provide for improved pedestrian movement, provide landscaping for beautification, art work and fountains to enhance the City. However, Appellee has failed to establish that it has authority to issue revenue bonds for this particular project. Unless the project rises to the level of an essential governmental purpose, Article IX of the City's Charter clearly provides that revenue bonds must be submitted to the voters for approval.

Appellee's first paragraph of its reply states: "... that a project also be found to be an 'essential government function' is an attempt to harken back to the outdated concept of 'essential government purpose' ...". While the concept of "essential government purpose" may be outdated, an anachronism and no longer required by the Florida Constitution, it is clearly imposed as a limitation on the authority of the City Commission of the City of Clearwater. If the concept is so outdated, why was it so overwhelmingly approved by the voters of the City of Clearwater in March of 1999. (A-10)

10.

Appellee's trial memorandum, recognizes the applicability of the "essential government purpose" test by citing City of Jacksonville v. Savannah Machine &

Foundry Company, 47 So.2d 634 (Fla. 1950), and in State v. City of St. Petersburg, 198 So. 837 (Fla. 1940). Appellee now attempts in its brief to eliminate the “essential governmental function” requirement by its Answer Brief.

While Appellee in its brief cites numerous reasons for the project, those reasons would support any municipal project. Appellant again does not contest that within the broad discretion given the City commission the project is a legitimate municipal purpose. Again, however, the project does not constitute an “essential governmental purpose” entitling the City Commission to move forward and issue revenue bonds without voter approval.

It is the Appellant’s position that as a matter of law, the Beach Entryway Project is a municipal purpose and not an essential governmental project. In light of the language of Article IX of the City Charter, the City Commission’s legislative determination is so clearly wrong as to be beyond the power of the City Commission.

CONCLUSION

The citizens of the City of Clearwater retained the “essential government purpose” test in Article IX of the City Charter and in the absence of voter approval of the Beach Entryway Project, the City Commission is without authority to issue revenue bonds for the project.

While Appellee established by competent substantial evidence that the project is a legitimate municipal purpose, there is no competent substantial evidence to support the finding that the project rises to the level of an “essential government purpose”. As a matter of law, Appellee has failed to bring itself within the exception of the referendum requirement of Article IX of the Charter of the City of Clearwater for the issuance of revenue bonds in excess of One Million (\$1,000,000.00) Dollars.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing Reply Brief of Appellant has been furnished to Robert C. Reid, Esq., Bryan, Miller and Olive, P..A., 201 South Monroe St., Suite 500, Tallahassee, Florida 32301, and to Pamela K. Akin, Esq., City Attorney, City of Clearwater, P. O. Box 4748, Clearwater, Florida 33758, by U.S. Mail, this ____ day of January, 2000..

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CERTIFICATION

The undersigned does hereby certify that this Reply Brief used 14 point Times New Roman type and does hereby comply with Rule 9.21(a)(2), Florida Rules of Appellate Procedure and the Administrative Order of this Court dated July 13, 1998.

Patrick T. Maguire, Esq.

SUPPLEMENTAL APPENDIX