IN THE SUPREME COURT OF FLORIDA

THE CITY OF OLDSMAR,
a municipal corporation and
public body corporate and
politic of the State of Florida,

Appellant,

vs. CASE NO. SC00-2695

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,

Appellees.
_______________________________/

ANSWER BRIEF OF APPELLEE, STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
GENERAL CIVIL DIVISION
CASE NO: 00-004479-CI-21

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<u>PRELIMINARY STATEMENT</u>

For the purposes of this Answer Brief, the State of Florida, Department of Transportation, the intervenor below and appellee herein, will be referred to as the "Department." The State of Florida, the named defendant and appellee herein, will be referred to as the “State.” The City of Oldsmar, plaintiff and appellant herein, will be referred to as the “City.”

Citations to the record, which consists of the appendix to the City’s initial brief will be referred to by Tab number and when possible, to a specific page number(s) in the form of (Tab 1, p.2) or to a specific paragraph(s) in the form (Tab 1, ¶ 6). Citations to the appendix to the Department’s answer brief will be in the form of (A.) followed by the appropriate page number(s). Citations to the transcript of the hearing held on August 24, 2000, found in the City’s appendix at Tab 4, will be in the form of (T.) followed by the appropriate transcript page number(s). Citations to the City’s Initial Brief will be in the form of (IB.) followed by the appropriate page number(s).

QUESTIONS PRESENTED

Whether the trial court erred as a matter of law in concluding that the City's attempt to avoid its obligations under a Joint Project Agreement ("JPA") was not the proper subject for a bond validation proceeding under Chapter 75, Florida Statutes.

Whether the trial court erred as a matter of law in concluding that it lacked jurisdiction over a complaint filed as a Chapter 75, Florida Statutes, bond validation proceeding where the alleged bond is a JPA for the relocation of the City's underground utilities pursuant to Sections 337.401-404, Florida Statutes, and Rule 14-46.001, Florida Administrative Code, and the alleged invalidity of the JPA has been raised as a defense to a breach of contract action earlier filed and pending in another judicial circuit.

Whether the trial court erred as a matter of law in concluding that the City's use of the JPA as a shield in the previously filed Hillsborough case collaterally estopped the City from bringing the same issues before the Pinellas Court in a Chapter 75, Florida Statutes, bond validation proceeding.

Whether the trial court abused its discretion in granting the Department's motion to intervene in the proceeding.

<u>STATEMENT OF THE CASE AND FACTS</u>

This is a case of a City's attempt to avoid its statutory obligations, and five year old contractual obligations, to relocate its underground utilities during a Department road widening project in the City by bringing a Chapter 75, Florida Statutes, bond validation suit while a circuit court contract action was pending. (Tab 1, 3A, 3B, 3C) The City admits the motivation for its complaint for a bond validation proceeding in Pinellas County was to avoid potential liability in the Hillsborough case. (T. 45-47)

In December 1995, the City and the Department entered into a JPA whereby the City paid the Department $1,094,817.79, as the City's estimated cost of relocating its utilities which are located in Department right of way, which work was to be included in the Department's contract for a road project in the City, pursuant to Sections 337.401-404, Florida Statutes, and Rule 14-46.001, Florida Administrative Code. (Tab 2; 3A, p.2-9) It was the City's responsibility to provide the plans depicting the location of the utilities. (Tab 2, ¶ 2; 3A, p.4-9)

Subsequently, the contractor, Kimmins Contracting Corp., was awarded the contract for the road project, completed the project, and sued the Department in the Thirteenth Judicial Circuit for Hillsborough County (the Hillsborough case) for

damages due to the delays in completing the project caused by the actions of, and erroneous plans provided by, the City. (Tab 3, 3A) The Department filed a third party complaint against the City alleging that any damages resulting from the erroneous plans were the liability of the City. (Tab 3A) The City responded to the Department's third party complaint with an answer, affirmatives defenses, and counterclaim against the Department seeking affirmative relief under the provisions of the JPA. (Tab 3B) In the Hillsborough case, the City also filed a motion for summary judgment claiming the JPA violated Article VII, Section 12, Florida Constitution, because the JPA, is a "long term pledge of the City's ad valorem taxes and, as such, is void *ab initio*." (Tab 3C, p.4) The motion was argued before and denied by Judge Steinberg in the Hillsborough case. (Tab 3D)

Thereafter, the attorney representing the City in the Hillsborough case filed a complaint in the Sixth Judicial Circuit for Pinellas County (this case, the Pinellas case) also alleging that the JPA violates Article VII, Section 12, Florida Constitution, and is therefore void. (Tab 1) The only named defendant in the City's Pinellas case is the State of Florida. (Tab 1) An order to show cause in the Pinellas case was issued by the Honorable James R. Case, ordering, inter alia, that the

office of the state attorney appear and represent the State of Florida in the matter, and was published in the Tampa Bay Review. (Tab 5) Pursuant to the order, a show cause hearing was to be held on August 24, 2000. (Tab 1) On or about August 23, 2000, the office of the state attorney filed a written response to the order to show cause, asserting that: 1) the Pinellas complaint does not seek to validate bonds or other evidence of indebtedness, but rather seeks to avoid the City's contract with the Department for utility work; 2) the City is without authority pursuant to Chapter 75, Florida Statutes, to invalidate its prior contract with the Department; 3) the complaint improperly fails to name the Department and others as indispensable parties as the City's action is not a bond validation, but an attempt to avoid a written contract; 4) the state attorney's office is without authority to represent the Department; and 5) dismissal for lack of jurisdiction is appropriate. (A. 1-4)

In the afternoon of August 22, 2000, trial counsel for the Department in the Hillsborough case was, for the first time, notified of the Pinellas case and the August 24, show cause hearing; such notice was received from the office of the state attorney. (T. 17) The Department's trial counsel immediately prepared, filed, and served a motion to intervene, to dismiss,

or alternatively to abate the Pinellas case. (Tab 6; T. 16)

On August 24, 2000, the hearing commenced before the Honorable Bruce Boyer, sitting on behalf of Judge Case, who had a scheduling conflict. (T. 3) All attorneys present at the hearing indicated they had no objection to Judge Boyer hearing the matters presented. (T. 6) At the hearing, counsel for the Department argued that because the Pinellas case was a duplication of the facts, issues, and legal positions presented in the prior filed and still pending Hillsborough case, the Department should be allowed to intervene; the Pinellas case was an improper attempt to use Chapter 75, Florida Statutes, to avoid contractual obligations; the Pinellas court did not have jurisdiction over the case due to the prior filed and still pending Hillsborough case; and, alternatively, should the motion to dismiss not be granted, the case should be abated pending the outcome in the Hillsborough case. (T. 17-22, 26-33, 70-74) The Department also introduced certified copies of various pleadings filed in the Hillsborough case[1]. (Tab 3; T. 31-32) Those

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[1]Those documents are the Third Party Complaint, the City's Answer, Affirmative Defenses, Counterclaim, and Demand for Jury Trial; the City's Motion for Summary Judgment; the Hillsborough judge's Order Denying City's Motion for Summary Judgment; the City's Motion for Reconsideration; the Department's Memorandum Opposing the City's Motion for Reconsideration; and the Order Denying City's Motion for Reconsideration. These documents are found at (Tab 3A-F) of the appendix to the City's initial brief.

pleadings were accepted and judicially noticed without objection. (T. 31-32) The State reiterated the positions contained in its response to the order to show cause, agreed that the Department was the proper party to the Pinellas case, and had no objection to the Department's intervention. (T. 22, 25, 34-36, 38-40)

The City argued that the Department was not an indispensable party to the Pinellas case; the City had no duty to advise the Department's attorneys, of whom they were aware, of the Pinellas case or to name the Department as a party defendant; the City did not oppose the Department's intervention so long as it did not delay the proceedings; the Hillsborough case did not present a problem for the Pinellas court to hear the same issues; Chapter 75, Florida Statutes, applies to both the Hillsborough and Pinellas proceedings; and the JPA violates Article VII, Section 12, Florida Constitution. (T. 10-24, 40-69) The City also admitted that: 1) this action is not a bond validation proceeding (T. 13); the subject JPA is the "debt instrument" relied upon to invoke Chapter 75, Florida Statutes (T. 45); the Hillsborough case is "the same thing" as the Pinellas case (T. 46); the City entered into the JPA and is now trying to invalidate that same JPA (T. 46); the City is attempting to invalidate its own agreement (T. 47); the Hillsborough case

motivated the filing of the Pinellas case (T. 47); the Hillsborough case is still pending (T. 49); the same arguments have been made, heard, and denied without prejudice in the Hillsborough case (T. 50); the alleged invalidity of the JPA is a valid defense in the Hillsborough case (T. 51); the City's position regarding the invalidity of the JPA and its violation of Article VII, Section 12, Florida Constitution, is being used as a shield in the Hillsborough case and as a sword in the Pinellas case (T. 65); and the Pinellas case is an attempt to avoid potential liability in the Hillsborough case (T. 49-50).

Judge Boyer granted the Department's motion to intervene (T. 25; Tab 7, p.6) and further held:

> This court does not believe this court has jurisdiction to proceed on the matter. This court does not see that it is a Chapter 75 proceeding, that is the contract matter has been litigated in Hillsborough County. The JPA entered into between the City and the Department of Transportation was for work done in the City of Oldsmar.
>
> Work has resulted in a lawsuit in the circuit court of the thirteenth judicial circuit. I believe the Hillsborough case number is 99-02257. The City of Oldsmar has been brought into the Hillsborough lawsuit, has filed pleadings. And from the pleading standpoint, participated actively as a party in that lawsuit.
>
> The City of Oldsmar has raised in the Hillsborough case a defense, the same argument the City is attempting to litigate in Pinellas County in our court case number

> 00-4479. The Pinellas County issues regarding the validity have been litigated in Hillsborough County.
>
> There was a motion for summary judgment in Hillsborough County that was denied and that circuit court case is ongoing. There was then filed by the City – there was an effort by the City to have the Pinellas County courts proceed as a bond validation under Chapter 75 on behalf of the citizens of the City of Oldsmar so they would have an opportunity to attempt to invalidate the agreement that the City has entered into with the Department of Transportation.
>
> Said agreement subjects the City to potential adverse consequences in the Hillsborough County circuit case. And there was no notice given to the parties in the Hillsborough Circuit Court case to this proceeding.
>
> The proceeding in the Pinellas Circuit Court, if favorable to the City of Oldsmar may preclude any judgment against the City in the Hillsborough Circuit Court case, or even preclude them from being a participant as a party.
>
> The Court is going to rule in this case that there is collateral estoppel. A defense has been validly raised and it needs to be litigated in the Hillsborough Circuit Court. This Court doesn't have authority to proceed.
> (T. 75-77)

The City filed a notice of appeal on December 18, 2000. (Tab 7)

SUMMARY OF THE ARGUMENT

It is undisputed that the City filed a complaint in Pinellas County to avoid adverse rulings it had received and potential adverse results anticipated in a prior filed case in Hillsborough County. The City is defending the Hillsborough case, which emanated from a joint project agreement (JPA) the City entered into for the relocation of its utilities during a Department road project, with the same arguments it raises in the Pinellas County case.

The plain language of Section 75.02, Florida Statutes, provides that certain political subdivisions of the state may file a complaint to "determine its authority to incur bonded debt or issue certificates of debt . . . ." (emphasis added) Florida case law is replete with examples of issuing authorities seeking prior validation of their proposed bond issues or other evidences of debt. None of those cases authorizes a Chapter 75, Florida Statutes, proceeding for bond validation to invalidate a written contract five years after it was executed or to resolve disputes arising out of a performed contract. This Court has on many occasions held that a Chapter 75 proceeding to validate governmental securities was never intended to "be used for the purpose of deciding collateral issues or those other issues not going directly to the power to issue the securities

and the validity of the proceedings with relation thereto." State v. City of Miami, 103 So. 2d 185, 188 (Fla. 1958). The trial court's conclusion that it was without jurisdiction over the Pinellas case because it was not a bond validation case is well supported in the record and the law.

The trial court's rulings are also supported by the principle of priority or collateral estoppel which prevents a party from filing a subsequent action to resolve issues pending in a previously filed action in another forum. Hirsch v. DiGaetano, 732 So. 2d 1177 (Fla. 5th DCA 1999).

The City knew of the Department's participation in the Hillsborough case and the parties to and counsel for the parties in the Hillsborough case when it filed the Pinellas case. Nevertheless, the City neither named them in the Pinellas case nor informed any of them that it had been filed. The Department, with whom the City contracted to provide for the relocation of its utilities, is the stakeholder in the contractual dispute with the Department's contractor over the actions of the City. The Department and the City are actively defending that action in Hillsborough County. There has been no showing that the trial judge abused his discretion in allowing the Department to intervene in the Pinellas case. Sekot Laboratories, Inc. v. Gleason, 585 So. 2d 286 (Fla. 3d DCA

1990)(abuse of discretion is evaluated against the totality of the circumstances).

The trial court’s order should be affirmed in all respects.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT THE JOINT PARTICIPATION AGREEMENT (JPA) BETWEEN THE CITY AND THE DEPARTMENT DID NOT FORM A BASIS FOR A CHAPTER 75, FLORIDA STATUTES, BOND VALIDATION PROCEEDING, AND THAT THE COURT LACKED SUBJECT MATTER JURISDICTION.

A. Standard of Review

In this case, the Pinellas judge concluded that the JPA, which the City admits it executed and was attempting to invalidate to avoid liability for its potential breach, did not form a basis for a Chapter 75, Florida Statutes, bond validation proceeding. (Tab 7; T. 75-77) That decision is predicated upon the arguments of counsel, pleadings, admissions of the City, and an interpretation of the contract (the JPA). Review of decisions predicated on the interpretation of a contract is undertaken *de novo* as a question of law. Triple R Paving, Inc. v. Broward County, 774 So. 2d 50 (Fla. 4th DCA 2000); Burns v. Barfield, 732 So. 2d 1202 (Fla. 4th DCA 1999).

The trial court's conclusion that the JPA did not form the basis for a bond validation proceeding and, therefore, the court lacked subject matter jurisdiction is also a pure question of law, subject to review by this Court *de novo*. Klonis v. State,

Dep't of Revenue, 766 So. 2d 1186 (Fla. 1st DCA 2000).

B. The JPA is not a bond or certificate of indebtedness subject to Article VII, Section 12, Florida Constitution, or Chapter 75, Florida Statutes. (Responding to Point I.A.)

The City admits, in its pleadings in both the Hillsborough case and the Pinellas case and at the hearing in the Pinellas case, that: the City entered into the JPA; the JPA was entered into to obtain services the City was obligated by law to perform; the work has been completed; the validity of the JPA is being used as a defense in the Hillsborough case and as a sword in the Pinellas case[2]; the issues and arguments are the same in both cases; and the purpose of the Pinellas case is to avoid liability in the Hillsborough case. (T. 45-50; Tab 1, 3B, 3C) In addition, certified copies of relevant pleadings in the Hillsborough case were filed, without objection, in the instant case, the facts of which were readily admitted by the City. (T. 31-32; Tab 3A-F) It is against this background and on this record that the trial judge in this case, the later filed Pinellas case, concluded that the JPA is not a "Chapter 75

[2]It is also being used as a sword in the Hillsborough case as the City has brought a counterclaim against the Department claiming affirmative relief under the provisions of the JPA. (Tab. 3B)

proceeding, that [it] is the contact matter that has been[3] litigated in Hillsborough County. The JPA entered into between the City and the Department of Transportation was for work done in the City of Oldsmar." (T. 75)

As argued in the State's response to the order to show cause (A.1-4), and as argued by the State and by the Department at the August 24, 2000, hearing, there is no legal basis for the filing of the Pinellas case as a Chapter 75, Florida Statutes, bond validation proceeding to invalidate a fully performed contract. Because the trial court properly concluded as a matter of law that it was not a bond validation proceeding, this Court is, likewise, without jurisdiction to review that decision pursuant to Section 75.08, Florida Statutes, and Florida Rule of Appellate Procedure Rule 9.030(a)(1)(B)(i).

While it has been held that under ordinary circumstances, a motion to dismiss is not the proper vehicle by which a court should "determine issues of ultimate fact," this is no ordinary case and the ultimate facts in this case were either undisputed, admitted, or both. See Florida Farm Bureau General Ins. Co. v. Ins. Co. of North America, 763 So. 2d 429, 432 (Fla. 5th DCA

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[3]The trial judge misspoke when he said the matter "has been litigated in Hillsborough County," and clearly meant to say "is being litigated in Hillsborough County." See (T. 76) "that circuit court case [the Hillsborough case] is ongoing."

2000)("A motion to dismiss should not be used 'to determine issues of ultimate fact' and 'may not act as a substitute for summary judgment.'")(citations omitted). Because the facts were not in dispute in the instant case, the trial judge was not required to resolve ultimate issues of fact. As such, the trial judge properly concluded as a matter of law that the JPA was not the type of instrument that could establish jurisdiction in the Pinellas court as a bond validation proceeding under Chapter 75, Florida Statutes.

However, even if there were ultimate issues of fact remaining for the trial court to resolve, it was never brought to the court's attention. (T. 1-79) At the beginning of the August 24, 2000, hearing, the City noted that there were "fact witnesses here to testify." (T. 6) However, the City made no attempt to have them present testimony, never informed the trial judge that his rulings were erroneous without the benefit of testimony, and never sought to proffer the testimony those witnesses would have presented. (T. 1-79) Error, if any, in this regard was not preserved because no proffer was made of any testimony the City believed the trial court should have considered. Smith v. Schlanger, 585 So. 2d 1152 (Fla. 4th DCA 1991).

There was no doubt as to the nature of the JPA and there

were no fact issues raised which the trial court could or should have resolved in favor of the City's position. The cases relied upon by the City to support a contrary conclusion are inapplicable and inapposite. (IB. 14) For example, Hollywood, Inc. v. Broward County, 90 So. 2d 47 (Fla. 1956), is a taxpayers' class action for a declaratory decree invalidating a contract for the acquisition of real property by the county. There, it was alleged that the county's proposal to issue bonds for the transaction received an adverse vote of the people. Id. It was also alleged that in light of the subsequent execution of certain purchase and mortgage documents and the fact that no money actually changed hands, the transaction was a mere sham and the payment plan provided for was violative of then Article IX, Section 6, of the Florida Constitution .[4] Id. at 49-50. The trial court's dismissal of the action was reversed by this Court because "[t]he complaint presents a cause of action to compel a rescission, unless and until the present deferred payment plan has been approved under the provisions of Section 6 of Article IX of the Constitution, or unless some other payment plan is arranged, and approved under the Constitution." Id. at 52.

Spearman Brewing Co. v. City of Pensacola, 187 So. 365 (Fla.

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[4]Then entitled "Bonds. State, county, municipal." Art. IX, § 6, Fla. Const. (1855)(the predecessor of Article VII, Section 12, Florida Constitution (1968)).

1939), is equally inapposite. There, Spearman brought suit against the city and others to restrain the city from issuing, signing, or executing certain "time warrants" and the trial court dismissed the action. Id. at 366. Reversing, this Court held:

> we decide that the city of Pensacola is without power to issue the time warrants payable from a special fund created by the discharge of liens against specific property although liability is attempted to be limited to such resources.
>
> In forming this opinion, we have kept in mind the utterances of this court that any 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. Williams v. Town of Dunnellon, 125 Fla. 114, 169 So. 631; Kathleen Citrus Land Co. v. City of Lakeland, 124 Fla. 659, 169 So. 356.

Id. at 367-368.

In neither of these cases had the governmental entity admitted the basic underlying facts of its opposition. More importantly, neither Hollywood, Inc., nor Spearman is a Chapter 75, Florida Statutes, proceeding by a governmental entity to invalidate its own written contract documents. The trial court in this case properly found, based upon the record before it, that the JPA was not subject to a Chapter 75, Florida Statutes, proceeding and the court was without jurisdiction over the

matter.

Contrary to the City’s assertions, the trial judge did not fail to “understand that essentially any municipal debt can be subject to Article VI, Section 12” and did not “express disdain for the seemingly harsh result sought by the City.” (IB. 13-14) Rather, the trial court understood that neither the facts nor the law supported the City’s argument that it was entitled to a bond validation proceeding to invalidate a contract for work which had already been performed.

The City also argues that its Pinellas case is proper and was improperly dismissed because 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,” citing to <u>State v. Suwannee County Dev. Auth.</u>, 122 So. 2d 190 (Fla. 1960). (IB. 15) The City misconstrues both the statute and the case law. Section 75.02, Florida Statutes, is not a mechanism for <u>invalidating</u> five year old contracts which have been fully performed by filing a “complaint to determine the validity of municipal bonds or certificates of indebtedness.” (IB. 14)

The plain language of Section 75.02, Florida Statutes, provides that a “county, municipality, taxing district or other political district or subdivision of this state” may file a

complaint to "determine its authority to incur bonded debt or issue certificates of debt . . . ." (emphasis added) The City admits that the only reason it filed the Pinellas case was because the Department filed a third party complaint against the City for the City's wrongdoing in providing defective plans to the Department's contractor, which the contractor claims resulted in cost overruns alleged in the Hillsborough case. (T. 10-11, 46-47)

Although the City claimed at the hearing and in its initial brief that there is precedent for its highly unusual action to, five years after the fact, invalidate its own contractual obligations, the authorities offered do not support its claim. (T. 42-43, 59-60; IB. 18-21) In Andrews and Frankenmuth, relied upon by the City in the instant case, the actions were for declaratory judgment brought by a bondholder (Andrews) and by an insurance company seeking an injunction and a declaration of its rights under a lease-purchase agreement (Frankenmuth). Andrews v. City of Winter Haven, 3 So. 2d 805 (Fla. 1941); Frankenmuth Mutual Ins. Corp. v. Magaha, 769 So. 2d 1012 (Fla. 2000). Neither case was a Chapter 75, Florida Statutes, proceeding and neither was brought by an issuing authority to invalidate its own contractual obligation. Such is also the case in Hollywood, Inc., discussed above, and Kathleen Citrus and Betz.

Hollywood, Inc., 90 So. 2d 47; Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356 (Fla. 1936); Betz v. Jacksonville Transp. Auth., 277 So. 2d 769 (Fla. 1973). In Kathleen Citrus, a corporate citizen filed an injunction to prevent the city from issuing "sewer revenue debentures" without public referendum or, presumably, a validation proceeding. Kathleen Citrus, 169 So. 2d at 358. Kathleen Citrus is not an after-the-fact attempt by the City of Lakeland to invalidate its own contract. As noted in Kathleen Citrus, "[t]he incurring of 'debts' was the principal subject which gave the true significance to the word 'bonds' which . . . [are] mere promises to pay debt." Id. at 361. In the instant case there is no debt and the only promises made by the City were that monies paid up-front were accurately estimated and constituted the total actual cost of the relocation of its utilities based upon the City's own plans, and that if the estimate or the plans were not accurate, the City would be responsible for the consequences.

In Betz, citizens sought to enjoin a proposal by the City of Jacksonville and the transportation authority to purchase a private bus transportation system operating in the city. Betz, 277 So. 2d at 770. Once again, Betz is a before-the-fact attempt by third parties to prevent the execution of contracts and management agreements, not an after-the-fact attempt to set

aside executed contracts by a party to the contract in reliance on Article VII, Section 12, Florida Constitution. These cases do not support the City's position that its Pinellas case is a proper validation proceeding. Rather, these cases support the trial court's decision as they represent the rights of third parties to sue a governmental entity in a proceeding other than a Chapter 75 proceeding.

Indeed, some of the cases offered by the City give a liberal interpretation to the meaning of bond, for example:

> the proposition of jurisdiction is that the statutory proceedings for validation of bonded debts and certificates of indebtedness authorized by the 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 <u>proposed</u> certificate of indebtedness, negotiable or nonnegotiable, limited or general, which a county, municipality, taxing district, or other political subdivision may undertake to issue under purported authority of law.

<u>State v. City of Miami</u>, 152 So. 6, 8 (Fla. 1933). Based upon that broad interpretation, the City of Miami sought to <u>validate</u> its <u>proposed</u> water revenue certificates. <u>Id.</u> The City of Miami did not after the fact seek to invalidate its own five year old obligations. As such, <u>City of Miami</u> and similar cases fail to support the City's position in the instant case.

The City's other alleged precedents are also validation

proceedings - not invalidation proceedings, and address proposed bonds (Orange County Civil Facilities Auth., School Bd. of Sarasota County, and Tampa Sports Auth.) and proposed lease purchase agreements (GRW Corp. and Brevard County) - not five year old executed and performed contracts. Orange County Civil Facilities Auth. v. State, 286 So. 2d 193 (Fla. 1973); State v. School Bd. of Sarasota County, 561 So. 2d 549 (Fla. 1990); State v. Tampa Sports Auth., 188 So. 2d 795 (Fla. 1966); GRW Corp. v. Dep't of Corrections, 642 So. 2d 718 (Fla. 1994); State v. Brevard County, 539 So. 2d 461 (Fla. 1989).

The financing arrangement in Orange County Civil Facilities included a "Cooperation Agreement" between the authority and the board of county commissioners, which was determined to be the "stumbling block leading to the denial of validation of the bonds." Orange County Civil Facilities, 286 So. 2d at 193-194. The opinion does not, however, address whether the agreement constituted an independent subject of validation or invalidation if no bond had been involved. Id. In fact, this Court in State v. Sunrise Lakes Phase II Spec. Rec. Dist., 383 So. 2d 631 (Fla. 1980) and McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980), has held that contract provisions collateral to a bond validation are not to be resolved in a Chapter 75,

Florida Statutes, proceeding.[5]

The City's reliance on opinions of the Attorney General are similarly unpersuasive. For example, in AGO 80-25, the attorney general addresses a lease purchase/installment sales contract, noting that it is beyond his authority to invalidate an existing contract and that the validity of an executed contract is a judicial question to be resolved by the courts. Op. Att'y Gen. Fla. 80-25 (1980). In AGO 89-58, the attorney general, again noting he had no authority to approve or disapprove specific contracts, discusses when obligations or debts require eligible voter approval. Op. Att'y Gen. Fla. 89-58 (1989). Neither opinion is applicable to nor establishes error in the instant case.

The City also cites to the attorney general's summary conclusion that "A municipality is prohibited by s. 10, Art. VII, State Const., from agreeing to indemnify a private for profit corporation for financial losses which might be suffered over the term of the agreement in the provision of emergency medical services to the inhabitants of a three county area." Op. Att'y Gen. 84-103 (1984). Therein, it is noted that Section 10, Article VII, Florida Constitution, "prohibits the state or counties or municipalities or any agency thereof from using,

[5]This issue is addressed more fully at I.E. below.

giving, or lending its taxing power or credit to aid any private interest or individual." Id. In that particular inquiry, a city commission had agreed to indemnify a private corporation for fifty percent of any loss it might incur in operating a health care center, up to a specified amount for a period not to exceed two years. Id.

That indemnification provision and its infirmities bear no resemblance to the indemnification provision in the instant JPA. (Tab 2, ¶ 10) It is clear that the indemnification discussed by the attorney general would impermissibly create liability for the city for the wrongdoings, acts, or omissions of a private for profit corporation. Id. The indemnification provision in the instant JPA requires only that the City stand behind its own plans and its own acts and failures; it does not require the City to pledge its credit, create a debt, or impose liability upon the City for the acts of others, let alone the acts of private persons or entities.

Under Florida law, governmental entities can be sued for breaches of their contracts. Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4, 6 (Fla. 1984)("our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter"); see also County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d

1049 (Fla. 1997). The JPA in this case is a written contract and the indemnification provision applies only to the utility work to be performed for and on behalf of the City and imposes no liability greater than is already imposed by Florida law. The provision makes the City responsible and liable for its actions and inactions and the City acknowledges that it, and not the Department, is responsible for the City's actions. The provision does not make the City responsible or liable for the actions or inactions of the Department or anyone else, nor does it create an unauthorized debt for the City.

Paragraph 11 of the JPA provides that "upon final payment to the contractor for the entire project" if the "final cost [of the

City's required utility work] exceeds the advance payment,[6] the UTILITY [the City] will be invoiced for the balance . . . [and] will reimburse FDOT in the amount of such actual cost within forty (40) days [or] pay an additional charge of 1% per month on any invoice not paid within the time specified . . . ." (Tab 2, ¶ 11) Once again, this provision obligates the City only to stand behind the accuracy of its plans and estimated advance payment and acknowledges that the responsibility and liability

[6]Which the City itself determined to be accurate and the only cost the City would be required to pay for the work the Department's contractor would provide.

for errors and overruns caused by the City remains with the City. The JPA is not, as the City would have this Court believe, "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.[7]" (IB. 22)

The $1,094,817.79 advanced by the City would have been, could have been, and should have been, the only monies paid by the City. In reality, more money may be due[8] because the City provided inaccurate plans, the inaccurate plans caused project delays and damages, and the contractor is seeking to recover those damages from the Department when in fact they should be recovered from the City. The Department's third party complaint

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[7]Contrary to the City's position, this provision does not render the JPA a debt obligation maturing more than twelve months after issuance. (IB. 22) The cases found in the City's footnote as supporting this position do not. Out of context statements to the effect that a "public debt is issued at the time the first debt instrument is delivered" fail to support any claim of error in this case. There was simply no debt due at the time the JPA was executed in this case because the City paid for all of the work it was obligated to pay by law. Nothing else could or would become due if the City properly estimated the cost and provided accurate plans. This potential contingency which could arise only if the City itself miscalculated or provided bad plans does not constitute a debt contemplated by Article VII, Section 12, Florida Constitution, or Chapter 75, Florida Statutes.

[8]As alleged by Kimmins, the Department's contractor in the Hillsborough case.

against the City is, the City readily admits, the reason for filing the Pinellas case.[9] The law cannot and does not allow such posturing and forum shopping to avoid contractual obligations.

No error has been established in the trial court's conclusions and order. The trial court's order should be affirmed in all respects.

C. The Joint Project Agreement is not a debt obligation and the lack of a savings provision does not render it violative of Article VII, Section 12, Florida Constitution. (Responding to Point I.B.)

Article VII, Section 12, Florida Constitution, provides:

> Local bonds.--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:
>
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

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[9]The Pinellas case trial judge asks: "And the reason you want to invalidate your own bond (sic) at this time is because there is a civil lawsuit going on in the 13th circuit which may subject to the City of Oldsmar to pay money." To which counsel for the City responds "That is what's motivating this action right here. . . ." (T. 47)

> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

It is the City's position that the JPA in this case violates this provision because it 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,' and is subject to Article VII Section 12 of the Florida Constitution." (IB. 22)

As argued above, the JPA does not create a debt obligation maturing more than twelve months after issuance. This is so because the City paid its obligation before the work began on the project - its obligation was to pay for all work associated with the relocation of the City's utilities - work that the City would have had to do with its own forces but for the City's election to include the work in the Department's contract and to pay for it up-front. The so-called savings clauses that the City now argues could have saved the JPA from constitutional defects are neither necessary nor required.

The Department cannot and does not dispute the holdings of this Court regarding constitutional infirmities under Article VII, Section 12, Florida Constitution, and the types of language

necessary to save bond financing arrangements from constitutional infirmity. The decisions are clear and consistent that proposed bonds supported or serviced by that interlocal agreements, ground leases, facilities leases, and trust agreements are limited by this constitutional provision. See, e.g., State v. School Bd. of Sarasota County, 561 So. 2d 549 (Fla. 1990).

In School Board of Sarasota, this Court upheld the trial court's validation of bonds supported by a ground lease of school land to not-for-profit entities, the school boards' leaseback of facilities to be constructed, and trust agreements conveying lease rights, to finance construction of new school facilities. Id. In affirming the trial court's validation, this Court noted that of the four sources of lease payments identified by the school boards, three sources were non-ad valorem and one was from ad valorem taxes. Id. at 549 n.3. This Court concluded that "because these obligations are not supported by the pledge of ad valorem taxation, they are not 'payable from ad valorem taxation' within the meaning of article VII section 12, and referendum approval is not required." Id. at 552. The agreements, it was concluded "although supported in part by ad valorem revenues, expressly provide that neither the bondholders nor anyone else can compel the use of the ad valorem

taxing power to service the bonds." Id. Moreover, this Court continued, the agreements "give the boards freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments." Id.

However, different clauses and similar clauses have met with varying results. For example, this Court has also concluded that bonds secured by a county's pledge of "all legally available, unencumbered sources of county revenue including all money derived from regulatory fees and user charges assessed by the county" would "have the effect of requiring the levy of increased ad valorem taxation, requiring a referendum." County of Volusia v. State, 417 So. 2d 968, 969 (Fla. 1982). Quoting its earlier opinion in Town of Medley v. State, 162 So. 2d 257, 258 (Fla. 1964), this Court reminded issuing authorities:

> Only bonds or certificates of indebtedness which directly obligate the ad valorem taxing power are encompassed by Section 6, Article IX, Fla. Const. The incidental effect on use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject such bonds or certificates to that constitutional requirement.

While these cases provide guidance to issuing authorities in their efforts to craft valid and constitutionally firm agreements to support their bonding efforts, they neither address the issue presented in this case nor establish error in

the trial court's conclusions. Most of the cases cited by the City are attacks on agreements supporting a bond issue or proceedings to validate proposed bonds supported by written agreements. (IB. 24-31) See, e.g., City of Orlando v. State, 67 So. 2d 673 (Fla. 1953)(street improvement certificates specifically prohibited use of ad valorem taxes to pay the city's debt and were not bonds); Clover Leaf v. City of Jacksonville, 199 So. 923 (Fla. 1941)(paving certificates were mere evidences of indebtedness and city may not borrow money under a device for repayment); Kathleen Citrus, 169 So. 356 (injunction granted because sewer revenue debentures contained features of a borrowing plan without public referendum).

The City improperly characterizes the JPA in this manner:

> 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. . . . (IB. 25 n.9)

As revealed by a plain reading of the JPA (Tab 2), that is not the purpose of the JPA or a result of the JPA. The City's utilities are located in the Department's right of way. The City, as required by Sections 337.401-337.404, Florida

Statutes[10], and Rule 14-46.001, Florida Administrative Code, is responsible for the relocation of those utilities. Accordingly, the City entered into the JPA and paid up-front the amount the City determined would be the full and only cost of relocating its utilities. As required, the City also provided the Department and the Department's contractor with plans to effectuate relocation of the utilities for the amount determined. The City could have performed the work itself or have the work performed by the Department's contractor.[11] The City chose the latter.

If, and only if, the City's estimate or plans were erroneous or defective would the City become responsible for any

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[10]"(1) Whenever it shall become necessary for the authority to remove or relocate any utility as provided in the preceding section, the owner of the utility, or the owner's chief agent, shall be given notice of such removal or relocation and an order requiring the payment of the cost thereof, and shall be given reasonable time, which shall not be less than 20 nor more than 30 days, in which to appear before the authority to contest the reasonableness of the order. Should the owner or the owner's representative not appear, the determination of the cost to the owner shall be final. Authorities considered agencies for the purposes of chapter 120 shall adjudicate removal or relocation of utilities pursuant to chapter 120."

[11]This statutory scheme and a City's mandated repayment have been previously enforced. City of Opa-locka v. Dep't of Transp., DOAH Case No. 93-9241, DOT Case No. 93-0479, affirmed; City of Opa-locka v. Dep't of Transp., 709 So. 2d 651 (Fla. 3d DCA 1998).

additional cost. The JPA imposes no additional costs and any potential additional cost is not pre-determined, nor is any defense thereto contracted away. The City can contest any additional cost claimed by the Department's contractor, and is doing so in the Hillsborough case. (Tab 3A, 3B) In the Hillsborough case the City has alternatively argued that the JPA is void *ab initio*, that it should not be obligated to pay any additional amounts, that it should recover the amount prepaid, and that it should be able to affirmatively enforce provisions of the JPA as the City interprets them. (Tab 3B) The provisions in the JPA for reimbursement of monies paid by the Department to the contractor on the City's behalf due to the errors and omissions of the City are enforceable, and do not violate Article VII, Section 12, Florida Constitution. The City argues that the Department entered into the JPA at its own peril, and that even equitable estoppel will not permit the enforcement of a void agreement, citing to Frankenmuth Mutual Ins. Corp., 1996 WL 571042 (N.D. Fla. 1996), Ramsey v. City of Kissimmee, 190 So. 474 (Fla. 1939), and P.C.B. Partnership v. City of Largo, 549 So. 2d 738 (Fla. 2d DCA 1989). The underlying principle behind these cases is that taxpayers should not be held accountable for the expense of contracted goods or services unless the contract has been entered into according to

the law. However, none of these cases involves a prepaid obligation, two governmental entities with overlapping spheres of responsible taxpayers, or fully performed services. If the City is bound by its contractual obligation in this case, the City's taxpayers, who are the sole beneficiaries of the work performed, will pay for it. If the City is not bound by its contractual obligation in this case and the additional cost or the entire cost is to be borne by the Department, all taxpayers of the State of Florida will pay for the benefit enjoyed by only the City's residents. The rule of law to emanate from this case cannot be that a fully performed standard contract is void *ab initio* and an agreement between two governmental entities are subject to invalidation proceedings after being executed and performed. There is no basis in law or fact to support such a result.

D. The Joint Project Agreement does not create a secured debt in violation of Article VII, Section 12. (Responding to Point I.C.)

The City argues that the JPA in this case is invalid because this Court invalidated a provision in a debt instrument that gave a creditor a right to foreclose on property owned by a governmental entity in Nohrr v. Brevard County Educ. Facilities

Auth., 247 So. 2d 304 (Fla. 1971) and cites also to Op. Att'y Gen. Fla. 98-71 (1998). However, it is not the JPA that the City argues creates a possibility of a lien on the City's property, but Section 337.403(3), Florida Statutes, which provides:

> (3) Whenever an order of the authority requires such removal or change in the location of any utility from the right-of-way of a public road or publicly owned rail corridor, and the owner thereof fails to remove or change the same at his or her own expense to conform to the order within the time stated in the notice, the authority shall proceed to cause the utility to be removed. The expense thereby incurred shall be paid out of any money available therefor, and such expense shall, except as provided in subsection (1), be charged against the owner and levied and collected and paid into the fund from which the expense of such relocation was paid.

The constitutionality of the statute under Article VII, Section 12, Florida Constitution, was not argued below, the issue was not decided below, and the issue has not been preserved for appeal. If Section 337.403(3), Florida Statutes, is unconstitutional as written or as applied, this is an issue to be decided another day, in another appeal, on a properly perfected record.

The cases offered by the City for the proposition that the JPA is invalid because the City would be morally compelled to levy taxes to pay the debt imposed by the JPA are not

persuasive. (IB. 32-33) In Nohrr, this Court validated non-referendum revenue bonds, but deleted from the bonds certain provisions creating a mortgage on the property which allowed bondholders to foreclose in the event of default. Nohrr, 247 So. 2d at 1024. Neither the bonds nor the supporting documents were deemed invalid or illegal; the offending language was merely deleted. The language this Court deleted was in the bond, not imposed by statute. In its initial brief, the City, for the first time, raises the constitutionality of Sections 337.403 and 337.404, Florida Statutes, arguing that they are the "functional equivalents of the 'non-substitution clause' deemed unconstitutional in Frankenmuth 769 So. 2d at 1012." (IB. 33 n.11) Constitutional issues cannot be raised for the first time on appeal. See Reese v. Dep't of Transp., 743 So. 2d 1227, 1229 (Fla. 4th DCA 1999).

The JPA in this case does not create a secured debt upon which the Department could foreclose. If the JPA becomes a secured debt by operation of an alleged unconstitutional statute, that issue was not raised below and must be decided another day. Under the JPA, the City pays for work the City is required by law to perform and agrees to stand behind its work in estimating the amount paid and in preparing the plans upon which the contractor would rely to perform the work. The City's

potential exposure to a lawsuit for its errors and omissions is nothing more than the legislature contemplated when it allowed municipalities to sue and be sued and this Court intended in cases enforcing those actions. Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985); Pan-Am Tobacco Corp., 471 So. 2d 4; Miorelli Engineering, Inc., 703 So. 2d 1049.

E. The trial court in the Pinellas case properly concluded that the prior filed and pending action in the Hillsborough case in which the City raised the Joint Project Agreement as both a shield and a sword must proceed and the Pinellas case must be dismissed. (Responding to I.D.)

A bond validation proceeding authorized by Section 75.02, Florida Statutes, authorizes:

> Any county, municipality, taxing district or other political district or subdivision of this state, including the governing body of any drainage, conservation or reclamation district, and including also state agencies, commissions and departments authorized by law to issue bonds, **may determine its authority to incur** bonded debt **or issue** certificates of debt and the legality of all proceedings in connection therewith, including assessment of taxes levied or to be levied, the lien thereof and proceedings or other remedies for their collection. For this purpose a complaint shall be filed. . . . (emphasis added)

The City admits that the motivation behind the filing of the Pinellas case is the Hillsborough case, in which the City argued and lost (without prejudice) the very issues it now raises and arguments it now makes in the Pinellas case, and in this appeal. (T. 47) The Hillsborough case is still pending. (T. 49) The pendency of the prior filed Hillsborough case was the basis for the trial judge's reliance on estoppel as one of the two bases for his decision. (Tab 7, p.5)

For the proposition that the Pinellas case is the only method of resolving the issues raised in the Hillsborough case, the City points to Bessemer Properties v. City of Opalocka, 74 So. 2d 296 (Fla. 1954). In Bessemer, the City of Opalocka filed a declaratory judgment action to validate proposed certificates of indebtedness. Id. at 297. This Court concluded that the city should have utilized Chapter 75, Florida Statutes, to validate its proposed certificates, reversed the trial court's order to the contrary, and directed the cause be dismissed without prejudice to the city to proceed in a "manner authorized by law." Id. Once again, the City relies on pre-issue validation proceeding cases to support its claims of error in the trial court's proper disposal of its five year after the fact contract invalidation proceeding to circumvent a pending proceeding in another jurisdiction.

This Court has held that when contract provisions are collateral to a bond validation proceeding, Chapter 75, Florida Statutes, is not the proper vehicle for resolution. Sunrise Lakes, 383 So. 2d 631; McCoy Restaurants, 392 So. 2d 252. In Sunrise Lakes, this Court affirmed a trial court's validation of certain bonds. More importantly, this Court also affirmed the trial court's conclusion that it lacked jurisdiction to decide the validity of the supporting operating contract because it was

a collateral issue involving "other parties [which] . . . clearly cannot be properly resolved in a bond validation proceeding." Id. at 633.

In McCoy Restaurants, this Court reminded litigants that "[t]he sole purpose of a validation proceeding is to determine whether the issuing body had the authority to act under te constitution and laws of the state and to ensure that it exercised that authority in accordance with the spirit and intent of the law." McCoy Restaurants, 392 So. 2d at 253 (citations omitted)(emphasis added). The issue "concerning the validity of the lease agreement is clearly a collateral issue and not properly the subject of a bond validation proceeding." Id. (emphasis added). Quoting from its earlier opinion in City of Miami, this Court continued:

> It was never intended that proceedings instituted under the authority of this chapter to validate governmental securities would be used for the purpose of deciding collateral issues or those other issues not going directly to the power to issue the securities and the validity of the proceedings with relation thereto.

Id. at 253-254 (quoting State v. City of Miami, 103 So. 2d 185, 188 (Fla. 1958)). At issue in McCoy Restaurants was the validity of certain lease agreements. This Court said the issue could not be resolved under Chapter 75 because it was "a collateral issue to the bond validation proceeding. The

airlines and other interested parties are not parties to this action, and the trial court has no jurisdiction to determine the validity of the leases in this type of proceeding." Id. at 254 (citing Sunrise Lakes, 383 So. 2d 631). Such is the case here. The City filed its alleged bond validation proceeding in Pinellas County with full knowledge of the pendency of the Hillsborough case, the presence of other parties who were represented by counsel, and the fact that the same arguments raised in its Pinellas case had been raised and rejected in the Hillsborough case. Nevertheless, the Pinellas case was filed without naming the other proper parties or notifying their counsel who were known to the City. The motivation behind this unauthorized complaint for bond validation is obvious - to exploit the unique procedural aspects governing disposition of such a complaint and obtain the relief the City had been previously denied in the Hillsborough case.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE IDENTICAL ISSUES RAISED IN THE CITY'S PINELLAS COMPLAINT MUST BE ADJUDICATED IN THE PRIOR FILED AND PENDING HILLSBOROUGH COMPLAINT

A. Standard of Review

The Department argued and the trial court held that collateral estoppel prevented the City from proceeding with the Pinellas case because the City was litigating the same issues in a prior filed case. (T. 17-22, 26-33, 70-74 ;Tab 7) Whether properly called collateral estoppel or priority of actions, the argument is the same, the result was correct, and this Court should review the result on an abuse of discretion standard. Hirsch v. DiGaetano, 732 So. 2d 1177 (Fla. 5th DCA 1999).

In Hirsch, the petitioners sought certiorari review of an order denying their motion to stay a Florida case brought by the appellee because a "previous contract action between the same parties and involving the same claims was first filed in Massachusetts." Id. The court concluded:

> It is the well-established law of Florida that where two courts have concurrent jurisdiction of a cause of action, the first court to exercise jurisdiction has the exclusive right to hear all issues or questions arising in the case. . . Absent extraordinary circumstances which do not exist in this case, a trial court abuses its discretion when it fails to respect te

principle of priority.

Id. at 1777-1178 (citations omitted). The Pinellas court is without jurisdiction because the City's complaint is not a bond validation proceeding. The principle applies and the trial court did not abuse its discretion.

B. Whether collateral estoppel, principle of priority, or future collateral estoppel, the trial court did not abuse its discretion in requiring the City to resolve the issues in the prior filed Hillsborough case.

When the City filed its Pinellas case for a bond validation it had been a party to and was actively defending the Hillsborough case and seeking affirmative relief from the subject JPA for approximately one year. (Tab 1, 3B) The City admits that the Hillsborough case and the Pinellas case are the "same thing" (T. 46); the arguments made in the Pinellas case had been previously made in the Hillsborough case and denied without prejudice (T. 50); the Hillsborough case motivated its filing of the Pinellas case (T. 47); and Article VII, Section 12, Florida Constitution, is being used as a shield in the Hillsborough case and as a sword in the Pinellas case (T. 65). The City simply has no legal right to litigate its contract dispute in two courts simultaneously and the trial court properly ruled as such.

Florida courts have consistently refrained from hearing issues on appeal when the future collateral estoppel effect of a ruling in the case between the same parties on the same issue is pending in another forum. Hirsch, 732 So. 2d 1177; Kidder Elec. of Florida, Inc. v. U. S. Fidelity & Guar. Co., 530 So. 2d 475, 476 (Fla. 5th DCA 1988). The trial court's reliance on these principles in this case are amply supported by the facts and the law. (T. 75-77; Tab. 7)

The City's claim that the Pinellas case and the Hillsborough case do not include the same parties is unpersuasive and cannot support an abuse of discretion by the trial court. The Department and Kimmins are not parties to the Pinellas case because the City purposefully utilized Chapter 75, Florida Statutes, to exploit the unique procedural aspects governing disposition of a bond validation proceeding to attempt to obtain the rulings the City was denied in the Hillsborough case. Prior to the filing of the Pinellas case, the City knew of and was actively defending, and offensively utilizing the JPA in Hillsborough case, and knew of the parties to and counsel for the parties in the Hillsborough case. Nevertheless, the City made no mention of the other case, or the other parties, the defenses raised by the City, or the City's counterclaim in the Hillsborough case.

While abatement may have been an option in the later filed Pinellas case, the trial court’s conclusion that it was not a Chapter 75, Florida Statutes, bond validation proceeding, precluded such a result. This Court has agreed in its rulings in such cases as Sunrise Lakes, 383 So. 2d 631, and McCoy Restaurants, 392 So. 2d 252, concluding that contract issues collateral to bond validation are not to be addressed in a Chapter 75 proceeding. Moreover, the City opposed abatement of the Pinellas case. (T. 62-64)

Having established no abuse of discretion in the trial court’s decision and rulings, the order from which this appeal was taken should be affirmed in all respects.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE DEPARTMENT TO INTERVENE IN THE PINELLAS CASE

A. Standard of Review

The standard of review for an order granting a motion to intervene is abuse of discretion. Union Central Life Ins. Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992); State, Dep't of Legal Affairs v. Rains, 654 So. 2d 1254 (Fla. 2d DCA 1995). The City concedes that the standard is abuse of discretion. (IB. 37-38)

B. There has been no showing that the trial court abused its discretion in granting the Department's motion to intervene in the proceeding

The City initially opposed the Department's intervention in the Pinellas case, but later conceded that it did not "mind" the Department's participation, so long as it did not delay the proceedings. (T. 16, 23) Although the City effectively ignored the existence of the Hillsborough case, the allegations and defenses in the Hillsborough case, and its own counterclaim in the Hillsborough case, it voiced no objection to the introduction and filing of certified copies of the Department's third party complaint, the City's answer, affirmatives defenses, and counterclaim, the City's motion for summary judgment, the

Hillsborough court's denial of the City's motion, the City's motion for reconsideration, the Department's response to the motion for reconsideration, and the trial court's denial of the motion for reconsideration. (T. 31-32; Tab 3A-F) In addition, while the City objected to intervention, then subsequently no longer objected, the City erroneously stated at the hearing that the Hillsborough case was "for all intents and purposes . . . between DOT, as plaintiff, and the City as defendant. Kimmens (sic) [the contractor and plaintiff in the Hillsborough case] is not really in that equation." (T. 61) This statement could not be further from the truth; but, even if true, supports the Department's position and the trial court's ruling on the collateral estoppel/principle of priority to prevent the City from bringing the Pinellas action.

"Whether or not discretion has been abused is a question to be evaluated under the totality of the circumstances." Sekot Laboratories, Inc. v. Gleason, 585 So. 2d 286 (Fla. 3d DCA 1990).

As argued by the Department in its motion to dismiss and at the August 24 hearing, the Department is the stakeholder in the contract dispute over the JPA. However, Kimmins initiated the Hillsborough action and is the driving force behind the case - the Department filed a third party complaint against the City as

a result of Kimmins' complaint. The dispute and the Hillsborough case are not simply between the Department and the City. In order for the City to be liable for any additional monies, Kimmins must establish that it incurred delays and/or damages resulting from the plans and/or actions of the City. The initial burden in that regard is with Kimmins. Because Kimmins does not have a contractual relationship with the City, it could not directly sue the City for the City's breaches of its contractual obligations.

The law does not require a party to establish that it is a real party in interest (although the Department is) or that a party is an indispensable party, only that the interest of the intervenor is appropriate to support intervention. See Union Central Life Ins. Co. v. Carlisle, 593 So. 2d 505 (Fla. 1991). While this Court said that the trial court must also "determine the parameters of the intervention," no argument has been made by the City as to this portion of the trial court's role. Id. at 507-508.

The City argues that in cases such as Broward County v. State, 515 So. 2d 1273 (Fla. 1987), bondholders are not necessary parties in a bond validation proceeding. However, the Department is not a bondholder, there is no bond, the City's Pinellas case is not a proper bond validation proceeding, being

a necessary party is not the test for intervention. Furthermore, collateral issues to a bond validation proceeding (or a purported bond validation proceeding) are not to be resolved in the proceeding.

There has been no abuse of discretion shown entitling the City to a reversal of the trial court’s ruling allowing the Department to intervene in the Pinellas case. The facts, the law, and the interests of fair play support the trial court’s ruling.

CONCLUSION

The City’s attempt to avoid the proper resolution of the issues concerning its contractual obligations and potential breaches by filing a Chapter 75, Florida Statutes, bond validation proceeding to exploit the unique procedural aspects governing disposition of a bond validation to obtain what the City had been denied in the prior filed Hillsborough case was well understood by the trial court. The trial court’s order determining that the case was not a bond valid proceeding, that collateral estoppel (or the principle of priority) prevented the City from filing an action in Pinellas County to avoid an identical action in Hillsborough County, that as a result the court was without jurisdiction over the alleged bond validation proceeding, and that the Department was a proper party to the

action are supported by the facts and the law and no error or abuse of discretion has been established. This Court should affirm the trial court’s order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail on this ____ day of March, 2001, to **GEORGE E. SPOFFORD, IV, ESQUIRE,** and **TRENTON H. COTNEY, ESQUIRE**, Counsel for Plaintiff/Appellant, Glenn, Rasmussen, Fogarty & Hooker, P.A., Post Office Box 3333, Tampa, Florida 33601-3333, and **C. MARIE KING, ESQUIRE**, Assistant State Attorney, Pinellas County, Post Office Box 5028, Clearwater, Florida 33748, Counsel for the Defendant/Appellee, State of Florida.

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MARIANNE A. TRUSSELL

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing has been prepared using Courier New 12 point font.

____

Marianne A. Trussell

IN THE SUPREME COURT OF FLORIDA

THE CITY OF OLDSMAR,
a municipal corporation and
public body corporate and
politic of the State of Florida,

Appellant,

vs. CASE NO. SC00-2695

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,

Appellees.
_________________________________/

APPENDIX TO THE ANSWER BRIEF OF APPELLEE,
STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

INDEX TO THE APPENDIX

DOCUMENT PAGE

Response to Order to A.1-
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Show Cause dated 8/23/2000