

No. 111,015

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF THE
OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY
FOR APPROVAL OF \$25 MILLION OKLAHOMA
CAPITAL IMPROVEMENT AUTHORITY CAPITAL
IMPROVEMENT REVENUE BONDS, SERIES 2012A
(RIVER PARKS AUTHORITY PROJECTS)

BRIEF OF RESPONDENT, PATRICK ANDERSON IN OPPOSITION TO
THE APPLICATION OF THE OKLAHOMA CAPITOL IMPROVEMENT
AUTHORITY FOR APPROVAL OF \$25 MILLION OKLAHOMA
CAPITAL IMPROVEMENT AUTHORITY REVENUE BONDS, SERIES
2012A (RIVER PARKS AUTHORITY PROJECTS)

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September 21, 2012

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF)
THE OKLAHOMA CAPITOL IMPROVEMENT)
AUTHORITY FOR APPROVAL OF \$25 MILLION) No. 111015
OKLAHOMA CAPITAL IMPROVEMENT)
AUTHORITY CAPITAL IMPROVEMENT)
REVENUE BONDS, SERIES 2012A (RIVER)
PARKS AUTHORITY PROJECTS))

**BRIEF OF RESPONDENT, PATRICK ANDERSON, IN OPPOSITION TO THE
APPLICATION FOR APPROVAL OF \$25 MILLON OKLAHOMA CAPITOL
IMPROVEMENT AUTHORITY CAPITAL IMPROVEMENT REVENUE BONDS,
SERIES 2012A (RIVER PARKS AUTHORITY PROJECTS)**

Introduction

Respondent Senator Patrick Anderson (hereinafter, “Senator Anderson”) is a tax paying resident of Oklahoma and a member of the Oklahoma legislature. Senator Anderson was elected as a member of the Oklahoma State Senate in 2004, served in the Oklahoma Senate in 2009 when the bond legislation in question was passed, and continues to serve in the Oklahoma State Senate today.

Senator Anderson contends that the Oklahoma Capitol Improvement Authority is seeking to have the bonds in question approved for a purpose that is different from the original intent of the Oklahoma legislature when the bond legislation was originally passed in 2009. Furthermore, Senator Anderson contends that the issuance of the bonds as now proposed by OCIA creates a constitutionally prohibited debt of the State and would result in a constitutionally prohibited gift of \$25 million of State funds to a municipality and/or political subdivision; as well as a constitutionally prohibited extension of the State’s credit to a municipality and/or political subdivision.

The History and Facts of this Matter

The River Parks Authority is a public trust authority created to develop and maintain the public park lands along the Arkansas River in Tulsa County created by a Trust Indenture dated April 9, 1974. The City of Tulsa and the County of Tulsa are designated as the sole beneficiaries of said Trust Indenture. Said Trust Indenture provides in pertinent part that the River Parks Authority is to hold in trust the assets of the Authority “for the exclusive use and benefit of the City of Tulsa, Oklahoma, a municipal corporation (hereinafter referred to as the ‘City’), and the County of Tulsa, Oklahoma, a political subdivision of the State of Oklahoma (hereinafter referred to as the ‘County’)...” See, Respondent’s Appendix, Exhibit I. .

The Zink dam is located at the intersection of 29th Street and Riverside Drive in the City of Tulsa. It was built in 1983 by the City of Tulsa. The City of Tulsa is the sole owner of the Zink dam.

The Zink dam is not an asset of the River Parks Authority Trust and therefore the River Parks Authority has no ownership interest in the Zink dam.

Senate Bill 239, which authorized the bonds in question, was passed by the Oklahoma legislature during the 2009 legislative session. The bill language is codified in statute at Title 73, O.S. §336. Paragraph A of section 336 provides in part that:

“The Oklahoma Capitol Improvement Authority (OCIA) is authorized to acquire real property, together with improvements located thereon, and personal property for the purposes of construction of Zink Dam improvements, stream bank stabilization **and** construction of two additional low-water dams on the Arkansas River.” (emphasis added) See, Respondent’s Appendix, Exhibit B.

The Oklahoma legislature’s intent in passing Senate Bill 239 is documented in the press release issued by Senator Mike Mazzei on April 20, 2009, the day Senate Bill 239 was passed.

Senator Mazzei stated that Senate Bill 239 “will authorize bonds needed to make safety improvements to Zink Dam, as well as create low-water dams in Sand Springs and the Jenks South Tulsa areas”. The Senate author went on to state in his press release that “SB 239 authorizes \$25 million in bonds, but that will enable us to secure an additional \$50 million in federal funds for this project...these projects are projected to create a total economic impact of \$2.8 billion and approximately 9,450 jobs”. See, Respondent’s Appendix, Exhibit A.

Since the passage of SB 239, the circumstances surrounding the planned projects have changed. The federal funds that were anticipated by the Legislature in 2009 were never appropriated and the Department of Central Services (“DCS”), the state agency designated by the legislature in 2009 to play a major role in these projects, no longer exists. DCS was consolidated under the State Government Process Consolidation and Reorganization Act of 2011. Consequently, the bonds authorized by the Legislature in 2009 have never been issued.

On January 26, 2012, the Oklahoma Council of Bond Oversight reviewed a request that the 2009 bonds be issued for a “scaled back project” that only included using the funds for improvements to the Zink Dam. At this meeting the Council of Bond Oversight discussed concerns about whether the new project was authorized by the legislature; whether there was an insurable interest that could be obtained for the project in order to protect the bond holders because of the fact that the Zink Dam was not a State owned asset; and whether River Parks Authority had the financial ability to pay for the insurance premium if an insurable interest could be established. Ultimately, the Council of Bond Oversight voted to approve the issuance of the bonds subject to several conditions including the passage of:

“...a Concurrent Resolution by the Oklahoma Legislature “(a) acknowledging that the River Parks Authority projects (described in Senate Bill 239 from the 2009 Session) have been scaled back to include only the renovation of the Zink Dam and stream bank stabilization and (b) expressing their continued support of OCIA bond issuance to finance the more limited project.” See, Respondent’s Appendix, Exhibit D.

On January 30, 2012, the Oklahoma Capitol Improvement Authority met and directed that the Oklahoma Council of Bond Oversight remove the condition that the Oklahoma Legislature adopt a Concurrent Resolution acknowledging the changes that had been made to the original bond project. See, Respondent’s Appendix, Exhibit E. .

On February 9, 2012, a special meeting of the Council of Bond Oversight was held wherein the State Bond Advisor stated that the Governor was the principal spoke-person in returning the project to the Council of Bond Oversight for reconsideration and that the Governor had expressed that the additional conditions imposed by the Council of Bond Oversight were unnecessary. Subsequently, the Council of Bond Oversight voted to remove the conditions that they had placed on the issuance of the bonds just fourteen (14) days prior. See, Respondent’s Appendix, Exhibit F.

The new proposed use of the bond funds has little to do with the Legislature’s original intent when the bonds were passed in 2009. The funds, if approved, are now simply going to be used to raise the level of the Zink dam by three (3) feet so that the River Parks Authority can increase the depth of the Zink Lake. The purpose is to make lake area more aesthetic pleasing so that they can develop the surrounding fifty-five (55) acres which is privately owned by the George Kaiser Family Foundation. See, page 13 of Applicant’s Brief and Respondent’s Appendix, Exhibits G & H. .

On February 27, 2012, Senator Anderson requested an official opinion from the Oklahoma Attorney General regarding the constitutionality of the issuance of the bonds that are in question in the present case. In July of 2012, Senator Anderson was informed by the Oklahoma Attorney General's office that the Attorney General was not going to issue an opinion on the issue. Senator Anderson filed a declaratory judgment action in the District Court of Oklahoma County, Oklahoma, on August 22, 2012, case number CV-2012-1785, seeking to have this 2009 bond issue declared unconstitutional on multiple grounds. See, Respondent's Appendix, Exhibit C.

On August 29, 2012, the Oklahoma Capitol Improvement Authority initiated this Application proceeding.

Admissions of Facts by Applicant

A careful read of the Applicant's brief in this matter reveals three (3) admissions of fact by the Applicant that delineate precisely why the issuance of the bonds in question are unconstitutional.

Admission #1: The Zink dam is owned by the City of Tulsa.

"This dam is owned by the City of Tulsa and operated by the River Parks Authority ("RPA"), a public trust created by the City of Tulsa and Tulsa County to develop and maintain the public park lands along the Arkansas River in Tulsa County." See, Brief of the Applicant, page 1.

Admission #2: Appropriations from the Oklahoma Legislature is the only source for repayment of these bonds.

"The only funds available to owners of OCIA bonds for principal and interest payments are the rental payments from the Department of Central Services which it will annually receive in an appropriation from the Oklahoma Legislature." See, Brief of the Applicant, page 11.

Admission #3: The OCIA now intends to spend the bond funds for a different purpose than what the legislature intended when it authorized the bonds in 2009.

“The proceeds from the Series 2012A Bonds...will be used to provide funds for the acquisition and construction of certain improvements to the Zink Dam, including structural and operational modifications thereto **and an increase in the elevation thereof**, and associated stream bank stabilization features ...Proceeds of the Series 2012A Bonds **will not be used** to pay any costs associated respect to the potential construction of two additional low-water dams on the Arkansas River referenced in Section 336(A) of the Act.” See, Brief of Applicant, page 13 (emphasis added).

Argument

PROPOSITION I ORIGINAL JURISDICTION SHOULD NOT BE ASSUMED IN THIS MATTER

Original jurisdiction action before the State Supreme Court is not “ripe” for adjudication by the Supreme Court in its present form, since there are unanswered questions of fact. Title 73, O.S. §160 provides that the Supreme Court only has exclusive jurisdiction to determine questions of law. -

The facts involved of the present case are clearly unusual and there remains numerous predicate issues of fact that are yet to be resolved such what entity has the legal right to lease improvements made to the Zink Dam? What entity has an insurable interest in the improvements to the Zink Dam that are to be pledged in order to protect the bond holders in this matter?

Senator Anderson, prior to the initiation of this matter by OCIA, properly filed a declaratory judgment action in Oklahoma County District Court to address these existing questions of fact. Therefore, this Court should not accept jurisdiction in this matter until the issues of fact have been properly determined in the lower Court proceeding.

PROPOSITION II APPLICANT SEEKS TO USE THE BOND FUNDS FOR A DIFFERENT PURPOSE THAN THAT WHICH THE LEGISLATURE APPROVED

Article 10, §16 of the Oklahoma Constitution is known as the purpose-of-borrowing requirement and provides:

All laws authorizing the borrowing of money by and on behalf of the State, county, or other political subdivision of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for no other purpose.

In order to ascertain what the Legislature intended, one should look to the language of the statutes under review and presume the legislative body intends what it expresses. *Fent v. Oklahoma Capitol Improvement Authority*, 1999 OK 64, 984 P.2d 200, at 212 (Lavender, J. dissenting).

In *Borin v. City of Erick*, 1942 OK 144, 125 P. 2d 768 (1942) the Oklahoma Supreme Court enjoined a municipal bond sale after the vote to support the bonds had taken place because the project was subsequently altered. The issue in *Borin* was very similar to the case at bar in that the voters in Boren (the citizens in Erick, Oklahoma) and the voters in the case at bar (the legislature) both voted to support a specific project that was to be matched with federal funds. However, when federal funding did not materialize, the promoters of the bond issues in *Borin* (as well as the bond promoters in the case at bar) attempted to have the bonds issued for a similar project – but one that different from what the voters had actually approved.

In reaching its decision to enjoin the issuance of the municipal bonds, the *Borin* Court found the change in the intended use of the bond funds violated Article X, Section 16 of the Oklahoma Constitution saying:

The very purpose of Section 16 is to require officials to reveal the true purpose in mind. To contemplate one purpose and submit a substantially different one to the vote of the people constitutes a direct violation of Section 16. *Borin* ¶13, 125 P.2d at 770.

Article 10, section 16 requires the Legislature to specify the purpose for which borrowed money is to be used. The word “purpose” means “the thing to be accomplished”. *In re*

Oklahoma Capitol Improvement Authority, 2003 OK 59, ¶17, 80 P.3d 109, 113, (2003). The State may not officially plan a specific project and then use bond proceeds that were voted in contemplation of the original project for another purpose. *Quinn v. City of Tulsa*, 1989 OK 112, ¶3, 777 P.2d 1331, 1336 (1989).

The Applicant attempts in its brief to argue that the facts in the present case are similar to a situation where increases in material costs result in the construction of fewer miles of a highway project than might have been originally contemplated. This is not a highway project, nor is the change in the original intent due to increases in material costs. The change in the project in the present case is due to the fact that the federal funds, like in *Borin*, were never made available to the originally planned project.

The facts in the present case reveal that OCIA has changed the project from that which the Legislature contemplated in 2009. At its January 26, 2012, meeting the Oklahoma Council of Bond Oversight specifically raised concerns about the changed project and conditioned approval of the issuance of the bonds which were approved in 2009 upon the passage of a Concurrent Resolution by the Oklahoma Legislature which acknowledged that the project had changed to include only the renovation of the Zink Dam and which expressed the Legislature's continued support of the changed project.

This Court cannot ignore the facts that the new OCIA project is not the project that the Oklahoma Legislature approved in 2009. Therefore, this Court should enjoin the issuance of these bonds on the grounds that the issuance of these bonds would violate Article X, Section 16, of the Oklahoma Constitution.

PROPOSITION III
THIS ISSUANCE OF THE BONDS WOULD VIOLATE
ARTICLE 10, §§ 14 AND 15 OF THE OKLAHOMA CONSTITUTION

Article 10, §14(A) of the Oklahoma Constitution prohibits the State from assuming the debt or liabilities of any county, municipal corporation, or political subdivision of the State. In drafting Article 10, §14, it is clear that the framers of the Constitution and the people of this State who adopted it intended that the State not assume the debt of any county, municipal corporation, or political subdivision of the State. *Reherman v. Oklahoma Water Resources Board*, 1984 OK 12, ¶7, 679 P.2d 1296, 1302. The Zink Dam is owned by the city of Tulsa. Any improvements made to the Zink Dam are therefore the responsibility of the City of Tulsa. Therefore, pursuant to §14, the debts and liabilities relating to these improvements to the Zink Dam cannot be assumed by the State of Oklahoma. As a result, neither the State of Oklahoma nor OCIA has any authority to issue bonds for repairs or improvements to the Zink Dam.

Article 10, §15(A) of the Oklahoma Constitution provides that “the credit of the State shall not be given, pledged, or loaned to any ... municipality or political subdivision of the State...” Because the Zink Dam is owned by the City of Tulsa and operated by the River Parks Authority, there is no logical conclusion that can be drawn from the established facts other than that the credit of the State of Oklahoma would be being given, pledged or loaned to the City of Tulsa, the River Parks Authority and/or the County of Tulsa if the bonds in question were issued. Therefore the issuance of these bonds is clearly prohibited.

In an attempt to cloud the glaring unconstitutionality of the proposed bond project, the Applicant cites several cases involving the Oklahoma Development Finance Authority

(hereinafter “ODFA”) for the argument that OCIA can issue debt to political subdivisions and municipalities. This Court need look no further than the authorizing statutes of the two different State agencies to see that the Applicant’s reliance on cases involving ODFA have no application to the case at bar. ODFA and OCIA are statutorily created entities that both have the ability to issue bonds – but for very different purposes. OCIA was created and granted the ability to issue bonds for the purpose of providing buildings for the State’s departments and agencies and to expand and maintain the State’s highway system. See, Title 73, O.S. §151. On the other hand, the ODFA was established for the specific purpose of assisting political subdivisions and municipalities of the State of Oklahoma. ODFA has specific statutory authority to the lend funds and to purchase of obligations of political subdivisions and municipalities. See, Title 74, O.S. §5062.8. OCIA simply does not have the statutory authority to issue bonds for the benefit of the City of Tulsa, the County of Tulsa or the River Parks Authority. Therefore, the issuance of the bonds in the present would result in the assumption of the debt of a municipality or a political subdivision and result in an extension of the State’s credit for the benefit of a municipality or a political subdivision in clear violation of Article 10, §§14 and 15 of the Oklahoma Constitution.

Furthermore, the issuance of these bonds would result in the making of a \$25 million gift to the City of Tulsa. Gratuitous transfers of the property of the State voluntarily and without consideration are unconstitutional gifts pursuant to Article 10, §15 of the Oklahoma Constitution. A gift is a gratuitous transfer of the property of the state when there exists no obligation to do so and when no consideration exists. *Hawks v. Bland*, 1932 OK 101, Okla. 48, 9 P.2d 720, 722. In the present case the Applicant is proposing that the State issue \$25 million in bonds so that the State may in essence give the \$25 million raised from the bond sale to the City of Tulsa so that

the City of Tulsa may in turn spend it. Moreover, the State is going to pay the principle and the interest on these bonds. In the end, the City of Tulsa will own the same dam it already owns – and the State will have a \$25 million debt to pay. There is no legitimate consideration for the State’s transfer of these funds – therefore the issuance of these bonds would amount to the making of a constitutionally prohibited gift.

**PROPOSITION IV
THE ISSUANCE OF THESE BONDS WOULD RESULT IN AN
UNCONSTITUTIONAL ISSUANCE OF DEBT IN VIOLATION OF
ARTICLE 10, §25 OF THE OKLAHOMA CONSTITUTION**

It is significant to note that in the adoption of the Constitution the people reserved to themselves all power to determine whether or not debts should be incurred and fixed upon themselves the responsibility of providing the revenue for the payment of such debt. *Boswell v. State*, 1937 OK 727, ¶25, 74 P.2d 940, 945. The reservation of this power is found in Article 10, §25 of the Oklahoma Constitution. Section 25 provides that no debts shall be contracted by or on behalf of this state, unless such debt is authorized by law...No such law shall take effect until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election.

Applicant goes to great lengths to argue that the bonds before this Court are not “debt”. However the bonds in question are referred to as “obligations” no less than fourteen (14) times in the enabling statute, Title 73, O.S. §336. The word “obligation” is defined in Webster’s Dictionary as a “debt security”. Applying the plain meaning of “obligation” to the words found in Title 73, O.S. §336, there can be no doubt that the term “obligations” as used in §336 is in fact a reference to the creation of debt. Furthermore, Title 73, O.S. §336 (F) specifically references the “payment of annual debt service”. Therefore, this Court must inevitably conclude that a

"debt," within the prohibition of the above-quoted constitutional provisions, will be incurred under this act unless for some well-defined reason said constitutional provisions are otherwise inapplicable. *Boswell* at ¶13, 74 P.2d at 943.

The question of whether the bill authorizes a debt of the state contrary to the constitutional provisions is a judicial and not a legislative question. *Boswell* at ¶16, 74 P.2d at 943. A mere statement that the bonds are not debts of the State is not determinative of the issue. The goal of the restrictions on borrowing found in the Constitution is to protect the Oklahoma citizenry from the Legislature's abuse of the State's credit and the consequent oppression of burdensome taxation. *In re Oklahoma Capitol Improvement Authority*, 2003 OK 59, ¶32, 80 P.3d 109, 117, (2003), footnote 24. However, this Court has determined that the provisions of Article 10, Section 25 do not apply where the bond does not constitute a debt payable out of state funds, such as a self-liquidating debt. *OCIA* at ¶31, 80 P.3d at 117. So the question before this Court becomes whether or not the Zink Dam bonds before this Court are self-liquidating.

This Court should take note that the Applicant concedes on page 11 of Applicant's brief that the only source of repayment of the principle and interest of these particular bonds is an appropriation from the Legislature. In light of this conceded fact, this Court should apply the reasoning of Justice Watt in his dissent in *In re Oklahoma Capitol Improvement Authority*, 1998 OK 25, ¶21, 958 P.2d 759, 792, to the present case and find that these bonds are not self-liquidating debt since the projects proposed to be funded will produce no income that may be used to retire the debt. This Court should also take special note of Justice Lavender's dissent in *Fent v. Oklahoma Capitol Improvement Authority*, 1999 OK 64, ¶9, 984 P.2d 200, 214, wherein he described a similar plan for the repayment of bonds.

The undeniable fact in the scheme used here for repayment is that there is a total reliance on legislative appropriations. The project cannot generate any tangible revenue of its own. There is no possibility of repayment without dependence on annual legislative appropriations. This alone prevents the proposed transaction from qualifying as a “self-liquidating” obligation. *Id* at 214.

The acknowledgment that these bonds are not self-liquidating should lead this Court to adopt the conclusion that Justice Wilson’s reached in her dissent in *Fent* wherein she stated that “the Oklahoma Capitol Improvement Authority may not borrow money that is to be repaid via legislative appropriations over a number of years unless the voters of Oklahoma have approved the law authorizing the debt.” *Fent* (dissenting opinion of Justice Wilson) ¶1, 984 P.2d at 215.

The factual circumstances in the present case make the dissenting opinions in the *OCIA* and *Fent* cases cited above particularly applicable to the case at bar. Paraphrasing Justice Lavender, there is no amount of legal semantics, word-massaging, linguistic subterfuge that can be magically used to convert the proposed bonds for the Zink Dam into “self-liquidating” debt. The bonds that are now before the Court simply cannot be considered not self-liquidating debt. These bonds are debts which are subject to the requirements of Article 10, §25 of the Oklahoma Constitution and therefore, the Oklahoma Capitol Improvement Authority may not issue these bonds and borrow this money unless the voters of Oklahoma have approved the law authorizing this debt.

Conclusion

Three years have gone by since the Legislature enacted 73, O.S. §336. Unfortunately, the project that the Legislature contemplated and originally approved under that statute never materialized. As a member of the Oklahoma Senate who voted

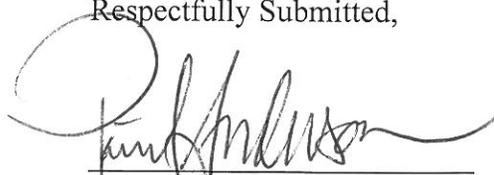
affirmatively for the issuance of the 2009 bond issue, I can assure the Court that the Legislature in 2009 believed that it was voting to approve a measure that was going to create 9,450 jobs and spur the Oklahoma economy to the tune of \$2.8 billion. The Legislature did not believe we were voting to simply raise the level of the Zink Dam by three feet.

OCIA is clearly seeking to issue these bonds for a project that is different from what the Legislature approved in 2009. The Oklahoma Council of Bond Oversight sought to cure this problem by having the Legislature affirmatively approve the change in the use of these funds. However, OCIA objected to consulting the Legislature on these changes and directed that the Oklahoma Council of Bond Oversight remove the requirement that the Legislature affirm its support of the changes. OCIA did not want the Legislature to be involved in this matter, because it had indeed changed the projects and it knew that the Legislature would not approve of the changes that had been made.

Ironically, OCIA has now come before this Court asking that this Court approve those changes so that these bonds can be issued. For the constitutional reasons set out above in this brief, this Court should deny the approval of the issuance of these bonds.

WHEREFORE, the respondent prays that his protest/objection be sustained.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Patrick Anderson", written over a horizontal line.

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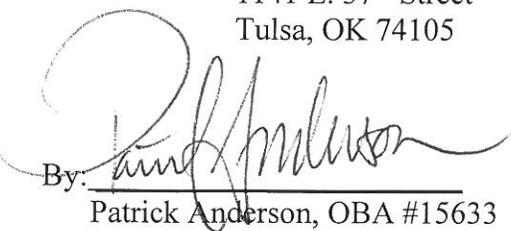
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