

summonses, make arrests, carry firearms and make searches and seizures, as the sheriff or his deputies, in the respective counties where such investigations, hearings or inspections may be held; and affidavits necessary to authorize any such arrests, searches or seizures may be made before any magistrate having authority under the law to issue appropriate processes.

In view of the above, it is my opinion that the chief of an organized fire department may serve summonses, make arrests, carry firearms, and conduct searches and seizures incident to his duties as an ex officio agent of the state fire marshal while enforcing the Florida Fire Prevention Code. Attorney General Opinions 059-248 and 073-176.

073-455—December 10, 1973

MUNICIPALITIES

COMPLETION OF PUBLIC IMPROVEMENTS—ENFORCEABILITY BY ADJOINING PROPERTY OWNERS

To: Dwight W. Severs, City Attorney, Titusville

Prepared by: Sharyn Smith, Assistant Attorney General

QUESTION:

Is the City of Titusville under a legal obligation, enforceable by adjoining property owners, to complete public improvements in the Lake View Park, Unit Number 4, subdivision?

SUMMARY:

Adjoining property owners have no legal right to force a city to complete public improvements when a developer fails to install such public improvements unless the adjoining property owners are third-party beneficiaries to that public improvement contract entered into between the city and the developer. However, the city may proceed against the bond and obtain a deficiency decree against the developer for the cost of completing the public improvements agreed upon.

According to your letter, the City Council of the City of Titusville approved on August 8, 1967, the platting of a subdivision known as Lake View Park, Unit Number 4. At the time of the approval of the subdivision, the public improvements called for in the subdivision had not been completed and in accordance with the subdivision ordinance, Ch. 29 of the Titusville Code, the developer was required to post a performance bond in the amount of twelve thousand five hundred eighty dollars and seventy cents. The performance bond was a part of a mortgage deed given by the developer to the City of Titusville on lots 7, 8, and 9, Lake View Park, Unit Number 4.

Since the developer has so far failed to install the necessary public improvements, the city council has received complaints from adjoining property owners who seek to force the city council to install such improvements. It has now been determined that the estimate of the costs of the public improvements, *i.e.*, twelve thousand five hundred eighty dollars and seventy cents, is in error and that the actual cost to the city would be approximately twenty-five thousand to thirty thousand dollars. The City of Titusville is presently financially unable to install the public improvements since the security for the improvements is insufficient to cover the cost of the actual improvements.

Under some circumstances, an individual citizen may maintain an action on a

contract entered into by the municipality of which he is an inhabitant with a third party when the contract was made by the municipality for the benefit of its citizens rather than in its private or proprietary capacity. *See*, 56 Am. Jur.2d *Municipal Corporations* §500. It is not necessary that the property owners in question be named as obligees; the problem is one of whether the contract and bond were entered into exclusively for *their benefit*. *City of University City v. Frank Miseli and Sons, R & B Co.*, 347 S.W.2d 131 (Mo. 1961).

The general rule, as stated by the court in *Tri-State Insurance Co. v. United States*, 340 F.2d 542, 545 (8th Cir. 1965) is as follows:

[A] third person who is a stranger to a contract or a bond thereunder, cannot recover from the surety even when the contract and bond, as here, contain some reference to him or to the class to which he belongs, unless there is a specific promise to *pay* such third person or such class, contained in the contract and bond. The mere statement of a *duty* to be discharged by the contractor, which may incidentally benefit a third party or class to which the latter belongs, without more, does not make the surety liable to such third person for the contractor's failure to discharge that duty. (Emphasis supplied.) [Quoting *National Surety Co. of New York v. Ulmen*, 68 F.2d 330, 336 (9th Cir. 1933), *cert. denied* 292 U.S. 624 (1934).]

Thus, in order to maintain the action, the contract and bond must by its *express terms* protect the adjoining property owners against a breach of the contract. *City of University City v. Frank Miseli and Sons*, *supra*; *Ryder v. Baco Realty Co.*, 207 So.2d 155 (La. 1968). An examination of the bond and contract in question—in this case, mortgage deed—reveals that it fails to make any provision for or mention of adjoining property owners within the subdivision. The mortgage deed, which conveyed to the city of Titusville the title to lots 7, 8, and 9 of Lake View Park, Unit Number 4, in lieu of posting a cash performance bond in the amount of twelve thousand five hundred eighty dollars and seventy cents, required the mortgagor (developer) to comply with the provisions of the subdivision ordinance (exhibit A). The subdivision ordinance provides at 23-26 that:

The cost of trunk line extensions for either water or sewer when required for the development of subdivisions, and when the primary benefit to be derived from said extensions accrue to said subdivision, shall be paid by the developer thereof. In the event the Council should determine in its sole discretion that the extension of a water and sewer trunk line shall be for the common good of various areas or lands abutting thereon, or capable of being served thereby, and it shall be determined by council that the extension thereof shall be economically feasible to the city, then the cost thereof or a portionate [sic] part may be paid by the city. In no event shall the city be required to extend any such trunk line or pay the cost thereof, except upon its own volition and after appropriate action of the Council.

Thus, it is clear that the mortgage deed itself refers only to the two parties, the City of Titusville (mortgagee) and the developer (mortgagor), and creates no added rights or liabilities in regard to third parties.

Additionally, the performance bond itself makes no reference to any individuals or parties other than the city and developer. Under the terms of the bond the developer is required to indemnify the *city* for all damages direct or consequential caused by the failure of the developer to construct such improvements. The city is further given the right to, at its option, bring suit against the developer under the bond or sue to foreclose the mortgage, and if the security fails to satisfy the indebtedness, *at its option* the city may sue for the balance remaining due after the foreclosure sale. It is clear that the bond and mortgage deed

show a two-party contract between the city and developer and no third party is included thereunder as a third-party beneficiary.

Therefore, the adjoining property owners cannot force the city to complete the installation of the public improvements. The city may, however, on its own volition proceed against the bond and may obtain a deficiency decree against the developer for the cost of completing the public improvements agreed upon.

073-456—December 10, 1973

**RESIGN-TO-RUN LAW
APPLICABILITY TO UNPAID COMMISSIONER OF
HOUSING AUTHORITY**

To: Vernon W. Turner, City Attorney, Homestead

Prepared by: Michael Parrish, Assistant Attorney General

QUESTION:

Is a commissioner of the Homestead Housing Authority required by §99.012, F. S., to resign as such commissioner in order to qualify as a candidate for the office of city councilman of the City of Homestead?

SUMMARY:

A commissioner of a housing authority, being appointed to office and serving without salary, is within the exception to the Resign-to-Run Law created by §99.012(5), F. S.

The Resign-to-Run Law (§99.012, F. S.) contains an exception which exempts a person "who serves as a member of any appointive board or authority *without salary*" from the resignation requirements of that section. (Emphasis supplied.) See §99.012(5), *id.* As you note in your letter, under §421.05(1), F. S., a commissioner of a housing authority "shall receive no compensation for his services." Such a commissioner, who under §421.05(1) is appointed by the mayor, is clearly within the above-mentioned exception to the Resign-to-Run Law. Accordingly, the failure of such a commissioner to resign presents no obstacle to his qualification as a candidate for the office of city councilman.

073-457—December 10, 1973

**GAME AND FRESH WATER FISH COMMISSION
FEES FOR ARREST AND CONVEYANCE OF
PRISONERS—COLLECTION**

To: Sal Geraci, Clerk, Circuit Court, Fort Myers

Prepared by: Michael M. Parrish, Assistant Attorney General

QUESTIONS:

1. Are the Game and Fresh Water Fish Commission and its conservation officers entitled to receive fees for arrests made between July 5, 1963 and August 1, 1970?
2. Are there any time limitations on an action to recover such fees?

SUMMARY:

Under §372.72, F. S., as amended by Ch. 70-370, Laws of Florida,