IN THE SUPREME COURT

OF THE STATE OF FLORIDA

JOHN W. TAYLOR, PAULETTE M. BURTON, HANNAH DAVIS, NORMA LEAS, as Taxpayers, Property Owners, and Citizens of Lee County, Florida,

Appellants,

vs.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellees.

APPEAL NO. 69,174

APPELLANTS' INITIAL BRIEF

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PREFACE

The Appellants in this appeal will be referred to in this Brief as the "Taxpayers", and Appellee will be referred to as the "County". References in this Brief to Appellants' Appendix will be designated (A-).

JURISDICTIONAL STATEMENT

Jurisdiction of the Court to review the Final Judgment entered by the Circuit Court is based upon Fla.R.App.P. 9.030(a)(1)(B)(i) and 9.110(i), and Section 75.08, Fla. Stats. (1985).

STATEMENT OF THE CASE

The nature of this case is as follows:

(a) The County was the Plaintiff and the Taxpayers were the intervening Defendants in this suit as originally filed by the County in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida (herein called the "Circuit Court"). The other Defendant in the Circuit Court, the State of Florida, is not a party to this Appeal.

(b) On April 24, 1986, the County commenced an action in the Circuit Court seeking validation of certain Transportation Facilities Revenue Bonds under the provisions of Chapter 75, Florida Statutes (A-1).

(c) Thereafter, the Circuit Court entered an Order to Show Cause (A-86) directing the State and any interested taxpayers, etc., to appear and show cause why the bonds should not be validated.

(d) On May 28, 1986, hearing was held on the Order to Show Cause, at which time the Taxpayers appeared in this action and filed their Answer and Affirmative Defenses (A-89) to the Complaint.

(e) On June 9, 1986, the Circuit Court entered a Final Judgment (A-106) validating the bonds.

(f) The Taxpayers then timely moved for rehearing (A-114), which motion was denied by the Circuit Court on July 1, 1986 (A-115).

(g) The Taxpayers then commenced this appeal by timely filing of Notice of Appeal (A-210) with the Circuit Court.

STATEMENT OF THE FACTS

The facts with respect to this case are (so far as they are relevant to this Appeal or are not set forth in appropriate detail in the "Argument") as follows:

(a) On April 16, 1986, the County enacted Ordinance 86-11 (A-7) which in turn empowered the County to enact Resolution 86-4-12 (A-14), authorizing the County to issue and sell 100 million dollars of Transportation Facilities Revenue Bonds. The Ordinance and Resolution were enacted solely under the auspices of Chapter 125, Florida Statutes, the County having consciously elected not to proceed under the provisions of Chapter 159, Florida Statutes (A-158, ll. 9, 10).

(b) More specifically, the Ordinance authorized the construction of "Transportation Facilities" (A-7, 9) defined as the existing Cape Coral Bridge, the existing Sanibel Bridge and Causeway, and any other toll bridge, causeway, or expressway which is acquired, constructed, or improved with the proceeds from the subject bonds (A-8). It also authorized the imposition of tolls on both existing and proposed bridges (A-9), or, for that matter, for the use of any bridge, causeway, or expressway within the County (A-9). Lastly, the Ordinance authorized the issuance of refunding bonds to refund, among other things, the existing Sanibel Bridge bonds (A-11).

(c) The Resolution authorized the construction of an "Initial Project" (A-32), defined as (1) a two-lane span bridge parallel to the existing Cape Coral bridge, and

(2) various improvements to the existing Sanibel Bridge and Causeway (A-24), and further authorized the construction of future additional, but unspecified, projects (A-19) through supplemental resolution (A-79), a "project" being defined as the "Initial Project" and any "Additional Project" (A-27). In addition, the Resolution authorized the refunding of the Sanibel Bridge Bonds from the bond proceeds (A-27, 31). The Initial Project and the refunding of the Sanibel bonds are to be paid from the $100 million dollar bond issue authorized by the Resolution (A-33). The authorized bonds are to be paid solely from the net revenues derived from the operation of the Transportation Facilities (A-41), which means from tolls charged for the use of such facilities (A-63, 64; A-192, 11. 10-15). The Resolution also provides that all of the net revenues from the various toll facilities are to be pooled in an "enterprise fund" for payment of the cost of operation and maintenance of the various projects, payment of interest and principal on the bonds, and various related matters (A-52-59), without regard to the actual source of the toll revenues (A-60). In other words, toll revenues collected from one facility would be used to pay for other unrelated facilities. Lastly, the Resolution provides for the issuance of additional bonds in unspecified amounts for additional unspecified projects (A-70).

POINTS ON APPEAL

I. THE CIRCUIT COURT ERRED IN VALIDATING THE BONDS SINCE THE COUNTY LACKED THE POWER AND AUTHORITY TO IMPOSE A TOLL ON A PRE-EXISTING TOLL-FREE BRIDGE FACILITY.

II. THE CIRCUIT COURT ERRED IN VALIDATING THE BONDS SINCE THE COUNTY LACKED THE POWER AND AUTHORITY TO ISSUE THE BONDS SOLELY UNDER THE AUTHORITY OF CHAPTER 125, FLORIDA STATUTES.

SUMMARY OF ARGUMENT

POINT I: The power of a county to impose tolls for the use of a facility must be granted by express statutory authority. There exists no express statutory authority of any kind empowering a county to impose a toll on what is presently a free bridge in order to retire revenue bonds issued to construct another bridge or to pay for the operation and maintenance of the new bridge. Consequently, the County was without authority to enact the bonding Ordinance and Resolution authorizing the imposition of tolls on an existing toll-free facility, i.e., the Cape Coral Bridge.

POINT II: The Ordinance and Resolution enacted under the sole authority of Chapter 125, Fla. Stats., authorizes the issuance of what are clearly self-liquidating revenue bonds, as such bonds are defined in Part I of Chapter 159, Fla. Stats. Furthermore, the Ordinance and Resolution authorizes a highly complex and unique bonding scheme, the likes of which is not addressed by any statutory enabling act, save, possibly, Chapter 159, nor by any decision of this Court.

Prior decisions of this Court strongly indicate that bonds of the type contemplated by the Ordinance fall within the province of Chapter 159, and that the power of counties to issue bonds under Chapter 125, while broad, does not include self-liquidating revenue bonds.

ARGUMENT

POINT I

I. THE CIRCUIT COURT ERRED IN VALIDATING THE BONDS SINCE THE COUNTY LACKED THE POWER AND AUTHORITY TO IMPOSE A TOLL ON A PRE-EXISTING TOLL-FREE BRIDGE FACILITY.

One of the key features of the bonding scheme implemented by the County is that the projects to be constructed from the revenue raised by the sale of the bonds are to be paid solely from tolls charged to the users of the projects (A-192, ll. 10-15).

While the Resolution authorizes the construction of an infinite number of projects in the future (a point discussed under Point II, infra), the "Initial Projects" described in the Resolution are the construction of improvements to the existing Sanibel Bridge and Causeway[1] and the construction of a span bridge parallel and adjacent to the existing Cape Coral Bridge which crosses the Caloosahatchee River at College Parkway in Fort Myers, Florida (A-24). Specifically, the Initial Project, as it relates to the parallel span, is defined in the Resolution as:

> (1) Construction of a two-lane parallel span to the Cape Coral Bridge, with four lane approaches on the east and west sides and an urban interchange at College Parkway and McGregor Boulevard. (A-24)

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[1]This Court is no stranger to these facilities, the Court having decided the validity of various bonds used to construct or improve them throughout the years. See, Sanibel-Captiva Taxpayers' Association v. Lee County, 132 So.2d 334 (Fla. 1961); McGovern v. Lee County, 346 So.2d 58 (Fla. 1977); Lee County v. State, 370 So.2d 7 (Fla. 1979).

The ostensible authority for establishing tolls on the projects is found in the Ordinance, which provides in pertinent part:

> Section 3. Tolls. The Board of County Commissioners is hereby authorized and empowered to impose tolls for the use of any Bridge, Causeway or Expressway within the County.
>
> (a) Tolls shall be reasonable in amount and shall be classified in a reasonable way to cover all traffic subject to such tolls, so that such tolls are uniform in application to all traffic falling within any reasonable class.
>
> (b) Tolls applicable to Transportation Facilities shall be established by resolution of the Board of County Commissioners and shall be reviewed at least annually. (A-9)

As seen, the Ordinance permits the imposition of tolls on any of the Transportation Facilities, as defined in the Ordinance. The Ordinance defines Transportation Facilities as follows:

> "Transportation Facilities" shall mean the Cape Coral Bridge; the Sanibel Bridge and Causeway; and any other Bridge, Causeway, or Expressway, where tolls are charged for the use thereof and which is acquired, constructed or improved with proceeds of any Transportation Facilities Revenue Bonds. (A-8)

The same basic definition is contained in the Resolution. (A-30)

Thus, the Ordinance and Resolution permit the imposition of tolls not only on the parallel span, which is to be constructed with the bond revenues, but the existing Cape Coral Bridge, which is presently a toll-free facility.[2] Testimony at the hearing confirmed that the County's plan is to either impose a toll on the existing bridge prior to construction of the parallel span and then increase the toll after the span's

completion, or simply impose a toll on both bridges once the new span is complete (A-204, ll. 1-12).

The question then becomes does the County have the power and authority to impose a toll for use of the existing Cape Coral Bridge to pay for the construction of a new bridge spanning the river?

In this regard, the law in Florida is clear that it is the sole perogative of the State to impose and regulate tolls, and that tolls cannot be imposed without express authority from the State. 29 Fla.Jur. 2d, HIGHWAYS, ETC., §217, p.256, citing Day v. St. Augustine, 139 So. 880 (Fla. 1932).

While Section 125.01(1)(l) (A-211) empowers counties to ".. [P]rovide and regulate ... toll ... bridges ...," Chapter 125 (nor any other statute, for that matter) nowhere provides that a county, once it has constructed a toll bridge, paid for the bridge with the tolls, and abolished the toll, may reimpose a toll to pay for the construction of other projects.[3]

No Florida case expressly addressing this situation could be found; however, a number of Florida cases recognize that the power of local government to impose or regulate tolls is

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[2]The existing Cape Coral Bridge was constructed by means of a previous bond issue and paid for with tolls collected from the use of the bridge. See, Intervenors' Exhibit 2 in evidence (A-117). The Cape Coral Bridge bonds have long been retired and the toll on the bridge lifted many years ago.

[3]In fact, the only Florida statute which authorizes the imposition of tolls to pay revenue bond obligations is found in Chapter 159, Florida Statutes, i.e., Section 159.03(3), the application of which to this case is discussed under Point II of this Brief.

governed expressly and strictly by statute. See, e.g., Masters v. Duval County, 154 So. 173, 174 (Fla. 1934); Flint v. Duval County, 170 So. 587, 597 (Fla. 1936); Day v. City of St. Augustine, supra, at 885. As stated by this Court in Masters, supra;

> ... statutes may authorize toll bridges to be constructed and maintained as a part of a highway system and may determine whether bridges shall be free or toll and when toll bridges shall become free bridges, there being no organic regulation of the project. (citation omitted) The matter is one of statutory policy, not of legislative power." Id, 154 So.2d 174.

The issue was addressed, however, by the Supreme Court of West Virginia in the case of Baier v. City of St. Albans, 39 S.E. 2d 145 (W.Va. 1946), wherein a citizen sought to continue the collection of bridge tolls financed by self-liquidating revenue bonds in order to fund other county projects, even though the original bonds were paid. In denying such relief, the court stated:

> The right to collect tolls rests solely on a grant from the State, and is limited to the powers granted, or necessarily implied therefrom, and cannot arise or exist through any other type of implication. 8 Am.Jur. 976; 11 C.J.S., Bridges, § 51, page 1082; 9 C.J. 447. The city was empowered to borrow money and to construct and operate a toll bridge, and required to collect tolls or otherwise provide a fund to liquidate the debt incurred in the construction thereof; but there was no express grant of power to the city to collect tolls after the said bonds had been paid, or provision made for the payment thereof, as required by the Act, nor can such power be implied.

Id., at 151.

Thus, it appears quite clearly from this case and the above-cited Florida decisions that the County has no power to

impose a toll on the free Cape Coral Bridge to construct another bridge across the Caloosahatchee River.

Further support for this proposition is the 1985 enactment of Section 338.165, Fla. Stats., which expressly authorizes a county to "... continue to collect the toll on a revenue-producing project after the discharge of any bond indebtedness relating to such project ...".[4] The very enactment of this law demonstrates that a specific statute was needed before a county could continue a toll on a toll facility, once the initial bonds were discharged. More importantly, it reinforces the point that the County, in the absence of express statutory authority, has no power to impose a toll on a free bridge to pay for another bridge, regardless of the fact that the new bridge is built adjacent to the existing one.

In short, because the original Cape Coral Bridge bonds have been discharged and the bridge has long been a free bridge, the County, lacking express statutory authority to impose a toll on a free facility, had no power to enact an Ordinance and Resolution calling for the retirement of the bonds from tolls imposed on the existing Cape Coral Bridge. For such reason, the bonds are invalid, and the Circuit Court erred in validating such bonds.

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[4]The entire text of this statute is reproduced on Page A-220 of the Appendix.

POINT II

II. THE CIRCUIT COURT ERRED IN VALIDATING THE BONDS SINCE THE COUNTY LACKED THE POWER AND AUTHORITY TO ISSUE THE BONDS SOLELY UNDER THE AUTHORITY OF CHAPTER 125, FLORIDA STATUTES.

As shown in the Statement of Facts, the County endeavors to combine a wide variety of matters under the umbrella of the Resolution: it provides for two initial self-liquidating, yet unrelated projects[5]; refunding of existing bonds on one of the projects; the construction of future unspecified projects; the funding of such projects by bonds authorized by the Resolution; and the repayment of such bonds solely from toll revenues generated by the projects.

Research has not revealed any case in Florida validating a bonding scheme as varied or as far reaching as that authorized by the Resolution, the validity of this scheme appearing to be one of first impression in this State.

It should be noted, however, that most of what the County seeks to do under the Resolution is specifically authorized by Part I of Chapter 159, Fla. Stats., known as the Revenue Bond Act of 1953 (A-212-218). That Act provides for the construction of self-liquidating projects [§159.02(5)], in combination

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[5]At the bond validation hearing, the County asserted that self-liquidating projects were not involved in this case (A-158, ll. 9-16). However, the County's witnesses' testified that the subject projects and revenue bonds were self-liquidating as defined in §159.02(5) and (6), Fla. Stats. (A-176, ll. 10-21; A-201, ll. 8-24).

with other such projects [§159.03(1)][6], the refunding of outstanding bonds in combination with the construction of such projects [§159.13(1)], all funded by revenue bonds [§159.08(1)], payable solely from the revenues generated by the projects [§159.02(6)], including tolls for the use of such projects [§159.03(3)].

In spite of these specific powers granted to the County under Chapter 159, the County sought to proceed solely under the very general authority of Chapter 125, Fla. Stats., intentionally avoiding the provisions of Chapter 159 (A-158, ll. 9-12). Hence, the question under this Point, given the unique bonding scheme set forth in the Resolution, is whether the County was authorized to enact the Resolution solely under the authority of Chapter 125.

Upon first reviewing the law on this issue, it is tempting to jump to the conclusion that this Court has ruled that Sections 125.01(1)(c), (r), and (t) are sufficient legislative authority for the County's enactments, based upon its decisions in State v. Orange County, 281 So.2d 310 (Fla. 1973)[7]

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[6]It is not clear from a reading of this Section whether combined projects must be related or may be unrelated, as in the case at bar.

[7]This decision was decided by a sharply divided Court (4-3), and dealt with the effect of the 1968 revision of the Florida Constitution on the power of noncharter counties to issue bonds without a referendum. With all due respect to the Court, the dissenting opinion of Justice Deckle appears to be the better reasoned opinion; and the Taxpayers respectfully request the Court to revisit this issue, and reverse the majority opinion, based upon the reasoning of Justice Deckle in his dissent, which is incorporated herein by reference.

and Speer v. Olson, 367 So.2d 207 (Fla. 1979). A closer analysis of these holdings, however, will demonstrate that such is simply not the case.

State v. Orange County involved the question of whether a noncharter county may issue capital improvement revenue bonds, payable from race track and jai alai funds, without an approving referendum. The Court held that the 1968 Florida Constitution did not preclude the issuance of such bonds, and that Sections 125.01(1), (c), (r), and (t) empowered a noncharter county to issue the bonds and adopt the ordinance, without the necessity of seeking a special act of the Legislature to do so.

The Court pointed out that, although Chapter 130, Fla. Stats. prescribed the general authority for the issuance of county bonds, such statute only came into play if ad valorem taxes were levied or the taxing credit of the county was pledged for payment of the bonds, thereby requiring voter approval. Id, 281 So.2d at 312. The Court then distinguished the revenue bonds in question, stating that the Orange County bonds, payable from race track funds, were authorized without the referendum requirement "... pursuant to enabling law[1] ..." Id. (court's footnote).

The footnote to the above quoted phrase states:

> 1. F.S. Section 125.01(1)(r) F.S.A. read in connection with F.S. Chapters 130 and 159, F.S.A., together with Article VII State Constitution prescribe the enabling authority for the issuance of the county bonds.

Id (e.s.).

The Court then set forth its actual holding, which consisted only of the last paragraph of its opinion:

> The law is well settled that counties have delegated authority under the implementing and applicable provisions of F.S. Chapters 130 and 159, F.S.A., to issue bonds (including those pledging the county's taxing credit and revenue bonds) but that revenue bonds and certificates of indebtedness which do not pledge ad valorem taxes do not require an approving election.

Id, at 313 (e.s.).

Thus, three basic categories of bonds which may be issued by a county may be gleaned from the holding in the Orange County case, to wit: (1) general obligation bonds paid from ad valorem taxes or pledging the taxing credit of a county and which must be issued under the authority of Chapter 130, Fla. Stats., if within one of the purposes set forth in Section 130.01; (2) revenue bonds paid from self-liquidating projects built with the bond proceeds, and which must be issued under the authority of Chapter 159, Fla. Stats.; and (3) all other general obligation or revenue bonds which may be issued under the general authority of Chapter 125, Fla. Stats., or some other specific, yet alternative legislative authority.

The case of Speer v. Olson, supra, involved bonds falling within this last category. There, a municipal service taxing unit, created by a county under Section 125.01(1) (q), sought to issue general obligation bonds, with voter approval, for the acquisition of a water and sewer system (which is not one of the projects contemplated by Chapter 130). The bond resolution was enacted by the county solely upon the authority of Chapter 125. In affirming the validation of such bonds,

the Court, citing the Orange County case, supra, held that there was no prohibition in Florida law for the issuance of such bonds, and that Chapter 125 constituted a delegation of authority by the legislature for such purpose.

The appellants in that case also argued that the county should have proceeded under the authority of Chapter 153, Fla. Stats. (1975), which specifically deals with bond issues for the construction of water and sewer systems. The Court rejected this argument, stating Chapter 153 was merely an alternative method for the issuance of the bonds under Chapter 125, citing the language of Section 153.20, Fla. Stats.

It may be argued that this holding is fully applicable to the case at bar, since Section 159.14 contains language similar to Section 153.20. The Speer decision is not applicable, however, since Chapter 153, enacted years after the passage of Chapter 125, did not form part of the initial implementing provisions of Article VII, Section 1(f) of the 1968 constitutional revision. Chapter 159, however, pre-existed the constitutional revision, and formed part of such implementing legislation, together with Chapters 125 and 130, as expressly recognized by the Court in the Orange County case. Id., at 312, 315. Cf., State v. City of Daytona Beach, 360 So.2d 777 (Fla. 1978), holding Chapter 159 not a limitation on a city's authority to issue municipal refunding bonds where Chapter 166 also specifically authorized the issuance of such bonds.

Language in other decisions of the Court lend support to the fact that self-liquidating revenue bonds must be issued by a county solely under the authority of Chapter 159. In Sanibel-Captiva Taxpayers' Ass'n. v. County of Lee, supra, the Court stated Chapter 159 "... was designed to authorize counties and municipalities to finance certain self-liquidating projects without incurring other indebtedness to pay the cost of such projects." 132 So.2d at 336. In McGovern v. Lee County, supra, the Court stated "[T]he authority of counties and municipalities to issue revenue bonds is given in the Revenue Bond Act of 1953, Chapter 159, Part I, Florida Statutes. Lastly, in County of Volusia v. State, 417 So.2d 968 (Fla. 1982), Justice Alderman, in a dissenting opinion arguing in favor of validation of capital improvement bonds, implicitly recognized the distinction between bonds issued for self-liquidating projects under the authority of Chapter 159, and other type bonds which may be issued under the sole authority of Chapter 125. Id., at 975.

Lastly, one need only consider the effect a holding that the County could proceed in this instance solely under Chapter 125 would have, in order to conclude that Chapter 159 is the proper legislative avenue for the issuance of the subject bonds.

Thus, the effect of such a holding, at best, would be to overrule by implication the Court's ruling in McGovern, supra, that the funding of self-liquidating projects (as are those in the case at bar) requires "... that those who directly benefit

from the project should bear a substantial portion of the cost and that those who bear the substantial cost should benefit from the expenditure of money on the project." Id., at 64. To allow the County to construct non-related projects from a single bond issue, to co-mingle the tolls of such projects, and to expend the co-mingled tolls for any of the projects grossly violates this principle.[8]

At worst, to hold that a county may proceed solely under the authority of Chapter 125 for the issuance of these self-liquidating revenue bonds would give carte blanche authority to counties to issue bonds for any type project, known or unknown, to construct totally unrelated projects from the proceeds of one bond issue, to impose tolls on existing free facilities to re-pay bonds issued to construct other projects, to co-mingle revenues from unrelated projects for the operation and maintenance of the various projects, and to retire the bonds issued to build the projects with tolls from any of the projects, all of which the County strives to do under the Resolution.

The Legislature, however, surely did not intend to grant an unlimited extension of authority to non-chartered counties to issue bonds for projects of any nature, extent, or description under the sole authority of Chapter 125, just as this

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[8]No evidence was presented by the County showing how the improvements to the Sanibel Bridge and Causeway benefited users of the Cape Coral Bridge and the parallel span or vice-versa, nor was there any showing of the matters required by Section 159.08(5)(a), (b), and (c), Fla. Stats., a condition precedent to issuance of revenue bonds under Chapter 159.

Court found that the Legislature did not intend to grant an "unlimited extension" of authority to counties under Chapter 159. See, McGovern, supra, at 64. Moreover, as shown above, nothing in the prior decisions of this Court holds otherwise.

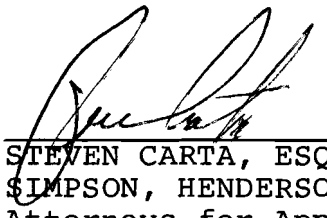
To the contrary, the prior decisions of this Court, as cited above, strongly support the contention that Chapter 125 does not authorize the issuance of self-liquidating revenue bonds, especially within the far-reaching context proposed by the County, and that such authority is presently derived solely from Chapter 159.

For such reason, the County could not issue the subject bonds under the authority of Chapter 125; and the Circuit court erred in validating such bonds.

CONCLUSION

Based upon the reasons set forth in the argument, the Circuit Court erred in validating the subject bonds. Therefore, the Taxpayers respectfully request the Court to reverse the Final Judgment entered by the Circuit Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Initial Brief has been furnished by regular course of United States Mail to JAMES G. YAEGER, LEE COUNTY ATTORNEY, Post Office Box 398, Fort Myers, FL 33902, LARRY D. JUSTHAM, ASSISTANT STATE ATTORNEY, Post Office Box 399, Fort Myers, FL 33902, and to GEORGE H. NICKERSON, JR., ESQUIRE, NABORS, GIBLIN, STEFFENS & NICKERSON, P.A., 519 NW 60th Street, Suite 3, Gainesville, FL 32607, this 15th day of August, 1986.

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