O/a 8-31-87

IN THE
SUPREME COURT OF THE STATE OF FLORIDA
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CASE NO.: 70,812

REF CASE NO.: 87-05446CH
"J" ANDREWS
* * * * * * * * * * * * * * * * *

BROWARD COUNTY, a political subdivision of the state of Florida,

Appellant,

vs.

THE STATE OF FLORIDA AND THE SEVERAL PROPERTY OWNERS, TAXPAYERS AND CITIZENS OF BROWARD COUNTY, FLORIDA, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED THEREBY,

Appellees.

* *

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

* *

ANSWER BRIEF OF APPELLEE, STATE OF FLORIDA

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PRELIMINARY STATEMENT

Appellant, Broward County, was the Plaintiff in the proceeding before the Circuit Court of the Seventeenth Judicial Circuit (the "Circuit Court") in and for Broward County, Florida. Appellee, the State of Florida and the Several Property Owners, Taxpayers and Citizens of Broward County, were the Defendants. South Broward Citizens for a Better Environment, Inc. and Bruce Head joined the State as Intervenors. The parties will be referred to as the "County," the "State" and the "Intervenors," respectively. The symbol CA will refer to the County's Appendix. The symbol SA will refer to the State's Appendix. The symbol CB will refer to the County's Initial Brief.

This Brief is submitted on behalf of the State. The County has taken this appeal from a final judgment and order of the Circuit Court dismissing the complaint for validation of $521,175,000 Broward County Resource Recovery Revenue Bonds.

Jurisdiction is vested in the Supreme Court of Florida pursuant to Article V, §3(b)(2), Florida Constitution, Section 75.08, Florida Statutes, as amended, and Rule 9.030(a)(1)(B)(i) of the Florida rules of Appellate Procedure.

STATEMENT OF THE CASE AND OF THE FACTS

The State cannot accept the County's argumentative, misleading, and largely irrelevant statement of the facts which are often not supported by the record, or are presented with an incomplete record. Instead, the State submits this, its statement of the pertinent facts.

In 1984, the County engaged in a validation proceeding resulting in the Broward Circuit Court entering a Judgment validating bonds specifically pursuant to only Chapter 166.111. Florida Statutes (SA 1). The State and Intervenors who were a party to the validation proceeding, took an appeal to this Court in which the State filed its initial brief (SA 2) and reply brief (SA 3), and after the opinion of this Court was rendered, filed its Motion for Rehearing (CA 28). Intervenors also filed briefs, most pertinent, its reply brief (CA 27). This Court affirmed, and denied the State's Motion for Rehearing without opinion (SA 4). See, State v. Broward County, 486 So.2d 965 (Fla. 1985), reh. denied, June 5, 1985.

On December 27, 1984, during the pendency of the appeal, the County issued its bonds after issuing an official statement dated December 18, 1984 (CA 30). Later, in November, 1986, the County sent to Bondholders a supplement to the official statement (CA 32).

By virtue of the Circuit Court's Judgment requiring the County to institute a subsequent validation proceeding before it attempted to "convert" the bonds validated specifically pursuant solely to Chapter 166, into bonds issued pursuant chapter 159, Part II, Florida Statutes ("IDB's"), the County, on February 27, 1987, filed its Complaint for Validation (CA 2). The County submitted voluminous exhibits with its complaint, totaling four court files. In relevant part, one exhibit

(County's Exhibit A to Complaint being Resolution 84-3097, dated December 18, 1984, Article II) contains the actual language of the bonds that were sold to the bondholders (SA 5). Exhibit L to the Complaint for Validation, being the Project Completion Agreement for the South Site project, contains an exhibit 3 which is the surety bond given by Financial Security Assurance of Oklahoma, Inc. (SA 6). Exhibit R to the Complaint is the Project Completion Agreement concerning the North Site project (SA 7). Pursuant to this Complaint, the Circuit Court entered a Notice and Order to Show Cause on March 4, 1987, setting the date for the validation hearing on april 6, 1987 (CA 3). The State filed its Answer to the Complaint dated March 11, 1987 (CA 4).

Thereafter, Intervenors filed a Motion to Dismiss dated March 20, 1987 (CA 5). On March 27, 1987, the State filed a Motion to Continue (CA 6), which was heard by the Court on that date and granted, resetting the validation hearing until May 8, 1987 (CA 7).

On April 6, 1987, a hearing was held on Intervenors Motion to Expedite Discovery, at which time the Court allowed both State and Intervenors to file interrogatories (CA 9). Answers to Intervenor's interrogatories dated April 20, 1987, were served by the County (CA 12).

Intervenors filed an Amended Motion to Dismiss in early April alleging that the bondholders were indispensible parties and stating a number of grounds (CA 10). On April 17, 1987, the County filed its Memorandum in Support of Validation (CA 11). Thereafter, the State, on April 24, 1987, filed its Motion for Judgment on the Pleadings (CA 13). On May 1, 1987, the County filed its Motion for Order Allowing Appearance of Foreign Attorneys (CA 15) along with its Notice of Hearing, noticing a hearing scheduled for May 5, 1987 (SA 8).

Pursuant to the Circuit Court's Order granting Intervenor's Motion to Compel Better Answers to Interrogatories, the County submitted its Amended Answers to Interrogatories dated May 4, 1987 (SA 9).

On May 5, 1987, all pending motions were heard, at which time the Court, heard and denied the County's Motion for Order Allowing Appearance of Foreign Attorneys. The Court further held a lengthy hearing on the Intervenors' Amended Motion to Dismiss, and on the State's Motion for Judgment on the Pleadings, and reserved ruling (SA 10). The Court not only considered the Defendant's Motions, but also the County's Memorandum in Response and Opposition to Defendant's Motion for Judgment on the Pleadings filed at the hearing (CA 33). Furthermore, the Court allowed the County to admit into evidence above objection of Intervenors, an affidavit of a County witness who was not available to attend this hearing, offered in opposition to the State's and Intervenors' Motions (CA 31).

On May 7, 1987, the Circuit Court entered its Order Granting Motions to Dismiss, stating it considered the State's Motion for Judgment on the Pleadings to be a Motion to Dismiss (CA 35).

On May 18, 1987, the County filed a Motion for Rehearing regarding the Court's Order dismissing the cause (CA 17) and a Motion for Rehearing (SA 11), with an affidavit of an attorney who is a member of the County's bond firm (CA 36), regarding the Order Denying the County's Motion for Appearance of Foreign Attorneys.

On May 27, 1987, the State entered its Response to the County's Motion for Rehearing on the bondholder issue, explaining in detail the challenges it had concisely made in its Motion for Judgment on the Pleadings, and attaching to this Response substantial portions of

relevant pleadings and records (SA 12). The Attorney representing the County responded with his own affidavit (SA 13).

On June 4, 1987, the Court entered an Order stating it finds substantial and serious allegations concerning the particular bonds and procedures used in the case, and as an example cited one of the State's many allegations, i.e., fraudulent issuance of the bonds (CA 19). This Order further stated that the Court was in need of more information and required the County to answer the State's Interrogatories which had not been answered to date, plus it propounded its own question, all to be answered within thirty (30) days before the Court could rule on the County's Motion for Rehearing on the bondholder issue.

The County, in compliance with that Order, on June 16, 1987 served its Answers to States Interrogatories (SA 14). Also on June 16, the County filed its memorandum in response to the May 7 (sic), 1987 Order of the Court (properly, response to the June 4, 1987 Order of the Court), which response addressed the question propounded by the Court only to say it had no ability to answer based on lack of information, and further discussed in detail irrelevant steps it had taken to decide on and plan for its resource recovery facilities to be built by bond proceeds (CA 20). It also entered a Motion for an Emergency Determination Regarding its Motion for Rehearing dated June 16. (CA 21).

The Court then allowed the State and Intervenors to respond within seven (7) days to the County's discovery, by order dated June 17, 1987 (CA 22). Intervenors responded on June 23rd (CA 23) and the State responded on June 24, encouraging the Court to enter an appealable order but challenging the County's statement that it was "unable" to join bondholders and challenging the County's assertions as to the alleged costs that would result from the alleged delays (CA 24).

The Court, also on June 24, entered its Order denying the County's Motion for Rehearing adding to its reasons for dismissal its finding that the State had presented prima facie evidence to support the allegation of fraudulent issuance sufficient to require joinder of the bondholders as indispensible parties (SA 15).

The County, on June 26 entered an Ex Parte Motion for Final Judgment with a proposed Order attached (CA 26). The Court ignored the County's proposed Order and instead entered its own Order and Final Judgment dated June 29, 1987 (CA 1). It is from this Order that the County appeals.

Previous to the Final Judgment, the State requested and received from the Florida Department of Insurance and Treasurer the March 31, 1987 quarterly statement filed by Financial Security Assurance of Oklahoma, Inc. (SA 16), which Statement will be referred to in the instant brief.

SUMMARY OF ARGUMENT

The State maintains that the Circuit Court properly reviewed all issues presented it, and correctly determined that the bondholders are indispensible since their rights/interests are to be litigated in the bond validation proceeding below.

The Circuit Court was not collaterally estopped from reviewing whether the bonds were purportedly issued as Ch. 159 bonds since this issue was never litigated previously. In any event, the County has not preserved this issue for appeal.

Further, throughout its argument, the County is attempting to mislead this Court by ignoring the substance of the Circuit Court's ruling by concentrating solely on only one of may grounds for that decision.

The Circuit Court made the correct decision to require joinder of bondholders during preliminary proceedings which is the appropriate procedure pursuant to Florida Rules of Civil Procedure, and is not precluded by Chapter 75, F.S. To the contrary, the issue of indispensible parties must necessarily be decided prior to the evidentiary bond validation proceeding. Furthermore, the County is estopped from arguing that only one hearing of any type is allowed in bond validation proceedings, since it made a pre-trial motion and caused a hearing to be held on that motion. Further, the County has not preserved that issue for appeal.

ARGUMENT

POINT I

THE STATE AND INTERVENORS ARE NOT ATTEMPTING TO RELITIGATE ISSUES ALREADY DETERMINED BY THIS COURT

A. This Court Lacks Jurisdiction Over this Appeal.

The State initially maintains that this Court is without jurisdiction to entertain the instant appeal of the Circuit Court's non-appealable and non-final Orders (CA 35; CA1).

On May 7, 1987, the Circuit Court entered its Order Granting Motions to Dismiss with leave for the County to amend within thirty days to join bondholders as parties defendant (CA 35). An order granting a motion to dismiss with leave to amend, or even with prejudice, is not final and not appealable. Gries Inv. Co. v. Shelton, 388 So.2d 1281 (Fla. 3d DCA 1980); Lawler v. Harris, 418 So.2d 1239 (Fla. 5th DCA 1982). For appeal purposes, a further act of the Court - the dismissal - is required for finality. 388 So.2d 1282.

The Circuit Court below clearly intending to enter an appealable order, entered its Order and Final Judgment on June 29, 1987 stating ". . . this Court, sua sponte, for the purposes of appeal, makes final the order entered dismissing this action without prejudice . . . " (CA 1). This Order does not specifically dismiss the action, but rather, attempts to make final the previous Order Granting Motions to Dismiss. In order to be appealable, the Circuit Court must enter its final order dismissing the action. Gruen v. State, 451 So.2d 525 (Fla. 3d DCA 1984; Bishop v. Kelly, 404 So.2d 1149 (Fla. 5th DCA 1981).

However, the State has not made a motion to dismiss this appeal on this impropriety, but rather, requests this Court relinquish jurisdiction to the trial court for entry of the dismissal. 388 So.2d 1282.

B. This Issue is not Preserved for Appeal.

In any event, the County's first point on appeal shows its incomprehension of all arguments presented to the Circuit Court concerning bondholders as indispensible parties, and attempts to mislead this Court by omitting the substance of the Circuit Court's Ruling.

The County is solely relying on the narrow issue of collateral estoppel, alleging that the State and Intervenors previously litigated the issue of misleading information contained in the Official Statement (CB 17-25). However, the County has totally failed in its duty to preserve this issue for appeal.

At no time did the County present the issue of collateral estoppel concerning the alleged previous litigation of the bonds as being improperly represented and sold as IDB's. Specifically, in its Memorandum in Response and Opposition to Defendant's Motion for Judgment on the Pleadings, the County asserted several points opposing the State's Motion, but did not discuss collateral estoppel (CA 33). Furthermore, there was no discussion of this issue at the hearing on the Motions to Dismiss (SA 10).

The only time the County discussed collateral estoppel was in its memorandum in Support of Validations, which mentioned other areas of law and fact not germane to this appeal (CA 11, pp. 13-16).

It is a rule of long standing that on appeal, the Supreme Court will confine itself to a review of those questions, and only those questions which were before the trial court. Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962). Matters not presented to the trial court by the pleadings or ruled on will not be considered by the Supreme Court on appeal. Id.; Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Specifically, the failure of a party to raise the issue of estoppel at the trial level precludes it from raising that issue on appeal. Clearwater Key Ass'n-South Beach v. Thacker, 431 So.2d 641

(Fla. 2nd DCA 1983). Therefore, this Court should disregard the County's Point I in its entirety.

C. There Was Never a Prior Litigation of this Issue.

However, assuming by a long stretch of the imagination that this issue is now properly before this Court, there is no merit to the contention that there was a previous litigation of that narrow issue.

The County aptly points out that there must have been a previous litigation of the issue in order for the doctrine of collateral estoppel to prevent a relitigation of the same issue (CB 17); Mobil Oil Corporation v. Shevin, 354 So.2d 372 (Fla. 1977). There was no prior litigation.

This Court, in 1985, took great pains to warn the County not to call the bonds IDB's when they were actually municipal revenue bonds, and stated clearly that "It is important to note at this point that we review only the issuance of revenue bonds by the County under section 166.111 . . . the County's authority to issue chapter 159 bonds is not determined at this time." State v. Broward County, 468 So.2d 965, 967 (Fla. 1985) (emphasis added). This Court specifically reserved judgment on the County's authority to issue IDB's by saying "Any such sale or lease which requires compliance with chapter 159 will be addressed at that time." 468 So.2d 969. Therefore, regardless of whether the State or Intervenors were attempting to litigate the chapter 159 issue, this Court specifically refused to consider that issue and consequently there was no prior litigation on which to base the doctrine of collateral estopped.

Furthermore, the State in 1984, did not raise the issue of the bonds being misleading as IDB's in either its initial brief or in its reply brief (SA 2, SA 3). The only time the State spelled out the improprieties on the face of the bonds and in the Official Statement, was in its Motion for Rehearing (CA 28), which was not properly brought before this Court.

This Court correctly disregarded without opinion, the IDB issue raised by the State in its Motion for Rehearing which issue had not been raised by the State's briefs and not preserved for appeal. Fiesta Fashions, Inc. v. Capin, 450 So.2d 1128 (Fla. 1st DCA 1984). The law is clear that an appellate court shall not consider an issue raised for the first time in a Motion for Rehearing. Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977). Therefore, this Court ignored the State's improper argument in its Motion for Rehearing, and did not allow litigation of that issue (SA 4).

Also, although Intervenors did raise the IDB issue in its reply brief (CA 27), it was again not preserved for appeal nor argued by Intervenors in its initial brief, and properly disregarded by this Court.

An appellate court will not consider a point not preserved for appeal and raised for the first time in appellant's reply brief. Zerwal v. State Farm Mutual Automobile Insurance Co., 3323 So.2d 645 (Fla. 3d DCA 1976). The purpose of a reply brief is to respond to issues contained in Appellee's answer brief, and an issue raised for the first time in a reply brief, will not be considered by the appellate court. St. Regis Paper Co., v. Hill, 198 So.2d 365 (Fla. 1st DCA 1967); Pursell v. Sumter Electric Co-Operative, Inc., 169 So.2d 515 (Fla. 2nd DCA 1964). Therefore, this too was not litigated since it was appropriately disregarded by this Court.

D. The County has Mislead this Court by Omitting the Substance of the Circuit Court's Ruling.

Contrary to the County's attempt show that the Circuit Court only considered the State's and Intervenors' allegations that the bonds are misleading as chapter 159 IDB's, the Circuit Court considered and ruled on substantial other grounds to require joinder of bondholders.

Intervenor's, in its Amended Motion to Dismiss asserted that bondholders rights are substantially being detrimentally changed by the attempted

conversion from F.S. 166 bonds to IDB's and partially listed the important changes of the obligors on the bonds, the pledge of revenue to pay off the bonds and the security for payment of the bonds (CA 10). Further, Intervenors alleged that the tax free status of the bonds is not available to the new bonds because the IDB's obligors are companies that were not in existence at the time of the prior bond issue, the IDB's exceed the TEFRA and other federal tax exempt bond limits for issues after January, 1985, and the new obligors were not mentioned in the 1984 Resolutions. Id.

The State, in its Motion for Judgment on the Pleadings, generally alleged that the Resolutions the bondholders relied on did not inform them of the obligors on the bonds, nor of the contractual obligations of a myriad of companies, corporations, limited partnerships, etc., nor of the County's pledge to pay tipping fees, to collect user fees, to pay a deficit from revenues not ad valorum taxes, or any other provision of the instant Complaint for Validation including the County's obligation to purchase the projects from the vendors in certain circumstances (CA 13). The State further argued that the sources pledged in the resolutions are not the sources of revenues pledged in the instant Complaint for Validation, thus affecting the fair market value of the bonds. Id. None of the foregoing arguments were or could have been litigated in the prior bond validation proceeding or the appeal therefrom.

The Circuit Court was also presented with the argument that the bonds State they are issued under and pursuant to . . . Part II, chapter 159, Florida Statutes, and also state that all acts, conditions and things required to happen, exist and be preformed precedent to and in the issuance of this Bond, have happened, exist and have been performed (CA 10; SA 5, pp. 41, 43 - Series A Bonds; pp. 85, 87 - Series B Bonds; pp. 130, 132 - Series C Bonds). The State further argued that Bondholders were not told at the time

they purchased the bonds, of the necessity of subsequent court approval before the bonds they hold can be considered to be IDB's (CA 10; SA 5 in its entirety).

The Circuit Court, in its Order Granting Motions to Dismiss, spelled out most issues raised as its justification for requiring joinder of the bondholders (CA 35).

However, the County completely disregarded the valid issues and filed its Motion for Rehearing, misinterpreting the Circuit Court ruling (CA 17), forcing the State to respond and explain in detail the challenges it had concisely made in its Motion for Judgment on the Pleadings, and attached to this Response substantial portions of relevant pleadings and records (SA 12), which attachments the County has conspicuously failed to include in its appendix (CA 18), and which will be discussed in detail in the State's argument on Point II.

Therefore, the doctrine of collateral estoppel does not apply to the instant proceeding, was not presented to the trial court and consequently was not preserved for appeal. The County's Point I should be disregarded or found to be meritless.

POINT II

THE CIRCUIT COURT CORRECTLY DETERMINED THAT BONDHOLDERS ARE INDISPENSIBLE PARTIES TO THIS VALIDATION PROCEEDING.

A. Standard of Review.

This issue is the only valid one raised by the County, for it is the sole decision of the Circuit Court to be reviewed (CA 35; CA 1). However, the County has taken deliberate pains to mask the basis for the Circuit Court's decision, by focusing on only one of several other substantial allegations tending to show how bondholders' rights are potentially affected. The County's objective, throughout its brief, is to argue in many ways how it was inappropriate for the Circuit Court to consider the allegation of fraudulent issuance of the 1984 municipal revenue bonds. However, the Circuit Court was presented with arguments by the State and Intervenors that go far beyond the allegations of material misrepresentations on the face of the bonds purporting them to be IDB's (CA 10; CA 13; SA 10; SA 12), and the Court expressed its own concerns throughout the proceedings concerning issues essential to the necessity of joining bondholders (CA 7; CA 9; SA 10).

Although the Circuit Court did point to the fraudulent issuance argument as an example of the substantial and serious allegations made (CA 19), and found that the State had presented prima facie evidence to support that allegation (SA 15), this Court should not ignore the Order being appealed (CA 1) which attempts to make final the Order Granting Motions to Dismiss (CA 35).

The decision of the Circuit Court to dismiss the cause sub judice for failure to join bondholders as indispensible parties comes before this Honorable Court clothed with a presumption of correctness. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1050 (Fla. 1979). This decision cannot be disturbed absent a showing that there was no competent evidence

sustaining it. Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981). The County has failed to even deal with all facts before the Circuit Court and consequently has not refuted them, nor shown or alleged the requisite abuse of discretion necessary for this Court to reverse. Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983).

Furthermore, although the Order Granting Motions to Dismiss does not spell out every allegation made by the State or Intervenors as the reasons for the Court's decision, all evidence and facts applicable to that issue should be considered by this appellate court in determining whether to uphold the Circuit Court's judgment. Vandergriff v. Vandergriff, 456 So.2d 464 (Fla. 1984); Johnson v. Davis, 449 So.2d 344 (Fla. 3d DCA 1984).

B. Bondholders Meet Defination of Indispensible Parties.

The County quotes (CB 32) this Honorable Court to show that indispensible parties:

> are necessary parties so essential to a suit that no final decision can be rendered without their joinder. This is in contrast to other necessary parties, who have an interest in a suit and ought to be made parties, but who do not have to be joined before a final decision may be rendered.

Hertz Corporation v. Piccolo, 453 So.2d 12, 14 n.3 (Fla. 1984). However, conveniently and purposefully, the County does not include the rest of this Court's language which says:

> A final decision will bind those parties joined in the suit, but will have no effect on the rights of necessary but unjoined parties.

Id. (emphasis added). Conversely, an indispensible party is one whose rights will be affected by the final decision rendered.

This defination is the one relied upon by the State (SA 12, p.7) when it argued that an indispensible party is one whose rights/interests will necessarily be affected by the Court's judgment, and who is materially interested,

legally or equitably, in the subject matter of the suit. U.S. v. State, 179 So.2d 890 (Fla. 3d DCA 1965); Degge v. First State Bank of Eustis, 199 So. 564 (Fla. 1941); Kline v. Kline, 134 So. 546 (Fla. 1931).

C. Bondholders' Rights/Interests are to be Litigated in this Validation Proceeding.

Bondholders were promised many things when they purchased the bonds. At the time of the purchase they were not told of the necessity of a subsequent court validation proceeding before their bonds could be considered IDB's. Instead, they are told that at some point in time there will be a change in security, i.e. on the construction funds designation date and fixed rate conversion date (CA 30). Notice was given that there was a validation proceeding wherein the Circuit Court validated the bonds, and the delivery of the bonds was specifically conditioned on the opinion of bond counsel that the bonds were validly issued and that the pending (1985) appeal was without merit (CA 30, p. 46). Therefore, if the Circuit Court, in the cause sub judice, denies validation and this decision is affirmed, bondholders who bargained for a potentially long-term investment in tax-free IDB's will not receive the benefit of their bargain.

Conversely, there is great potential harm to bondholders' interests even if the Circuit Court grants validation, since they purchased the bonds in reliance on specific facts which are not true today.

The Official Statement says that the projects will be designed, owned, operated and maintained by the contractor to be chosen. (CA 30, p.2). Later the Official Statement states that the contractor will be chosen from three (3) pre-qualified firms: American Ref-fuel, Signal RESCO and Waste Management, Inc. (CA 30, p. 25). tLater, the Official Statement says that he Project will be owned and operated by two wholly owned subsidiaries of the

contractor: North Broward Resource Recovery Project, Inc., and South Broward Resource Recovery Project, Inc., both Florida Corporations (CA 30, p. 25).

However, the Complaint for Validation filed in the instant cause, and all exhibits attached thereto, show that the North Project will be owned and operated by Broward Waste Energy, Company, Limited Partnership (the "North Company") (CA 2), which company was organized in September, 1986 (SA 9, #7), has no assets, has never transacted business and has unknown stability (SA 9, #12). This is the company who will be the obligor on the North Site Bonds (SA 14, #67).

Broward Waste Energy Company has as its "limited partner", Waste Management Energy Systems, Inc. (SA 14, #30, #39) whose net worth is approximately $508,000.00 (SA 14, #65V).

Further, Broward Waste Energy, Company, Ltd. Partnership, has as its "general and limited partner" another corporation called Broward Waste Management Energy Systems, Inc. (SA 14, #30), whose net worth is $1,000.00, has no earnings to date, and who has entered into agreements to support Broward Waste Energy, Company, Ltd. Partnership, in its obligations to construct and purchase the North Project (SA 14, #65 VI). This corporation is said to "partially own and control" the North Company (SA 14, #37).

Waste Management, Inc., is also a "support party" who has agreed to support Broward Waste Energy Company, Ltd. Partnership, in its obligations under the Project Completion Agreement and Project Support Agreement (SA 14, #65 IV). However, Waste Management, Inc., represented to be a "AAA" rated firm (see, County's Brief), may back out of its obligations, without bondholder approval, if it obtains an "A" rated firm as its substitute (SA 7). Waste Management, Inc. is said by the County to "own and control" Broward Waste Energy Company, Ltd. Partnership, through its two "subsidiaries", Broward Waste Management Energy Systems, Inc., and Waste

Management Energy Systems, Inc. (SA 14, #38, #54). However, the County also says that Waste Management, Inc., is the "indirect parent" of Broward Waste Management, Inc. (SA 7).

Therefore, the relationship between the promised "AAA" rated firm, Waste Management, Inc., and the actual firm which will be the obligor on the North Site Bonds is that Waste Management, Inc., is the "indirect parent" of Broward Waste Management, Inc., which is the "general and limited partner" who "partially owns and controls" Broward Waste Energy Company, Ltd. Partnership, and that Waste Management, Inc., is the "parent company" of Waste Management Energy Systems, Inc., who is the "limited partner" of Broward Waste Energy, Company, Ltd. Partnership.

There is no doubt that a limited partner will not be bound by the obligations of the partnership, (Sec. 620.01, F.S.), or that a parent corporation is not liable for the debts of its subsidiaries, Gladding Corporation v. Register, 293 So.2d 729, 732 (Fla. 3d DCA 1974), and that a partner is liable up to its assets, which are minimal, and a Ltd. Partner only to the amount of its contribution to the Partnership, which is confusing since the Ltd. Partnership has no assets.

Bondholders, relying on Waste Management, Inc., as either the owner of the North Site Project, or as the parent corporation of its "wholly owned subsidiary" who is the owner of the North Project, are indispensible because its interests are now directly affected by the present litigation, sub judice.

Even more tenuous relationships exist concerning the South Site Bonds, requiring joinder of the bondholders. The South Site Project, pursuant to the present Complaint for Validation, will be built, owned and operated by SES Broward Company, Limited Partnership ("South Company"), which was organized in June, 1986 (SA 9, #4), which has $5,000,000.00 approximate net

worth, has no earnings to date, unknown stability in the resource recovery industry (SA 9, #14), and is the obligor on the South Site Bonds (SA 14, #67). The Henley Group, Inc., represented to be the major "parent corporation" (see, SA 14, diagram by County-Vendor Corporate Structures, South Company), is said to have been "spunoff" in early 1986 by Allied-Signal, Inc. (SA 14, #27). Signal Environmental Systems, Inc. ("SES, Inc.") as shown to be a wholly owned subsidiary of the Henley Group (see, SA 14, diagram by County-Vendor Corporate Structure, South Company).

The County represents the Henley Group as "owning and controlling" the South Company, through its subsidiary, SES, Inc. (SA 14, #18). Further, SES, Inc. is represented as "controlling and owning" the South Company through its subsidiaries, SES Broward, Inc., and SES South Broward, Inc. (SA 14, #14).

However, SES South Broward, Inc. is the "general and limited partner" of the South Company (SA 14, #20, #21), and SES Broward, Inc. is the "managing general partner" of the South Company (SA 14, #15). SES Broward, Inc. has also entered into agreements with the County whereby it supports the South Company in meeting its obligations to construct and purchase the South Site Project (SA 14, #65 III). SES Broward, Inc. has zero net worth and has no earnings to date (SA 14, #65 III).

Financial Security Assurance of Oklahoma, Inc. has issued a special surety bond which guarantees the bond trustee and County the full and complete payment of the obligations of SES Broward, Inc. in its support of the South Company (SA 14, #65 VIII; SA 6). The County has represented the net worth of Financial Security Assurance of Oklahoma, Inc. to be approximately $206,000,000.00 (SA 14, #65 VIII). However, as a matter of public record, Financial Security Assurance of Oklahoma, Inc., in its quarterly statement filed with the Florida Dept. of Insurance and Treasurer, dated March 31, 1987, claims to have net assets of only approximately $51,000,000.00 (SA 16).

Clearly, bondholders who relied on Signal RESCO, Inc. to either own and operate the South Project, or its wholly owned subsidiary as the owner and operator of the South Project (CA 30) do not now have that promise fulfilled.

The significance of all these tenuous and complicated corporate relationships and agreements entered into, is that if the Limited Partnerships of both the North and South Projects fail in continuously making their required payments, the bondholders cannot now rely on the so-called "Parent Corporations" to be automatically liable, as they were lead to believe in the Official Statement. This is contrary to the County's assertion to the Court that "The vendor would have to go to its corporate parents and pay that money" (CA 9, p.15).

Furthermore, the sources pledged for the payment of the bonds, if converted from Chapter 166, F.S. to Ch. 159, F.S., will be the revenues of the projects and fees collected (CA 2). However, rather than the promised, experienced firms as the operators of the facilities, or their "wholly owned subsidiaries" as the operators, bondholders now must rely on two limited partnerships with no experience in the resource recovery industry as the generators of the revenues.

The Circuit Court, after careful examination of all pleadings before it, recognized the great potential effect of the instant validation proceeding, thus properly required the bondholders to be joined as indispensible parties.

This is especially so, considering that if the Court were to proceed without bondholders they would then be precluded from later asserting any challenges, since:

> If the judgment validates such bonds . . . which may include the validation of . . . any revenues affected . . . such judgment is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby, including . . . all others . . . to be affected in any way thereby, and the validity of said bonds . . . or of any . . . revenues pledged for the payment thereof, or of the proceedings authorizing the

> issuance thereof, including any remedies provided for their collection, shall never be called in question in any court by any person or party.

Section 75.09, Florida Statutes (emphasis added).

However, the Circuit Court was not only presented with allegations that go to the corporate structure or fraudulent issuance of the 1984 bonds (see, State's Brief, Point I (D) supra).

Furthermore, the Court also expressed its own concerns as to whether the County could pledge its own assets for a Ch. 159 bond issue (CA 9, pp. 10-14), whether there is an impermissible assessment by a taxing district to pay any deficits (CA 7, pp. 13, 14; CA 9, p. 17,), and further expressed concern as to the substantial change made even within the Ch. 166 bond issue:

> "You sold bonds on the market and you told these bond purchasers that should there be a shortfall between the governmental obligation revenues and the principal and interest to retire the bond, you'll pledge some excise taxes that can't be done under the 159 bond. So you have diminished the value of the present bond, have you not?" (CA 7, p.11).

Further, the State alleged that the potential "conversion" from ch. 166 to ch. 159 would affect the fair market value of the bonds (CA 13), and this was impliedly conceded to by the County when it said the bonds were "AAA" rated as Ch. 166 bonds, and would be "A" rated as Ch. 159 bonds (SA 10, p. 28).

In short, viewing all valid allegations made at hearings and within pleadings, and the Court's own concerns, there is no doubt the Circuit Court was emminently correct in requiring the presence of bondholders.

D. Chapter 75, F.S. Does Not Contemplate Bondholders as Proper Parties.

The State concedes that Chapter 75, F.S. does not contemplate or require bondholders to be made parties to a validation proceeding. However, the legislature could not envision the problem facing the court today, since Sec.

75.02, F.S., specifically only allows an issuing authority to incur bonded debt or issue certificates of debt. There is absolutely no statutory authority for the County to "revalidate" bonds already issued and sold purportedly as ch. 166, F.S. municipal revenue bonds, into Part II, Ch.159, F.S., industrial development revenue bonds. Consequently, bondholders are not in existence when an issuing authority follows the dictates of Ch. 75, F.S., and could not possibly be parties, but are in existence in this unique and first case of an attempted "conversion" and "revalidation".

This sound reasoning holds true as an answer to the County's assertion that the Circuit Court in 1984 specifically decided who the proper parties were by ordering the County to serve its future complaint on all parties of record, which, the County asserts, was reiterated by this Honorable Court in 1985 (CB 30). Obviously, the Circuit Court could not envision the substantial changes made by the instant Complaint for Validation and all documents attached thereto, nor could this Honorable Court.

Furthermore, even if, as the County alleges, State v. Broward County, 468 So.2d 965 (Fla. 1985) holds that an issuing authority may issue one type of bond and later convert to another upon "revalidation", then the instant appeal of Broward County v. State should warn issuing authorities that when they do so they should be extremely careful as to representations to bondholders, or bondholders will be indispensible parties to the subsequent "revalidation" proceeding.

E. Case Law and Equity Require the Joinder of Bondholders.

The County goes to great lengths to distinguish the facts of State v. Hillsborough County, 113 Fla. 345, 151 So. 712 (Fla. 1933), from the facts of the case sub judice (CB 30-33). However, although the Circuit Court did rely on Hillsborough County as authority to require joinder of bondholders, it recognized Hillsborough County was not squarely on point, but that it

presents the same concept as the challenges raised (CA 35). Specifically, the Court took notice that in Hillsborough County there were substantial legal defenses to the obligations proposed to be refunded which required a withholding of validation until bondholders could be made parties. Obviously, in the instant cause, there is no such refunding of original bonds. However, the unique situation caused by the County's attempt in 1984 to beat the deadline of the new tax code changes, requires that the principles of Hillsborough County apply.

Here, clearly there is no challenge to so-called original bonds being made in a refunding bond validation proceeding. Rather, the challenges are being made to the Ch. 166 bonds concerning the representations then made to bondholders, and challenges to the changes that will take place upon possible "conversion" to Ch. 159 bonds. These challenges are then, being made to the same bonds that bondholders own, which necessarily could not have been made by the State or Intervenors in 1984.

Further, Hillsborough County did not state that the Circuit Court should withhold validation until the issue could be decided in a "separate proceeding" in which the bondholders could be made parties, as the County asserts (CB 31). No where in that case does this Court require a separate proceeding. Rather, this Court required that the Circuit Court should not proceed without bondholders. 113 Fla. at 357, 151 So.at 717.

Even, if Hillsborough County arguably requires a separate proceeding, then that is what should be required in the instant cause, for there can be no doubt that bondholders' presence is necessary.

To support its interpretation that Hillsborough County required a separate proceeding, the County points to Hillsborough County v. Keefe, 82 F.2d 127 (5th Cir. 1936), cert. denied, 298 U.S. 679 (1936) stating the

rights of the Hillsborough bondholders against the County were ultimately litigated before the federal district court (CB 32, n. 6).

However, Keefe is not that separate action as the County asserts was contemplated by Hillsborough County Keefe is actually a case in federal court by some of the bondholders of the Hillsborough County original bonds, in an action on the County's default on the bonds.

In Keefe, the County tried to convince the federal court that the bonds were void so the County was not liable for default. 82 F.2d 128, 129. The County cited to the Hillsborough County to show that the State had argued the bonds were void and that the Florida Supreme Court had agreed. Id.

However, the Court in Keefe responded by saying that the Hillsborough County court only said it was enough to allege the bonds were invalid to require joinder of bondholders, and therefore, res judicata did not apply. 82 F.2d 130.

Furthermore, a thorough reading of Keefe shows that Hillsborough County never joined bondholders and consequently, never issued refunding bonds, so the original bonds to be refunded defaulted. This is further authority to support the Circuit Court's decision in the cause sub judice, and certainly gives equitable grounds to require joinder of bondholders.

Also, the Court in Keefe said that the Florida validation law very positively declares that a decree of validity is to be conclusive against the issuing authority, and that a certificate of validation shall be placed on the bonds. 82 F.2d 130. The Court goes on to say that on a question of impairment, a federal court might have to examine the validation certificate to determine its effect, but that it was not necessary in Keefe, because aside from the validation, the recitals of the bonds estop the County as against purchasers who relied on the recitals, Id.

The "recitals" the Keefe court was discussing stated:

> ". . . It is hereby certified that all acts, conditions and things required by the constitution and laws of Florida to happen, exist and be performed precedent to and in issuance of this Bond, have happened, exist and have been performed . . . " 82 F.2d 128.

Those same recitals are present in the bonds issued by the County in 1984 (SA 5, p. 43-Series A Bonds; p. 87 - Series B Bonds; p. 132 - Series C Bonds). Further, the bonds state that they are issued under and pursuant to . . . Part II, chapter 159, Florida Statutes. Yet, the County now claims that bondholders have not been told they own IDB's (CB 36).

Further, the County admits that it purposefully violated sec. 75.11 requiring the validation certificate by not complying and intentionally deleting that language, and attempts to use that violation as evidence of its good intent not to mislead bondholders (CB 7,8).

Equity and law, therefore, require bondholders to be parties defendant to the present validation proceeding.

POINT III

THE CIRCUIT COURT HAS FOLLOWED THE REQUIREMENTS OF CHAPTER 75, FLORIDA STATUTES.

A. The County is Estopped from Raising this Issue.

The County argues that Chapter 75, Florida Statutes, allows for only one judicial proceeding deciding all questions concerning the validation of bonds, and then cites to the fact that "...The State and the Intervenors have been permitted to raise a whole host of issues by way of a series of motions which have been decided without the single hearing contemplated by Chapter 75 and which have delayed this proceeding intolerably." (CB 37, 38). Therefore, the County now asserts that only a solitary court proceeding is allowed in any bond validation case.

The State submits that the County is estopped from presenting this alleged error on appeal since it contributed to the Circuit Court's entertaining of more than one hearing. Behar v. Southeast Banks Trust Co., N.A., 374 So.2d 572 (Fla. 3d DCA 1979).

The County filed a Motion for Order Allowing Appearance of Foreign Attorneys (CA 15). Furthermore, the County set for hearing this Motion (SA 8), which was heard on May 5, 1987 (SA 10). Also, the County filed a Motion for Rehearing regarding the dismissal for failure to join bondholders (CA 17), and a Motion for Rehearing concerning the denial of its Motion for Foreign Attorneys (SA 11).

Furthermore, the attorney representing the County at the May 5, 1987 hearing conceded that it was proper to raise the issue of failure to join the bondholders, and never objected to the court proceeding on that issue (or any other) before the final validation proceeding (SA 10, pg. 20, 21).

The state of the law is clear that one may not assert error upon an action of the lower court in which he, himself, has acquiesced. Karl v. David Ritter, Sportservice, Inc., 164 So.2d 23 (Fla. 3d DCA 1964). The county is therefor precluded from arguing this now on appeal.

B. The County has not Preserved this Point for Appeal.

The County is precluded from raising this issue for the first time on appeal, without having presented it to the Circuit Court. Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962). The County has never objected to any pre-validation proceeding in its pleadings, or on the record. The County's contention that the Circuit Court misconstrued ch. 75, Florida Statutes, should have been presented below to afford the lower court the opportunity to rule on that issue, and cannot be raised at this time. Palmer v. Thomas, 284 So.2d 709 (Fla. 1st DCA 1973).

Assuming arguendo that this is an appropriate issue on appeal, the State submits that the County is most assuredly entitled to only one validation proceeding, and further submits that the County has chosen not to have that proceeding by its refusal to join the bondholders so it could proceed.

Furthermore, the blatant argument in response to this misconception is that to require the issue of bondholders as indispersible parties to be raised solely in the validation proceeding, would cause irreparable harm to bondholders' rights if they were found to be indispensible after or during the proceeding when joinder would be impossible.

The County implies that normal Rules of Civil Procedure do not apply in validation proceedings. However, all pre-validation hearings below were like any other civil law action where the law provides for one final,

evidentiary proceeding, but this does not preclude consideration of preliminary matters.

B. The County has Contributed Considerably to any Delays.

As to the County's argument that the Circuit Court did not follow the language of F.S. 75.07 to "Render final judgment with least possible delay..." (CB 37), that is precisely what the lower court did. The validation hearing was originally scheduled for April 6, 1987 (CA 3). All considerations of the pleadings filed would have been completed by the lower court on May 7, 1987 when the court entered its Order Granting Motions to Dismiss (CA 35). By virtue of this Order, the County could have had its hearing within thirty (30) days if it had joined the less than one hundred (100) bondholders (SA 13). But the County chose to delay by refusing to join bondholders, and by filing its Motions for Rehearing. (CA 17; SA 11).

However, even considering all the County's Motions and Responses thereto, the Circuit Court entered its final order on Jun 29, 1987 (CA 1), less than three months after the scheduled validation hearing. Considering the amount of pleadings it had to review, the Circuit Court determined all issues in record time.

Therefore, this point on appeal has no merit, and should be disregarded by this Court.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited therein, the State respectfully requests this Court AFFIRM the Circuit Court's Order Granting Motions to Dismiss, or, in the alternative, REMAND to the Circuit Court with directions that it enter an appealable order.

Respectfully submitted,

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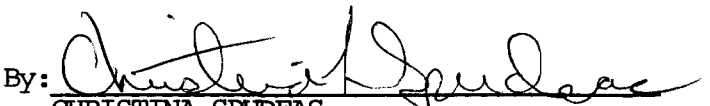
By: 
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