

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

CASE NO.: 72,041

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

Appellant,

vs.

THE STATE OF FLORIDA, et. al., and SOUTH BROWARD CITIZENS FOR A BETTER ENVIRONMENT, INC., and BRUCE HEAD,

Appellees.

FILED  
SID J. WHITE

APR 15 1988

CLERK, SUPREME COURT

By \_\_\_\_\_ Deputy Clerk

*Handwritten initials and signature*

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

ANSWER BRIEF OF APPELLEE/INTERVENORS

**FRANK A. KREIDLER, ESQUIRE**  
Attorney for South Broward  
Citizens for a Better Environment,  
Inc., and Bruce Head  
12 S. Dixie Hwy., Suite 204  
Lake Worth, FL 33460-3737  
Telephone: (407) 586-6226  
Florida Bar No.: 163092

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUES.....	ii
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND OF THE FACTS.....	2
SUMMARY OF ARGUMENT.....	5
POINT I.....	7
POINT II.....	8
POINT III.....	9
POINT IV.....	11
POINT V.....	12
POINT VI.....	13
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	17

7:BROW V ST/BR 20

## STATEMENT OF THE ISSUES

### I, p. 7

THE INTERVENORS ADOPT THE RESPONSE OF THE STATE OF FLORIDA TO THE TWO ISSUES RAISED BY THE COUNTY.

### II, p. 8

IF THE TRIAL COURT ERRED IN THE FINAL JUDGMENT, DOES THE RECORD ADEQUATELY REFLECT THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE COUNTY'S PLEDGE TO LEVY A SERVICE CHARGE AND TO PLEDGE ITS ENTIRE STREAM OF NON-AD VALOREM REVENUES TO PAY OFF THE PROJECT VENDORS SO THEY CAN PAY OFF THE BONDS TAKES THE BONDS OUT OF THE REQUIREMENTS OF THE INDUSTRIAL REVENUE BOND PROVISIONS AND MAKES THEM INVALID, F.S. 159.27(1).

### III, p. 9

IF THE TRIAL COURT ERRED IN THE FINAL JUDGMENT, DOES THE RECORD ADEQUATELY REFLECT THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE FOREGOING PLEDGES OF THE COUNTY TO THE VENDORS AND BONDHOLDERS ARE UNCONSTITUTIONAL SINCE IT PLEDGES THE TAXING POWER AND CREDIT OF THE COUNTY TO BENEFIT PRIVATE ENTITIES.

### IV, p. 11

IF THE TRIAL COURT ERRED IN THE FINAL JUDGMENT, DOES THE RECORD ADEQUATELY REFLECT THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THERE HAS BEEN NO FINDING BY THE PLAINTIFF THAT THE PARTIES THAT THE COUNTY INTENDS TO CONTRACT WITH FOR THE PROJECT ARE FISCALLY RESPONSIBLE AND FULLY CAPABLE AND WILLING TO FULFILL ITS OBLIGATIONS AS REQUIRED BY F.S. 159.29(2).

### V, p. 12

IF THE TRIAL COURT ERRED IN THE FINAL JUDGMENT, DOES THE RECORD ADEQUATELY REFLECT THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE MORTGAGE ON THE REAL PROPERTY FOR THE NORTH PROJECT AND THE INSTALLMENT SALES CONTRACT ARE ILLEGAL, VOID AND UNCONSTITUTIONAL AS A MATTER OF LAW.

### VI, p. 13

IF THE TRIAL COURT ERRED IN THE FINAL JUDGMENT, DOES THE RECORD ADEQUATELY REFLECT THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE PRIVATE FOR-PROFIT CORPORATIONS CREATED AND PAID FOR BY BROWARD COUNTY FOR THE NORTH AND SOUTH PROJECTS ARE VOID SINCE THE CREATION OF SAID PRIVATE PROFIT CORPORATIONS BY A PUBLIC ENTITY IS UNCONSTITUTIONAL. ALSO, DOES THE OWNERSHIP INTEREST ACQUIRED IN THE CORPORATIONS BY THE COUNTY'S ATTORNEYS AND MEMBER OF THE UNDERWRITING TEAM MAKE THE CORPORATIONS VOID BECAUSE SUCH A RELATIONSHIP WOULD VIOLATE PUBLIC POLICY.

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Bailey v. City of Tampa</u> 111 So. 119 (Fla. 1926)	13
<u>City of Clearwater v. Caldwell</u> 75 So.2d 765 (Fla. 1954)	14
<u>Orange County Industrial Development v. State, 427 So.2d 174 (Fla. 1983)</u>	14
<u>State v. Clay County Development Authority</u> 140 So.2d 576 (Fla. 1962)	14
<u>State v. Jacksonville Port Authority</u> 204 So.2d 881 (Fla. 1967)	14
<u>State v. Manatee County Port Authority</u> 193 So.2d 162 (Fla. 1966)	14
<u>State v. Town of North Miami</u> 59 So.2d 779 (Fla. 1952)	14
<u>Williams v. Dunnellon</u> 169 So. 631 (Fla. 1936)	15
<u>Wilson v. Palm Beach County Housing Authority, 503 So.2d 893 (Fla. 1987)</u>	12
 <u>CONSTITUTIONAL PROVISIONS</u>	
Art. 3.....	14
Art. 7.....	9, 12, 13, 14
 <u>STATUTES</u>	
F.S. 159.27(1).....	8
F.S. 159.27(2).....	11

**PRELIMINARY STATEMENT**

Appellees, South Broward Citizens for a Better Environment, Inc. (a Florida non-profit corporation) and Bruce Head, a citizen of Florida, a property owner and taxpayer in Broward County, are granted party intervenor status in this proceeding and in the trial court below pursuant to F.S. 75.07.

The Parties will be referred to as the "County", the "State" and the "Intervenors", respectively.

The symbol "A" will refer to the Appellant's (County's) Appendix.

The symbol "IA" will refer to the Intervenor-Appellees' Appendix.

The symbol "SA" will refer to the State-Appellee's Appendix.

This brief is submitted on behalf of the Intervenors.

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 Intervenors agree with the Intervenor/State's recitation of the case and of the facts with the following inclusions:

As presented in the County's case in chief, the money to pay off the bonds comes from:

- A. Tipping fees, and
- B. Service charges levied by a County Board, and
- C. Virtually all other non-ad valorem income sources of the County. See, Complaint, Para. XVII (A. Tab 6, p.10-13) and Interrogatory 3 and answer thereto (IA, Tab 2).

The County did not and could not make any finding of financial responsibility as required by F.S. 159.29(2) for the specific contracting parties for the south project (SES Broward Company, L.P.) and north project (Broward Waste Energy Company, L.P.) because these corporations were formed after the basic votes by the County Commission authorizing the bond issue, construction, etc., were made by the County. The evidence also reflects that these corporations are virtually uncapitalized, have no assets, net worth, no earning trends and no stability. See, Intervenors' Interrogatories 4, 6, 7, 15 and 16 (IA, Tab 2).

The County's principle witness, Thomas Henderson, stated that:

A. SES South Broward, Inc., had virtually no assets. (A. p. 116, l. 18-19).

B. SES South Broward Company, L.P. had virtually no assets. (A. p. 117 l. 4-8, 17-20).

C. SES Broward, Inc., had virtually no assets. (A. p. 117, l. 10-12, 17-20).

D. Broward Waste Energy Company, Limited Partnership, had virtually no assets. (A. p. 128, l. 2-7).

E. Broward Waste Management Energy Systems, Inc., had virtually no assets. (A. p. 128, l. 8-15).

F. Waste Management Energy Systems, Inc., had virtually no assets. (A. p. 128, l. 16-19).

Mr. Henderson admitted that there was no environmental damage insurance available for resource recovery plants. He denied that the string of no asset corporations on both the north and south projects were for potential liability cut-off purposes should there be uninsured environmental damage or disaster. (A. p. 120, l. 6-19; A. p. 124, l. 19 to p. 125, l. 6; A. p. 129, l. 9-13).

The bonds are private activity bonds as testified to by the County's chief witness, Thomas Henderson (A. p. 141, l.22-25). New bonds will have to be issued to those bondholders whose collateral (security), for each project is different (see, County witness, Mr. Buros, A. p;. 277, l.12-19)). The bonds will be new bonds as verified by the County Commissioner with the most experience in this project, Nikki Grossman, (A. p. 360 l. 3-9).

The County has not obtained authorization and consent from the State of Florida authorizing the issuance of these new private activity bonds. See, F.S. 159.802, 159.805 and A. p. 311, l. 5-14.

The County entered into a mortgage for the land on which the north project will be built and installment sales contracts for both projects that are identical to mortgages (see, Mr. Buross testimony, A. p. 248 l. 14 thru p. 250, l.24) and County Exhibit "T" in evidence, IA, Tab 3).

Corporate owner of the environmental permits for the north project is the North Broward County Resource Recovery Project, Inc., a private for profit corporation, created and paid for by Broward County (see, Henderson's testimony, A. p. 116, l.3-8 and Intervenors' request for admission 16 and answer thereto, IA, Tab 2).

Corporate owner of the environmental permits for the south project is the South Broward County Resource Recovery Project, Inc., a private for profit corporation, created and paid for by Broward County (see, Henderson's testimony, A. p. 116, l. 3-8 and Intervenors' request for admission 16 and answer thereto, IA, Tab 2).



## SUMMARY OF ARGUMENT

The trial court's denial of the validation of the County's bonds was correct and proper for the reasons pointed out by the State/Appellees. The State's argument is adopted elsewhere herein.

Furthermore, the trial court's denial of validation is correct for other reasons found in the record. Even if the Supreme Court would reverse the trial court's findings in the final judgment, a different result would not occur on retrial.

The proposed industrial development bonds are supposed to be for a self-liquidating project. The County's projects are not.

The County has unconstitutionally pledged its credit to support the vendors for the projects.

The industrial development bond statute requires that the County enter into the bonding agreements with financially sound corporations. The contracting parties with the County have virtually no assets.

Governmental entities in Florida have no authority to enter into mortgage agreements. The industrial development bonds for the north project include such a mortgage on the real property.

In order to obtain permits and build the two projects, the County's attorneys used county money and formed two for-profit Florida corporations, the same attorneys being the officers and owners of the corporations. Public entities

are not allowed by the Florida Constitution to create for-profit corporations and said creation and ownership by the attorneys for the County make these corporations void.

WHEREFORE, the trial court's denial of validation was proper on the grounds cited and/or for the other grounds as stated by the Intervenor.

POINT I

**THE INTERVENORS ADOPT THE RESPONSE OF  
THE STATE OF FLORIDA TO THE TWO ISSUES  
RAISED BY THE COUNTY.**

POINT II

**THE RECORD ADEQUATELY REFLECTS THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE COUNTY'S PLEDGE TO LEVY A SERVICE CHARGE AND TO PLEDGE ITS ENTIRE STREAM OF NON-AD VALOREM REVENUES TO PAY OFF THE PROJECT VENDORS SO THEY CAN PAY OFF THE BONDS TAKES THE BONDS OUT OF THE REQUIREMENTS OF THE INDUSTRIAL REVENUE BOND PROVISIONS AND MAKES THEM INVALID, F.S.159.27(1).**

The County failed to follow the requirements of F.S. 159.27 (1) which requires that an industrial revenue bond issue be self-liquidating.

The bonds for the projects are to be paid off with:

A. Tipping fees (if this was the only pledge, the project would pay for itself).

B. Service charges levied on Broward County property owners.

C. Other non-ad valorem tax revenues of the County (bad check fees, dog licenses, etc.).

Pledging items B and C above cause the project to be not self-liquidating and to be a continuous drain on the Broward County treasury which the IDB statute sought to prevent.

POINT III

**THE RECORD ADEQUATELY REFLECTS THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE FOREGOING PLEDGES OF THE COUNTY TO THE VENDORS AND BONDHOLDERS ARE UNCONSTITUTIONAL SINCE IT PLEDGES THE TAXING POWER AND CREDIT OF THE COUNTY TO BENEFIT PRIVATE ENTITIES.**

It is not disputed that the County did not have a referendum election prior to going forward with these projects and bonds. In this particular instance, a referendum should have been held since a total pledge of the County's non-ad valorem revenues must impact the budget and services of the County in the area funded by both ad valorem and non-ad valorem taxes. Broward County, in the situation it has placed itself, would certainly experience coercion to levy a tax to keep the projects from failure or to raise needed revenue formerly obtained from the non-ad valorem revenue sources to run the County.

The County has pledged its credit in violation of Art. 7, Sec. 10 of the Florida Constitution in numerous ways in these projects.

Credit of the County has been unconstitutionally pledged to insure payment of the IDB's in the instance of the service fee pledge (to be imposed on all Broward County property owners) and the non-ad valorem revenue pledge including dog license fees, bad check (NSF, non sufficient funds) fees, half-cent sales tax, etc., (IA. Tab 2, Interrogatory 3).

The mortgage the County intends to enter into as a vital part of the north project (IA, Tab 3) financing is clearly an instance of the County using its credit for the benefit of a private corporation.

7:BROW V ST/BR 18

POINT IV

**THE RECORD ADEQUATELY REFLECTS THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THERE HAS BEEN NO FINDING BY THE PLAINTIFF THAT THE PARTIES THAT THE COUNTY INTENDS TO CONTRACT WITH FOR THE PROJECT ARE FISCALLY RESPONSIBLE AND FULLY CAPABLE AND WILLING TO FULFILL ITS OBLIGATIONS AS REQUIRED BY F.S. 159.29 (2).**

The corporations that the County intends to actually contract with as vendors/operators of the two plants were incorporated in Florida after virtually all of the County's actions were taken approving the bonds for the construction and operation of the plants in violation of F.S. 159.29(2). See, Interrogatories 4, 6, 7, 15 and 16, IA, Tab 2.

F.S. 159.29(2) clearly requires that "no financing agreement for a project shall be entered into with a party that is not financially responsible..." The statute doesn't mention a subsidiary, spin-off or close relation can be financially responsible, it must be the party itself. Therefore, the County's "approval" of these contracting corporations is a sham and fraud upon the citizens of Broward County.

7:BROW V ST/BR 15

POINT V

**THE RECORD ADEQUATELY REFLECTS THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE MORTGAGE ON THE REAL PROPERTY FOR THE NORTH PROJECT AND THE INSTALLMENT SALES CONTRACT ARE ILLEGAL, VOID AND UNCONSTITUTIONAL AS A MATTER OF LAW.**

The Constitution of the State of Florida, Art. 7, Sec. 10, prohibits governmental entities from being lenders or borrowers through a mortgage (IA, Tab 3) and/or installment sales contract.

Because Broward County does have ad valorem taxing authority, the mortgage and installment sales contracts violate the constitution. See, Wilson v. Palm Beach County Housing Authority 503 So.2d 893 (Fla. 1987)..

Broward County has no authority to enter into the extention of credit business. It is not a chartered bank or a loan company.



POINT VI

**THE RECORD ADEQUATELY REFLECTS THAT THE BOND ISSUE SHOULD NOT BE VALIDATED BECAUSE THE PRIVATE FOR-PROFIT CORPORATIONS CREATED AND PAID FOR BY BROWARD COUNTY FOR THE NORTH AND SOUTH PROJECTS ARE VOID SINCE THE CREATION OF SAID PRIVATE PROFIT CORPORATIONS BY A PUBLIC ENTITY IS UNCONSTITUTIONAL. ALSO, THE OWNERSHIP INTEREST AQUIRED IN THE CORPORATIONS BY THE COUNTY'S ATTORNEYS AND MEMBER OF THE UNDERWRITING TEAM MAKE THE CORPORATIONS VOID BECAUSE SUCH A RELATIONSHIP WOULD VIOLATE PUBLIC POLICY.**

The County, at trial, readily admitted its creation of two for-profit Florida corporations, the North Broward County Resource Recovery Project Inc., and the South Broward County Resource Recovery Project, Inc. (A. p. 133, 1.6-19). Even if the County created these corporations for a good purpose, said creation is not allowed by the Florida Constitution. See Florida Constitution Art. 3, Sec. 11(12); Art. 7, Sec. 10, Bailey v. City of Tampa, 111 So. 119 (Fla. 1926)..

As it has been found in numerous cases by the courts of this nation and Florida, public entities have no place in private enterprise:

State v. Town of North Miami, 59 So.2d 779 (Fla. 1952) at 785: The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the destruction of the free enterprise system.

City of Clearwater v. Caldwell, 75 So.2d 765 (Fla. 1954), leasing city land for hotel construction is a threat to the free enterprise system and therefore unacceptable since it would ultimately justify lending public credit to all private businesses.

State v. Clay County Development Authority, 140 So.2d 576 (Fla. 1962), public financing of a plastics plant for lease to private industry is unconstitutional. An enterprise of private profit cannot be a paramount public purpose.

State v. Manatee County Port Authority, 193 So.2d 162 (Fla. 1966), regardless of the economic benefit to the community, public financing of docks leased to a private company was an unconstitutional use of public credit. Exclusive use of the facilities by private interests is not purely incidental to the project and for that reason does not serve the public purpose.

State v. Jacksonville Port Authority, 204 So.2d 881 (Fla. 1967), the public purpose doctrine does not include projects exclusively by and for private interests. Public financing of private enterprise (a private "for profit" corporation in the case at bar) to do good work would render the prohibition against lending public credit meaningless.

Orange County Industrial Development Authority v. State, 427 So.2d 174 (Fla. 1983), a privately owned television station does not serve a public purpose and therefore it cannot be constitutionally supported by the public taxing power.

A "for profit" corporation cannot be created with public funds by a public entity (Broward County) according to the Constitution of the State of Florida, Art. 7, Sec. 10 and Art. 3, Sec. 11(12). The power of a county (or other

governmental agency) to create a "for profit" corporation cannot be (and has not been) inferred from broad wording in the statutes or charter of Broward County. See, Williams v. Dunnellon, 169 So. 631 (Fla. 1936).

The County admitted also that the officers and directors of the two corporations were members of their outside legal firm (A. p. 130, l.25 to p.131 l. 21). One of the officers and directors, Andrea Fierstein, now works for the bond underwriting firm of the County for this bond issue (A. p. 131, l.20-24). Furthermore, the County Commission never was advised of these relationships, nor did the County Commission authorize the creation of the for-profit corporations (A. p. 186, l. 10-1.9).

Such an unauthorized interest in the two corporations clearly is in violation of the public policy of the State of Florida which would make these corporations void.

7:BROW V ST/BR 10

**CONCLUSION**

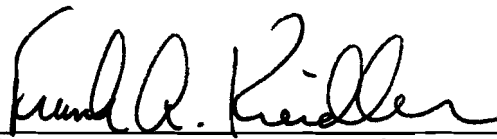
The trial court was correct in its denial of validation of the County's bonds. But should this court find the trial court to be in error, there are numerous other grounds upon which a denial of validation should have been based.

WHEREFORE, the trial court's decision should be AFFIRMED.

7:BROW V ST/BR 19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been served on the County Attorney and the attorney for the State of Florida, this 12th day of April, 1988.



---

**FRANK A. KREIDLER, ESQUIRE**  
Attorney for South Broward  
Citizens for a Better Environment,  
Inc., and Bruce Head  
12 S. Dixie Hwy., Suite 204  
Lake Worth, FL 33460-3737  
Telephone: (407) 586-6226  
Florida Bar No.: 163092

7:BROW V ST/BR 4