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 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

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Broward County, was the Plaintiff in the validation 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 "A." will refer to the Appendix.

This Brief is submitted on behalf of the County. The County has taken this appeal from a final judgment of the Circuit Court denying conversion and 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

By this appeal, the County seeks review of a final judgment of the Circuit Court denying revalidation of $521,175,000 of Resource Recovery Revenue Bonds of Broward County, Florida (the "Bonds"). That revalidation had been sought pursuant to an earlier decision of the Circuit Court and of this Court requiring such revalidation in connection with the conversion of the Bonds, which have been outstanding since 1984, from revenue bonds under Chapter 166, Florida Statutes ("Chapter 166") bonds to industrial development bonds under Chapter 159, Part II, Florida Statutes ("Chapter 159, Part II"). The Circuit Court permitted relitigation of, and denied validation based upon, issues decided in the County's favor in the earlier validation proceeding before the Circuit Court and this Court. In essence, the Court below refused to validate conversion of the Bonds on the ground that they had not been properly issued in 1984 as industrial development bonds under Federal tax law and, as such, they could not be converted to bonds under Chapter 159, Part II.

Given the issues decided by the Circuit Court in refusing to validate the Bonds, this Statement of the Case and of the Facts necessarily incorporates substantial references to the earlier proceedings in this case, as well as to the record of the recent validation hearing.

A. Background and Prior Validation History

Broward County officials have worked toward solving the waste disposal problems of the County over an extensive period of time.[1] In or about 1980, the County made a policy decision that it would attempt to assume future responsibility for providing waste disposal on behalf of the municipalities within the County, and retained expert advisors to evaluate the County's waste disposal needs. (A. Ex. 2 at 344).[2] After a nationwide search and pre-screening process, the County selected as its technical and financial experts for the development of a solid waste disposal plan, Malcolm Pirnie, Inc. ("Malcolm Pirnie") and Lazard Freres & Co. ("Lazard"), in 1981 and 1983, respectively, both of which had extensive experience in assisting municipalities in the development of resource recovery projects. (A. Ex. 2 at 196, 198-99, 297-98, 300, 345-46).

At the request of the Broward County Board of County Commissioners (the "Board"), Malcolm Pirnie conducted an evaluation of the various available resource technologies and concluded

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1 The waste generated in the County was being disposed of at two landfills. (A. Ex. 2 at 40-41, 301). One of the two landfills closed in 1987 and it is estimated that the second will be filled to capacity by the early to mid-1990s. (A. Ex. 2 at 42-43, 301). Accordingly, the County determined that it needed to develop a comprehensive plan and appropriate technology for waste disposal in the County. (A. Ex. 2 at 300, 352).

2 Exhibit 2 of the Appendix contains the transcript of the recent validation proceedings held on January 19-21, 1988, which proceedings are the subject of this appeal.

that the most appropriate technology to meet the County's needs was a mass burning waste incineration system because it would (1) convert waste into energy and thereby minimize the critical need for landfill sites, and (2) pay for itself through a combination of service charges and electricity revenues. (A. Ex. 2 at 86-87, 301, 307). This recommendation was presented to the Board, which, after extensive review, decided that the mass incineration-to-energy technology was the best technology that could be offered to the County's citizens at a feasible cost, and approved Malcolm Pirnie's recommendation. (A. Ex. 2 at 307, 352-53).

The County also determined, early in its planning process, that the proposed resource recovery facilities (the "Projects") could be most economically financed through their ownership and operation by private companies and the issuance of industrial development bonds under the Internal Revenue Code of 1954, as amended (the "Internal Revenue Code"), and the Public Utilities Regulatory Policies Act of 1978. Pub. L. 95-617, 92 Stat. 3117 (1978). Accordingly, the County decided to issue industrial development revenue bonds under Chapter 159, Part II as that Chapter expressly authorized the issuance by the County of bonds to finance privately owned and operated solid waste disposal facilities. State v. Broward County, 468 So.2d 965, 966 (Fla.

1985).[3] (A. Ex. 2 at 321-22, 351). On April 19, 1984, the Board held a public hearing and adopted, pursuant to published notice, Resolution 84-964 (the "Inducement Resolution") declaring its intention "to provide financing by the proposed issuance of industrial development revenue bonds in an amount of up to $590,000,000" for the Projects. Broward I, 468 So.2d at 966; (A. Ex. 2 at 321-22). Events subsequent to the passage of the Inducement Resolution are summarized in Broward I.

> [The Inducement Resolution], however, represented only an initial step in the process. In order to actually issue and market these revenue bonds, the County still had to perform the following: Select a company or companies and negotiate construction and waste disposal contracts; acquire the land required for the plants; obtain the necessary federal, state, and local permits to construct and operate the plants; enter into the necessary agreements with municipalities for their services; and prepare all the documentation required to issue the bonds.
>
> While the County was proceeding under the above financing scheme, the United States Congress passed the Deficit Reduction Act of 1984 which contains volume cap limits on industrial development revenue bonds by which the County planned to finance the plants and which places limitations on the investment of such bond proceeds and reserves. Deficit Reduction Act of 1984, Pub.L. No. 98-369, §§ 621, 624, 98 Stat. 494, 915-918, 922-924 (1984). This act also provides, however, that such tax-exempt bonds could be issued without regard to the volume caps and investment limitations if an inducement resolution (an "official action") had been adopted prior to June 19, 1984, and the bonds were issued by December 31, 1984. See id., § 631, 98 Stat. at 934-937. The County determined that Resolution 84-964 qualified as an official action for purposes of the

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[3] This decision shall hereinafter be referred to as "Broward I," while the decision of this Court on the issue of indispensability of the Bondholders (Broward County v. State, 515 So.2d 1273 (Fla. 1987)) (see p. 16, infra) shall be referred to as "Broward II."

> Deficit Reduction Act but determined that it could not issue industrial development revenue bonds under chapter 159 by December 31, 1984.
>
> This change in the tax law placed the entire project in jeopardy. In response, the County developed a two-step plan of financing. Because it was vital that the bonds be issued by December 31, 1984, the County would first issue revenue bonds under chapter 166 and secure the payment of principal and interest by investing the bond proceeds in United States securities. The County would then continue to proceed with the project. In the second phase, if the resource recovery plants are sold, leased, or operated by a private vendor, the present revenue bonds would be converted after notice and a full validation hearing to industrial development revenue bonds under chapter 159.

Broward I, 468 So.2d at 966-67 (footnotes omitted).

On September 4, 1984, the Board adopted Resolution 84-2053, which the Circuit Court found was sufficient in form and substance to establish the dual nature of the financing. Broward County v. State, No. 84-20784, slip op. at 6-8 (Fla. 17th Cir. Ct. Oct. 24, 1984). This form of escrow financing is common and was effectively used by numerous municipalities and counties facing the same problems as those the County confronted in late 1984. (A. Ex. 2 at 234-35, 323). The County then proceeded to validate the Bonds to be issued under this new structure.

By judgment rendered on October 24, 1984, the Circuit Court (Polen, J.) validated the Bonds and Resolution 84-2053. Broward County v. State, No. 84-20784, slip op. at 10. The Circuit Court expressly approved the two-step plan of financing but provided that the County must revalidate the Bonds as Chapter 159, Part II bonds. Broward County v. State, No. 84-20784, slip op. at 9.

Additionally, in the course of that decision the Circuit Court found, as a matter of fact and law, that the Bonds were properly issued for treatment as industrial development bonds for federal tax purposes and were not subject to volume cap restrictions under the Internal Revenue Code, as amended by the Deficit Reduction Act of 1984 (the "Deficit Reduction Act"). In that regard the Circuit Court concluded:

> 3. The determination made by the County as recited in the Resolution [84-2053] on the basis of action taken under the [1954] Code and Tax Regulations and upon advice of its bond counsel as mentioned in paragraph (m) above will permit the Bonds to be issued on or before December 31, 1984, without regard to the volume caps established by the 1984 [Deficit Reduction] Act.

Broward County v. State, No. 84-20784, slip op. at 8. The judgment of the Circuit Court was appealed to this Court by the State and the same Intervenors as appear in the instant proceeding.

On December 27, 1984, with the appeal of the validation judgment pending, the County issued and sold $521,175,000 of resource recovery bonds in three series to purchasers through a group of underwriters. The purchasers, largely institutions, paid for and received the Bonds prior to the end of December 1984. (A. Ex. 2 at 86, 95-96, 112, 223-25, 325, 327).

Official Statements, dated December 18, 1984, (the "Official Statements") were provided to all Bond purchasers in conjunction with the issuance and sale of the Bonds. The Official Statements described the status of the Bonds and the Projects, the intention

of the County to convert the Bonds and disclosed the remarketing process that would occur upon conversion, which remarketing process is more fully described below. (A. Ex. 3; A. Ex. 2 at 230-33).

The entire proceeds from the sale of the Bonds were invested in United States Treasury obligations and have been held in escrow to secure payment of principal and interest to the bondholders. (A. Ex. 2 at 227-28, 324). Since the interest being received on the escrowed government obligations has exceeded the interest received to date on the Bonds, the collateral for the Bonds has been more than sufficient to secure the debt service on the Bonds. (A. Ex. 2 at 86, 227-28).

Prior to the utilization of any Bond proceeds for the construction of the Projects, the Bonds will be converted from revenue bonds under Chapter 166 to industrial development bonds under Chapter 159, Part II. Broward I, 468 So.2d at 968; Broward II, 515 So.2d 1273. At that time, the security for repayment of the principal and interest on the Bonds will become the obligations of the companies that will own, develop and operate the Projects to make payments under installment sales agreements. (A. Ex. 2 at 86-87).

Additionally, before the conversion, the Bonds held by existing bondholders will be subject to mandatory tender to the County's remarketing agent, Smith Barney, Harris Upham & Co. Inc. ("Smith Barney"), together with other investment banking firms.

Existing Bondholders will be provided official statements with respect to the mandatory tender, describing the new security for the Bonds and the Bondholders' rights with respect to the conversion process. Those official statements will describe the Projects, the companies involved, the various agreements and the support party arrangements. (A. Ex. 2 at 230-31). The official statements will also include a feasibility study of the Projects prepared by Malcolm Pirnie. (A. Ex. 2 at 305-06). Existing Bondholders will be informed that, if they wish to continue to hold the Bonds as converted, they must confirm that intention to Smith Barney in writing; otherwise, the Bonds will be deemed to have been tendered to Smith Barney for payment in full of principal and accrued interest. Broward II, 515 So.2d at 1274. Any Bonds tendered, or deemed to have been tendered, will be remarketed by Smith Barney to new investors pursuant to the official statements. (A. Ex. 2 at 231-33). Upon conversion of the Bonds, the County will have no further obligation with respect to repayment of principal or interest on the Bonds, such obligation having been assumed by the companies that will own, develop and operate the Projects. (A. Ex. 2 at 85, 234, 325).

On appeal of the decision of the Circuit Court in Broward I, the State and the Intervenors argued that the two-step financing structure being utilized by the County was improper and that the Bonds issued in 1984 were, in fact, industrial development bonds that should have been issued under Chapter 159, Part II and which,

therefore, could not be issued or validated under Chapter 166. Broward I, 468 So.2d at 968. (A. Ex. 4 at 9-21; A. Ex. 5 at 12). In that regard, the State and Intervenors stressed that it was, and always had been, the intent of the County to sell or lease the Projects to private companies that would develop and operate the Projects. Neither the State nor the Intervenors appealed the findings and conclusions of the Circuit Court that the Bonds qualified as industrial development bonds under Federal tax law, were "grandfathered" under the provisions of the Deficit Reduction Act and, thus, were exempt from its volume cap limitations. Quite to the contrary, the whole thrust of the first appeal was that the Bonds were actually industrial development bonds, improperly issued under Chapter 166.

This Court rejected the contentions of the State and the Intervenors and held:

> The State argues that permitting the County to proceed under the authority of section 166.111 in the present case circumvents the purpose of article VII, section 10(c), Florida Constitution, and chapter 159, part II. We disagree. Although these plants, if constructed, are intended to be either sold to or operated by a private vendor, the bonds in this proceeding are merely the first step in a complex financing scheme. Any such sale or lease which requires compliance with chapter 159 will be addressed at that time.
>
> * * *
>
> It is important to note at this point that we review only the issuance of revenue bonds by the County under section 166.111, Florida Statutes (1983), despite any future intention of the County to convert these bonds to industrial development revenue bonds authorized and secured under chapter

> 159, part II. Subsequent aspects of this financing plan are not before this court, and the County's authority to issue chapter 159 bonds is not determined at this time.

Broward I, 468 So.2d at 967, 969. Thus, this Court recognized the County's intent to ultimately have private companies develop, own and operate the Projects, affirmed the decision of the Circuit Court and approved the two-step procedure for validation and issuance (and subsequent conversion) of the Bonds, provided the revalidation of the Bonds under Chapter 159 takes place, as is now sought by the County.

Notwithstanding the decision in Broward I, the State unsuccessfully sought a rehearing, contending that the Bondholders had been misled and had not been adequately informed as to the two-step nature of the financing. Rehearing on that issue was denied by this Court.

B. Events Subsequent to the Initial Validation Proceedings

Consistent with the approval of this Court and the Circuit Court of the two-step financing structure and the recognition of the County's intent from the outset to finance the Projects with industrial development bonds, the County has continued the process of selecting and negotiating agreements with the companies that were to own, develop and operate the Projects.

With respect to the selection of those companies, the Board had, in September 1984, issued a Request for Proposals to three

pre-qualified private companies.[4] (A. Ex. 2 at 43, 200). That Request sought detailed information regarding the proposed technical systems, management, performance guarantees, tipping fees, capital costs, legal contractual positions and other similar information in connection with proposals for the Projects. (A. Ex. 2 at 310).

The pre-qualified companies had been selected pursuant to a Request for Qualifications which had been prepared at the direction of the Board by Malcolm Pirnie, Lazard and the County's legal advisors and distributed to companies seeking to own, operate and develop the Projects. (A. Ex. 2 at 47, 201-02, 308-09). The Request for Qualifications set forth strict minimum financial requirements, established by Lazard, for the private companies. (A. Ex. 2 at 201, 203). The prospective companies were also required to satisfy certain technical, environmental and managerial criteria developed by Malcolm Pirnie. (A. Ex. 2 at 308).

The responses to the Request for Proposals, received in November 1984, were then evaluated over a six month period by the County's experts, whose recommendations were communicated to various committees formed by the Board. (A. Ex. 2 at 44-45). After extensive deliberation, meetings and workshops involving those committees and the Board, a final recommendation of private

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[4] The three pre-qualified private companies were Waste Management, Inc., Signal RESCO Company and Browning-Ferris Industries.

companies to own, develop and operate the Projects was presented to, and adopted by the Board. (A. Ex. 2 at 48-54).

The two companies selected by the Board for participation in the Projects were Waste Management, Inc. ("Waste Management") and Signal Environmental Systems, Inc. (now known as Wheelabrator Environmental Systems, Inc. ("Wheelabrator")). (A. Ex. 2 at 52-53). Both Waste Management and Wheelabrator's parent, Wheelabrator Technologies, Inc., are large, well capitalized companies and have considerable experience in developing municipal waste-to-energy resource recovery projects. (A. Ex. 2 at 204-05).

Subsequent to the selection of Waste Management and Wheelabrator, the County, through its Project Director and its financial, technical and legal advisors, negotiated a series of agreements between the County, on the one hand, and Waste Management, Wheelabrator (or certain affiliates thereof) and the various municipalities within the County, on the other hand. (A. Ex. 2 at 209-11). As is described more fully below, certain obligations of Waste Management, Wheelabrator and their affiliates under certain of the agreements constitute security for payment of the principal and interest on the Bonds after conversion; other obligations under other agreements serve to insure, to the extent feasible, that the Projects will be viable and self-sustaining. The Board found the Waste Management, Wheelabrator and their various affiliates to be technically capable and fiscally

responsible with respect to the Projects. (A. Ex. 2 at 142-43, 163, 172, 212).

With respect to the agreements themselves, the County and affiliates of Waste Management and Wheelabrataor will enter into virtually identical installment sales agreements. (A. Ex. 2 at 85). Pursuant to those agreements, those companies will agree to purchase the Projects from the County in return for payments sufficient to meet interest and principal payments on the Bonds. (A. Ex. 2 at 85, 214). Payments under these agreements will be pledged to the trustee under trust indentures to be entered into between the County and a qualified banking institution. (A. Ex. 2 at 85, 143). In the event of default by one of the companies, the trustee would be empowered to replace the company for purposes of the related Project. (A. Ex. 2 at 143).

Other agreements between the County and the private companies establish and provide for: (1) the design, construction, start-up and testing of the Projects by the companies; (2) the operation, maintenance and repair of the Projects by the companies; (3) the delivery of waste by the County to the companies for disposal and a payment of a fee for the disposal of that waste; and (4) the acceptance by the companies of the waste generated by the municipalities in the County. (A. Ex. 2 at 64-65, 68, 73, 84, 126-27, 144-45).

Additionally, certain agreements between the County and the municipalities within the County provide: (1) that the County

will provide solid waste disposal services and will accept and dispose of all waste delivered to it; and (2) the municipalities will collect and deliver all non-recyclable solid waste to the County and pay the County a tipping fee for disposing of such waste. (A. Ex. 2 at 59-60, 64-65). Thus, the agreements necessary for the County to revalidate the Bonds under Chapter 159, Part II have been negotiated and are in place.

C. Current Validation Proceedings

In accordance with the prior validation decisions, the County filed the Complaint for Validation on February 27, 1987 (the "Complaint") seeking to validate the Bonds under Chapter 159, Part II. The Complaint describes the prior validation proceedings and notes that, as a result of those proceedings, the County would be required to revalidate the Bonds, and the contractual and financing arrangements in connection therewith, prior to the conversion of the security for the Bonds from the government obligations presently securing the Bonds to the revenues to be derived from the operation, sale, lease and use of the Projects. The Complaint also notes that the County is authorized to finance solid waste facilities under Chapter 159, Part II and states with particularity the actions taken in accordance with Chapter 159, Part II. (A. Ex. 6 at 4, 5, 35, 36). On March 4, 1987, an Order to Show Cause was issued by the Circuit Court establishing a validation hearing date of April 6, 1987.

On March 27, 1987 the Circuit Court, at the State's request, adjourned the hearing to May 8, 1987. Before that hearing could be held, the Circuit Court granted the State's Motion for Judgment on the Pleadings and the Intervenor's Amended Motion for Dismissal for the County's alleged failure to join the Bondholders as indispensable parties. That order was appealed to this Court. In that connection, the State and the Intervenors again contended that the Bondholders had been misled as to the nature of the two-step financing, thus requiring their presence as parties to the action. Broward II, 515 So.2d at 1274. Additionally, on oral argument, the State, at one point, appeared to be attempting to relitigate the validity of the two-step conversion process:

> MS. SPUDEAS: When we came before this Court in 1985 it was the first time there was an attempt to show future intent to convert a bond from one statutory authority to another.
>
> JUSTICE MCDONALD: Isn't that issue all over with, though? I argued long and strong in my dissent for you and I lost four to three.

(A. Ex. 7 at 24). The State then conceded that the two-step conversion process was no longer at issue:

> MS. SPUDEAS: If the two-step process was okayed, which I'm sure that this Court was aware and ordered that they come back for the second step on a validation that was based on facts that you knew then. No one is challenging at this stage the two-step process.

Id. (emphasis added). The Circuit Court's order was reversed and the case was remanded for further proceedings. Broward II, 515 So.2d 1273.

On remand and pursuant to a Second Order to Show Cause, the Circuit Court held hearings on the merits of validation and conversion on January 19-21, 1988, during which the County presented extensive testimony and documentary evidence in support of validation and the State and Intervenors cross-examined witnesses, interposed evidentiary objections, and presented their own evidence. The testimony focused on the propriety of the County's various contractual arrangements under Chapter 159, Part II and on the issue as to whether there would be a reissuance of the Bonds.

In the course of summations the Circuit Court again resurrected the issue of the propriety of the two-step conversion process.

> Okay Mr. Pfeffer, first of all I want you to address the dissent in 468 So.2d 965, that being the State of Florida v. Broward County, the original validation proceedings on the 166 bonds.
>
> I want you to address the dissent in which I think Chief Justice McDonald said that there was no, I think he uses the words, no authority either constitutional, legislative, statutoral [sic] case or administrative authority for conversion of those bonds.

(A. Ex. 2 at 380).

In response, the County noted that the decision of this Court in Broward I, as is made clear by the dissenting opinion, had preclusively decided that issue and read the above-quoted dialogue between this Court and the State on argument on the indispens-ability issue. (A. Ex. 2 at 442-44). (The County, in its trial

memorandum, had requested that the Circuit Court give preclusive effect to both this Court's and the Circuit Court's decisions in Broward I.) (A. Ex. 8 at 13-16). Consistent with its arguments during summation and in its trial memorandum, the County, in its post-trial Proposed Findings of Fact and Conclusions of Law, argued that the earlier decision of this and the Circuit Court were controlling with respect to the two-step nature of the financing. (A. Ex. 9).

The State argued in its post-trial Proposed Findings of Fact and Conclusions of Law that the Bonds issued in 1984 were not industrial development bonds under Florida law, were not "grandfathered" by the Deficit Reduction Act, were subject to volume cap limitations, and, therefore, could only be issued in accordance with the requirements of Chapter 159, Part VI which governs industrial development bonds issued after December 31, 1984. The Circuit Court accepted that argument.

> Since it is clear that congress entended [sic] that in order to be "grandfathered", (1) an inducement resolution (such as the April 19th, 1984 Resolution) had to be enacted prior to June 19th, 1984 and (2) the bonds had to be issued by January 1st, 1985; it was the intent of congress that the bonds issued prior to January 1st, 1985 had to be issued as industrial development bonds (FS ss 159 bonds) not as municipal revenue bonds (FS ss 166.111) to be later converted. Therefore, these bonds were not issued as industrial development bonds before January 1st, 1985 and are not "grandfathered" under the terms of the Deficit Reduction Act of 1984. The County has not complied with F.S. 159, Part VI, regarding the issuance of private activity bonds, which the Court specifically finds these bonds to be, if conversion or re-issuance (the court finds that conversion is the same as re-issuance for the facts of this case) is granted. The bonds

> cannot be validated since F.S. 159.802 requires the County to introduce a confirmation from the State of Florida, Division of Bond Finance, pursuant to this section which the County has failed to do, and which the County has not obtained.

(A. Ex. 1 at 10-11).

Based solely upon this finding, the Circuit Court refused to validate the Bonds until such time as the County complied with Chapter 159, Part VI. As to the other issues raised by the parties in their post-trial filings (A. Ex. 11 and Ex. 12), those issues were either collateral to the bond validation proceeding or the evidence adduced on those issues by the County was effectively uncontroverted. This conclusion is bolstered by the refusal of this Circuit Court to further explicate its findings as it was invited to do by the County's Motion for Clarification, which motion was denied without opinion. It is further supported by this Court finding no need to relinquish jurisdiction to the Circuit Court for explication of these issues and, thus, denying the County's recent Motion to that effect.

SUMMARY OF ARGUMENT

The County respectfully submits that the Final Judgment Denying Conversion and Validation is incorrect as a matter of law and clearly erroneous on the record below. To the extent that the Circuit Court held that the Bonds were not properly issued in 1984 as industrial development bonds for purposes of Federal tax law (and, thus, not entitled to the "grandfathering" provisions of the Deficit Reduction Act as respects volume caps), that issue was conclusively decided by this Court in Broward I. In any event, the Circuit Court was wrong in interpreting Federal tax law by reference to Florida statutes rather than by reference to definitions expressly set forth in the Internal Revenue Code. Finally, the Circuit Court, in holding the conversion of the Bonds constitutes "reissuance" for purposes of Federal tax laws, again ignores Federal law on that issue, as well as the uncontroverted testimony below as to when these Bonds were issued.

POINT I

THE COUNTY HAS COMPLIED WITH THE REQUIREMENTS OF FEDERAL TAX LAW

The Circuit Court erred when it concluded the Bonds were not grandfathered under the provisions of the Deficit Reduction Act because they had not been issued as Chapter 159, Part II bonds before January 1, 1985. This Court and the Circuit Court, in the earlier validation proceeding, specifically considered whether the Bonds had been properly issued in time to comply with the requirements of the Deficit Reduction Act. In fact, the Circuit Court discussed the provisions of the Deficit Reduction Act in its 1984 opinion and noted that the volume cap provisions contained in that Act "will not apply to obligations which are part of an issue (1) with respect to which there was an inducement resolution (or other comparable preliminary approval) before June 19, 1984 and (2) which is issued before January 1, 1985." Broward County v. State, No. 84-20784, slip op. at 4. The Circuit Court found that Resolution 84-964 did constitute "'an inducement resolution (or other comparable preliminary approval)'" and thus would "permit the Bonds to be issued on or before December 31, 1984, without regard to the volume caps established by the 1984 Act". Id. at 8. The Circuit Court then validated the Bonds under Chapter 166 and approved the two-step conversion process.

Neither the State nor the Intervenors raised that issue on appeal and this Court affirmed the decision of the Circuit Court,

quoting certain portions of that opinion including paragraph 3 of the Circuit Court's conclusions of law, which paragraph specifically provides: "The determination made by the County . . . will permit the Bonds to be issued on or before December 31, 1984, without regard to the volume caps established by the 1984 [Deficit Reduction] Act." Broward I, 468 So.2d at 968. Thus, this Court directly considered whether the Bonds could be said to have been issued in time to comply with the Deficit Reduction Act.

Section 75.09, Florida Statutes, specifically provides that if a judgment validating bonds is affirmed, "such judgment is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby." Therefore, the Circuit Court cannot now reconsider and contradict the earlier decision of this Court. The only issue left open by this Court was the authority of the County to proceed under -- and the County's compliance with -- Chapter 159, Part II; the earlier decisions are the law of the case with respect to the County's compliance with the Deficit Reduction Act.

Indeed, the Circuit Court purported to be guided by Rogers v. State ex rel Board of Public Instruction, 156 Fla. 161, 162, 23 So.2d 154, 155 (Fla. 1945) which provides:

> 'Questions necessarily involved in the decision on a former appeal will be regarded as the law of the case on a subsequent appeal, although the questions are not expressly treated in the opinion of the court, as the presumption is that all the facts in the case bearing on the points decided have

> received due consideration whether all or none of them are mentioned in the opinion.'

Application of, rather than mere citation to, Rogers makes it abundantly clear that the earlier decisions of the Circuit Court and this Court must be treated as the law of the case and the Bonds must be considered to have been issued in time to be grandfathered under the provisions of the Deficit Reduction Act.

The County developed, and this Court approved, the two-step conversion process with the intent of complying with the changes in the Federal tax laws. Broward I, 468 So.2d at 966-67. This Court specifically approved the conversion of the Bonds to industrial development revenue bonds under Chapter 159, Part II, subject only to validation of the Bonds under that Chapter. Id.

Any doubt that this Court, in Broward I, approved the two-step financing structure, subject only to revalidation under Chapter 159, Part II (see pp. 5-6, supra) is dispelled by the dissent of Chief Justice McDonald. In that opinion, Justice McDonald made clear that the two-step structure, including the conversion feature, was very much at issue.

> I do not challenge the county's need for the project; I do challenge the county's right to issue municipal revenue bonds and later convert those bonds to industrial revenue bonds. The county has shown neither statutory nor administrative authority for such a conversion procedure.

Broward I, 968 So.2d at 971.

In approving the conversion, this Court recognized that the County has authority under Chapters 159 and 166 to utilize both

chapters in connection with the Bonds. This is consistent with Section 159.43, which provides for liberal construction of Chapter 159, Part II, and states that Chapter 159 "shall be and be deemed, authority in addition to, and shall provide alternative methods for, any other authority provided by law for the same or similar purposes." § 159.43, Fla. Stat. (1987). To hold now that the Bonds were not issued in time to comply with the Deficit Reduction Act because they were issued under Chapter 166 and not Chapter 159 would be tantamount to declaring that the conversion process developed by the County and approved by this Court is invalid. That issue has been preclusively decided in the County's favor and is not subject to relitigation. Rogers, supra, 156 Fla. at 161, 23 So.2d at 155.

In any event, the Circuit Court erred in assuming that Federal tax law looks to state law for purposes of defining the term industrial development bonds and holding that: "[I]t was the intent of congress that the bonds issued prior to January 1st, 1985 had to be issued as industrial development bonds (FS ss 159 bonds) not as municipal revenue bonds (FS ss 166.111) to be later converted." (A. Ex. 1 at 11). There is absolutely no indication in the Internal Revenue Code, the Deficit Reduction Act or any Federal tax law precedent that Congress was in any way deferring to the fifty states for the definition of the term "industrial development bonds." Quite to the contrary, the Internal Revenue

Code itself expressly provides the definition of that term in section 103(b):

> (2) INDUSTRIAL DEVELOPMENT BOND. -- For purposes of this section, the term "industrial development bond" means any obligation --
>
> > (A) which is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person (within the meaning of paragraph (3)), and
> >
> > (B) the payment of the principal or interest on which (under the terms of such obligation or any underlying arrangement) is, in whole or in major part --
> >
> > > (i) secured by any interest in property used or to be used in a trade or business or in payments in respect of such property, or
> > >
> > > (ii) to be derived from payments in respect of property, or borrowed money, used or to be used in a trade or business.
>
> (3) EXEMPT PERSON. -- For purposes of paragraph (2)(A), the term "exempt person" means --
>
> > (A) a governmental unit, or
> >
> > (B) an organization described in section 501(c)(3) and exempt from tax under section 501(a) (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

I.R.C. § 103(b)(2),(3) (1984) (emphasis added).

That definition looks to the utilization of the proceeds received from the issuance of bonds and in no way relies upon the

characterization of the Bonds as industrial development bonds under state law. Furthermore, the Revenue Rulings and Private Letter Rulings issued under that section have stressed that the qualification of bonds as industrial development bonds is dependent upon the intent of the issuer as to the utilization of bond proceeds at the time the bonds are issued and sold. Rev. Rul. 77-416, 1977-2 C.B. 34; Priv. Ltr. Rul. 8304074 (Oct. 26, 1982); Priv. Ltr. Rul. 8747043 (Aug. 26, 1987).

In the present case, the Bonds were issued and sold in 1984 to provide funding for tax-exempt solid waste disposal facilities under section 103(b)(4)(E) of the Internal Revenue Code. The County has intended, since the inception of its planning process in January 1983, to have private companies develop, own and operate the Projects which would be financed through the equity of those companies and the issuance of industrial development bonds. (A. Ex. 2 at 321-22). This Court recognized that intent in 1985 when it noted, the "plants, if constructed, are intended to be either sold to or operated by a private vendor." Broward I, 468 So.2d at 969. Chief Justice McDonald, in his dissent, not only recognized but stressed that the County has always intended to issue industrial development bonds. Broward I, 468 So.2d at 970 (McDonald, J. dissenting). In addition, the State, in 1985, argued to this Court that the Bonds should not be validated under Chapter 166 because "there is no doubt that the County intended to issue Industrial Development Revenue Bonds" (A. Ex. 4 at 14).

Moreover (and assuming the County's intent is even at issue at this juncture), the record below is unequivocal on this point. For instance, Broward County Commissioner Nicki Grossman testified that "[t]he County intended to sell $521,000,000 worth of industrial development bonds." (A. Ex. 2 at 351). Mr. Howard Whitaker, bond counsel to the County on this financing, also testified in those proceedings and drew a clear distinction between the status of the Bonds under state law, on the one hand, and Federal tax law purposes, on the other. He stated that the Bonds, at the present time, for "state law purposes are, . . . special obligations of Broward County." (A. Ex. 2 at 321, 327) (emphasis added). As to their status for Federal tax law purposes, Mr. Whitaker testified that "it was the County's intention from the beginning to issue these bonds as I.D.B.'s with the private vendors on the north and south sites being the ultimate obligors and under federal tax laws this makes them I.D.B.'s." (A. Ex. 2 at 321-22) (emphasis added).

Indeed, the intent of the County was evident as early as April 19, 1984, when the County, pursuant to published notice and a public hearing, adopted the Inducement Resolution declaring its intention "to provide financing by the proposed issuance of industrial development revenue bonds in an amount up to $590,000,000 for financing waste-to-energy facilities, land disposal facilities and sites therefor to be leased to a private vendor." (Ex. 10) (emphasis added). Thus, in April 1984 the County evidenced its

intent that the proceeds from the issuance of the bonds would be used for the development and construction of a tax-exempt solid waste disposal facility under section 103(b)(4)(E) of the Internal Revenue Code.

This intent has not changed. Although the passage of the Deficit Reduction Act compelled the County to issue the Bonds under the two-step financing plan described and authorized by this Court in Broward I, 468 So.2d 965, the Bonds were issued in December 1984 and their intended use has always been for the development and operation of the Projects by private companies. Temporary investment of the Bond proceeds in United States Treasury obligations until the private enterprises undertake the Projects does not alter the County's original plan that the Bond proceeds would ultimately be used for construction of those Projects. Those Projects will meet the requirements of section 103(b)(4)(E) of the Internal Revenue Code and thus, for Federal income tax purposes, the Bonds will be classified as industrial development bonds that are tax-exempt. Therefore, the Bonds were grandfathered under the provisions of the Deficit Reduction Act, inasmuch as, (1) an inducement resolution (R. 84-964) was enacted prior to June 19, 1984 and (2) the Bonds were issued before January 1, 1985. Whether the Bonds were issued in 1984 under Chapter 166 or Chapter 159, Part II is irrelevant for Federal tax law purposes as long as the Bonds qualify as industrial development bonds under Federal tax law, which they clearly do.

POINT II

CONVERSION IS NOT THE SAME AS REISSUANCE AND THE COUNTY NEED NOT COMPLY WITH THE REQUIREMENTS OF CHAPTER 159, PART VI

The Circuit Court erred when it found that "conversion is the same as re-issuance for the facts of this case" (A. Ex. 1, at 11) and determined that the County must comply with the requirements of Chapter 159, Part VI.[5] The Circuit Court, during the course of the validation proceedings, raised certain questions relating to when the bonds were issued and the definition of the term issuance. In response to the Circuit Court's request for a definition of the term issued or issuance, the County provided the Court with a copy of Treas. Reg. § 1.103-13(b)(6). That regulation provides that "[t]he date of issue of an obligation is the date on which there is a physical delivery of the evidences of indebtedness in exchange for the amount of the issue price. For example, obligations are issued when the issuer physically exchanges the obligations for the underwriter's (or other purchaser's) check." Treas. Reg. § 1.103-13(b)(6). Thus, that regulation provides the Bonds are deemed issued on the date that

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[5] Part VI of Chapter 159, enacted in 1985, effective January 1, 1986, establishes procedures for allocation among potential Florida municipal issues of the right to issue industrial development bonds under the state-by-state volume cap restrictions imposed by the Deficit Reduction Act. On its face, and by definition (§ 159.803(2)), Part VI does not apply to bonds not subject to those volume cap restrictions.

they were initially delivered to, <u>and the issuer was paid by</u>, the purchasers of those bonds.

As to when the Bonds in question were issued and sold within the framework of that definition, the County elicited unrebutted testimony that they were issued in late December 1984, because at that time they were delivered to a group of underwriters (who then sold them to the ultimate purchasers) and the County received the proceeds of the issuance from the underwriters. (A. Ex. 2 at 86, 95-96, 112, 223-27, 325, 327). In fact, Mr. Buros, a vice-president at Lazard Freres, testified that the managing underwriters made a commitment to the County "to purchase these bonds at a stated price and a stated yield . . . and . . . a bond purchase agreement was signed between the managing underwriters [and] the County for the underwriting of this transaction and . . . that took place around December 17th of 1984 . . . . [T]his finally led up to a closing which took place on December 27, 1984. At the closing the various funds were received from the investors who had purchased this transaction." In addition, "[t]hese bonds and these investors were delivered either in book entry or in a physical mode the bonds that they had purchased" by the end of December, 1984. (A. Ex. 2 at 226-27). Thus, the Bonds were issued for Federal tax law purposes as they were both paid for and delivered in December, 1984. Notwithstanding the foregoing definitions and testimony, the Circuit Court, without citation to anything in the record or any precedent, concluded

that the anticipated conversion of the Bonds would constitute a reissuance of the Bonds and thus concluded that the County must comply with Chapter 159, Part VI, before that conversion could take place.

The conversion and remarketing of the Bonds does not constitute a "reissuance" of the Bonds. The assumption that conversion is the same as reissuance is unsupported by any testimony in the record and is inconsistent with the one Revenue Ruling of which we are aware that considered the issue.

As to the record below, it is clear that the Bonds were issued once, in 1984, and will not be issued again. As noted above, issuance takes place when the issuer transfers the bonds to the purchasers and is paid. Here, both events occurred in 1984. Upon conversion, the County will receive no additional proceeds and the Bonds will remain outstanding, either held by existing Bondholders or remarketed to new investors by Smith Barney. Although the security for the repayment of principal and interest on the Bonds will be converted from the escrowed United States government obligations to the obligations of the companies that will own, develop and operate the Projects to make payments under the installment sales agreements, the same issue of Bonds will remain outstanding. As testified by Mr. Buros and Mr. Whitaker, the Bonds have been issued because they have been paid for and delivered. This will not happen again. The County will receive no new money on the Construction Funds Designation Date, i.e.,

"the date when . . . the contractual arrangements with the private vendors have been concluded such that you are in a position as originally contemplated . . . to convert those bonds to I.D.B.'s . . . ." (A. Ex. 2 at 324). Instead, it will release the funds already received and held in escrow since 1984 for the purpose of financing the Projects.

This conclusion is supported by Rev. Rul. 79-262, 1979-2 C.B. 33 which provides that the substitution of the security for repayment of bonds will not be deemed to constitute a reissuance if the terms of the bonds themselves remain the same. In that ruling, a corporation proposed to purchase and resell all of the industrial development bonds that were issued by a municipality and substitute itself in place of another corporation as lessee and guarantor on the bonds. The Internal Revenue Service held that under these circumstances no reissuance would be deemed to have occurred and the bonds would remain tax-exempt.

Similarly, in the present case, there is only a change in security for the payment of the bonds. Indeed, as Mr. Whitaker testified, "[t]he terms of the bonds, their interest rates, their maturities, their redemption features were all set in 1984 . . . ." (A. Ex. 2 at 329). Furthermore, the Bonds could continue to be held by existing bondholders assuming that they decide to retain them in connection with the mandatory tender and remarketing. (A. Ex. 2 at 230-32). Therefore, under the terms of Rev. Rul. 79-262 a reissuance will not occur upon conversion.

Since the Bonds were issued in 1984 and will not be reissued in connection with the conversion, Chapter 159, Part VI is inapplicable. That statute was passed in 1985 and became effective on January 1, 1986 and obviously applies only to bonds issued after January 1, 1986. In addition, that Part applies only to bonds subject to, and not grandfathered by, the Deficit Reduction Act.

* * *

Therefore, the County urges that the Circuit Court erred by considering issues already decided by this Court in the earlier validation proceeding, by assuming that Federal tax law looks to state law for purposes of defining the term industrial development bonds. The County further submits that the Circuit Court erred in concluding that conversion of the Bonds will constitute reissuance.

CONCLUSION

The County respectfully submits that, for the reasons set forth above, this Court should reverse the Circuit Court's Final Judgment Denying Conversion and Validation and remand the cause with instructions to validate the Bonds under Chapter 159, Part II, Florida Statutes.

Respectfully submitted,

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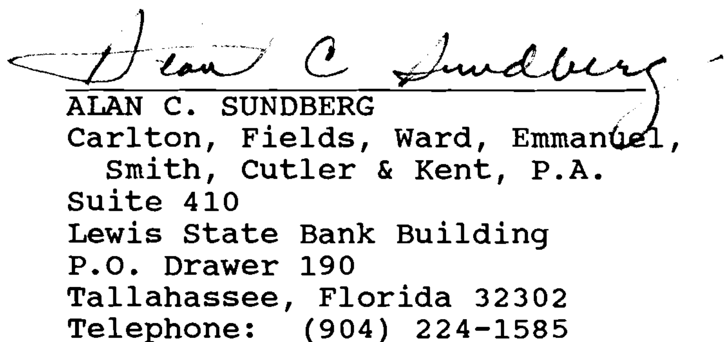

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing and appendices has been delivered to FRANK KREIDLER, Esquire, 12 South Dixie Highway, Suite 204, Lake Worth, Florida 33460-3737; and PAUL ZACK, State Attorney's Office, 201 Southeast Sixth Street, Room 640, Ft. Lauderdale, Florida 33301, on this 23rd day of March, 1988.

By: [signature]
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