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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 APPELLEE

THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

Appellant, Broward County, was the Plaintiff in the bond validation proceeding before the Circuit Court of the Seventeenth Judicial Circuit (the "Circuit Court") in and for Broward County, Florida. Appellees were the State of Florida and the several property owners, taxpayers and citizens of Broward County, who were the Defendants below. 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 transcript of the bond validation proceeding which was initiated on January 19, 1988, a copy of which is attached to the County's Appendix in Section No. 2, will be referred to by the designation "T" with the appropriate page reference thereafter.

STATEMENT OF THE CASE AND FACTS

The State does not accept the Statement of the Case and Facts as contained in the Brief of Appellant, as it is argumentative, slanted, and often unsupported by the record. In its stead, the State submits the more neutrally stated Statement of the Case and Facts as found below.

The initial portion of this Statement of the Case and Facts is taken from this Court's opinion in State v. Broward County, 468 So.2d 965 (Fla. 1985), which shall hereinafter be referred to as Broward I:

> "Broward County has developed a plan for the proper disposal of solid waste in the area which requires the construction of two solid waste disposal plants at a cost approaching $590,000,000. The County first intended to finance these plants through the issuance of industrial development revenue bonds under chapter 159, Florida Statutes (1983), and on April 19, 1984, the Broward County Board of County Commissioners held a public hearing and adopted, pursuant to published notice, Resolution 84-964 entitled:
>
> > Resolution declaring the intention of Broward County to provide financing by the proposed issuance of industrial development revenue bonds in an amount of up to $590,000,000 for financing waste-to-energy facilities, land disposal facilities and the sites therefor to be leased to a private vendor.
>
> This 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 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 Untied 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. If, however, the project is abandoned for any reason, the County proposed to redeem these revenue bonds, and any deficiency would be paid by the issuance of special obligation bonds." (Broward I, at 966-7).

This Court further explained:

"To implement the first part of this complex financing scheme, the Board of County Commissioners met again on September 4, 1984, held a public hearing, and adopted Resolution 84-2053 entitled:

> A resolution authorizing the issuance of not exceeding $590,000,000 aggregate principal amount of Broward County resource recovery revenue bonds for the purposes of financing a portion of the cost of the acquisition, construction and installation of a project consisting of solid waste disposal and conversion facilities located at certain sites in Broward County, Florida, and paying or providing for the payment of any notes issued to finance a portion of said project; providing that such revenue bonds shall not constitute a debt, liability or obligation of Broward County or the State of Florida or any political subdivision thereof but shall be payable solely from the revenues and proceeds provided therefor; providing for the issuance of special obligation bonds payable from the half-cent sales tax under certain circumstances; making certain findings; repealing a resolution adopted on June 19, 1984, relating to similar subject matter; authorizing proceedings validating said revenue

bonds; and providing an effective date." (Broward I, at 967-8).

This Court, in a four to three decision, validated the issuance of the revenue bonds pursuant to chapter 166 of the Florida Statutes. This Court carefully limited the scope of its ruling as follows:

> "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, at 967).

This Court also stated:

> "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. As the trial court found:
>
>> Despite that it is the future intention of the County to convert the bonds from bonds authorized and secured under Section 166.111, Florida Statutes, to revenue bonds authorized and secured under Chapter 159, Part II, Florida Statutes, the bonds may not by virtue of the rendition of this Judgment be represented as having been validated as revenue bonds within the meaning of said Chapter 159.
>
> Because this bond issuance, as validated by the circuit court, does not involve the use of the County's taxing power or credit for a private vendor, we find no violation of either chapter 159 or article VII, section 10 of the Florida Constitution." (Broward I, at 969)

The County then sold the bonds under chapter 166 of the Florida Statutes. As this Court then summarized in Broward County v. State of Florida, 515 So.2d 1273 (Fla. S. Ct. 1987), hereinafter referred to as Broward II:

> "In February 1987 the county filed a complaint for validation in the circuit court, seeking conversion and validation of the

> bonds under chapter 159. The state answered the complaint, and a citizens group intervened and moved to dismiss the complaint on grounds which included the failure to join indispensable parties because the purchasers of the 1984 bonds had not been joined. The trial court dismissed the complaint for validation." (Broward II at 1273).

This Court held that "bondholders are not indispensable parties to this bond validation petition," and therefore reversed "the circuit court's order holding to the contrary," and remanded the cause. Broward II, supra at 1274. Again, however, this Court clearly limited the effect of its holding in Broward II, stating that "whether or not this bond issue should be validated is not presented in this appeal, and we do not address that issue." Broward II, at 1274.

Thus, pursuant to the mandate of this Court, this cause was ultimately set for final validation proceeding, with the hearing beginning on January 19, 1988. The State notes at this juncture that the transcript of these validation proceedings are contained in the Appendix, section 2 attached to the Appellant's Brief in this cause, and further duplication is thus unnecessary. All cites to the transcript can thus be found by referring to the transcript contained in Appellant's Appendix, section 2 to the Brief of Appellant, and will be designated with the notation "T" followed by an appropriate page number from the transcript. At the hearing commencing on January 19, 1988, the testimony of several witnesses was taken and numerous exhibits and documents were admitted into evidence, but only the ones which are pertinent to the issues raised herein will be referred to and attached.

During its opening argument to the trial court, the County's counsel stated:

> "The County is seeking to have the court validate the issuance of the bonds and, as said by the court in its owning remarks, we are asking the court to decide essentially whether Broward

> County has the authority to issue the bonds and whether or not it's exercised that authority properly." (T 19), and
>
> "The only remaining item that needs to be completed before the County can deliver a notice to proceed to the vendors so that they can commence construction is the issuance in the sale of these bonds." (T 23).

The County thereafter called five witnesses to testify on its behalf; Thomas Henderson, who was the Director of the Broward County Resource Recovery Office, Peter Burros, who was the Vice-President of the investment banking firm which was the financial advisor to the County in this project, Robert Schneider, who was the Senior Project Manager of the company who advised the County on the resource recovery aspects of this project, Howard Whittaker, who is a partner in the law firm who served as bond counsel to Broward County in this cause, and Commissioner Nicki Grossman, who is a member of the Broward County Commission. The testimony of these witnesses, and the evidence introduced at trial established the facts outlined below.

The County's witnesses referred to the proposed second phase of their financing scheme as a "remarketing" procedure, and attempted to explain this concept to the trial court. (See, for example, T 144-5). Their witnesses explained that the "remarketing" would involve not only the actual issuance of new bond documents, but would involve a total change in the security and the type of bond to be issued. (T 228-34; 276-7). See also, for example: Attached Appendix, Exhibit I, which consists of excerpts from Exhibit A to the County's Complaint for Validation; and also page 15 of the County's Complaint for Validation, found in the Appendix to the Brief of Appellant, Section 6. The County's witnesses were also in sharp disagreement among themselves as to exactly what type of bond was presently under examination by the trial court.

Mr. Henderson, for example, testified that these bonds were private activity bonds. (T 141). Mr. Burros testified that these bonds were not private activity bonds, but were industrial development bonds for federal purposes, and revenue bonds for state purposes. (T 277-278; 283). Mr. Whittaker testified that bonds were "special obligation bonds." (T 21), but that the bonds should be treated as being what they will eventually be for federal income tax purposes, or industrial development bonds. (T 26-7). Mr. Whittaker also clearly stated that in 1984 the bonds had to be validated as chapter 166 revenue bonds because "that's all they could be at the time." (T 339). Significantly, Mr. Whittaker also stated that the County was maintaining a number of options "which in truth remain to this day as to public and private ownership of this plant or how they want to go." (T 338). Finally Commissioner Nicki Grossman, when specifically asked whether or not the bonds before the Court for validation were going to be new bonds, answered that they were going to be new bonds, giving as her reasons "they will be industrial development bonds as opposed to the bonds that originally the County sought to have validated which were revenue bonds," and further that "I would imagine they will be signed again, which in my mind would make them new bonds." (T 360). Much of this testimony just related was specifically referred to by the trial court, in its order of final judgment denying conversion and validation, as being crucial in determining whether or not these bonds were to be considered "issued" in 1984. (See The County's Appendix to Brief of Appellant, Section I).

Further, documents and testimony introduced at the hearing also established certain other matters. The County did not file any notice

of intent to issue private activity bonds with Division of Finance, nor did it receive written confirmation to issue private activity bonds from the Division of Bond Finance. (T 371). This fact remains undisputed by the County.

It was also established that the companies who will operate the north site and south site plants were eligible for a federal tax incentive if they contributed at least twenty per cent of the capital cost of the project, but it was further established that the County agreed to lend the companies an amount of money equal to this equity contribution. (See attached Appendix, Exhibit II, which consists of excerpts from Exhibit H to the County's Complaint for Validation). The County further agreed that it will pay or reimburse to the operating companies (excluding a certain deductible) all taxes, levies, fees, assessments or other charges, direct or indirect, levied or imposed by the United States, Florida, or other governmental unit. (See attached Appendix, Exhibit III, which consists of excerpts from Exhibit N to the County's Complaint for Validation). Still further, the County pledged to give the operating companies money (obtained from all available non ad valorem tax sources) to make up any revenue shortfall in the operation of the facilities due to insufficient collections of tipping fees and users fees. (See attached Appendix, Exhibit IV, which consists of excerpts from Exhibit G and Exhibit N to the Complaint for Validation; See also Article 17 of the Complaint for Validation, pages 12 and 13, as evidence in the Appendix to the Brief of Appellant, Section 6).

It was also shown that negotiations for the "north site" plant were ongoing at the time of the validation proceeding, and that contracts were being negotiated at that time which would substantially change

certain of the obligations and parties identified during the validation proceedings. (See attached Appendix, Exhibit V, which consists of the answers of the County to the State's Interrogatories of January 1988, and most particularly Answer No. 21 found on page 4 therein). Again, it was stated that the option still remains open to the County to have the facilities owned and operated by public, rather than private ownership. (T 338).

Finally, it was established that the "user's fee" (which the contracts provided could be assessed in case of a revenue shortfall in the project) would be assessed against the owners of all improved real property in the district, irrespective of whether that improved property was occupied or in use (and therefore irrespective of whether that property was generating any waste). (See attached Appendix, Exhibit VI, which consists of excerpts from Exhibit F to the Complaint for Validation, and more specifically Exhibit D from said Exhibit). The "user's fee", if not paid, was to be collected by the tax collector, and could become a tax lien to be ultimately enforced against the property (See attached Appendix, Exhibit VII, which consists of excerpts from Exhibit F from the Complaint for Validation, and more specifically Exhibit D therein).

After receiving all of the testimony and the evidence, the Circuit Court denied validation and "conversion" of the bonds. (See Appellant's Appendix 1). This appeal follows.

SUMMARY OF ARGUMENT

The State's submits that the final judgment denying conversion and validation was correct as a matter of law and clearly supported by the record below. The bonds which were issued in 1984 were not industrial development bonds, but were revenue bonds under Chapter 166 of the Florida Statutes, and the Circuit Court was correct in holding that events subsequent to 1984 did not change the character of the bonds. Additionally, because the bond financing scheme involved an impermissible lending of credit by the County to private vendors, and it legally involved the taxing power of the County, and further because the contracts were being negotiated in an ongoing fashion at the time of the validation proceeding, thus rendering the validation proceeding premature, there existed other valid reasons supporting the Circuit Court's judgment. For all of these reasons, the Circuit Court was correct in denying validation.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING VALIDATION.

It is the State's position herein that the trial court did not err when it denied validation and "conversion" of the subject bonds on February 5, 1988. This ruling of the circuit court, which comes to this Court clothed with a presumption of correctness (See State v. Town of Sweetwater 112 So.2d 852, (Fla. 1959)) is amply supported by the record below. Further, as will be seen below, there were valid grounds separate and apart from the specific ground stated by the court in its judgment which support the court's ruling. For all of the reasons set forth below, The County's position that the trial court erred reversibly by denying validation should be denied, and the circuit court's order affirmed.

The trial court, in its February 5, 1988 judgment denying conversion and validation, gave a fairly concise history of the instant proceedings, which history is consistent with, and mirrors, that given in the Statement of the Case and Facts, infra. In a nutshell, however, what occurred with respect to the subject bonds is fairly simple. While Broward County was in the process of developing a plan for the disposal of solid waste in this area, its original intention was to finance these disposal plants through the issuance of industrial development bonds, pursuant to Florida Statutes chapter 159, and on April 19, 1984, the Broward County Commission adopted a resolution to that effect. It was apparent that much needed to be done in order to accomplish this task, including the selection of companies, acquisition of the land, obtaining

the necessary permits, the entrance into interlocal agreements with certain municipalities, and the preparation of the bond documents. While this task was proceeding, the United States Congress passed the Deficit Reduction Act of 1984, which act contained volume cap limitations on the type of industrial development revenue bonds by which Broward County planned to finance the plan, and which act also placed limitations on the investment of such bond proceeds and reserves. See Deficit Reduction Act of 1984, Pb L. No. 98-369, ss 621, 624, 98 Stat. 494, 915-918, 922-924 (1984). The act also provided, however, that these tax exempt industrial development bonds could be issued without regard to the above-mentioned caps in investment limitations if an inducement resolution had been adopted prior to June 19, 1984, and the bonds were _issued_ by December 31, 1984. See _Id._, ss 631, 98 Stat. at 934-937. The County determined that its prior resolution qualified as an official action for purposes of the act, but also determined that it could not actually issue industrial development revenue bonds under Chapter 159 of the Florida Statutes by December 31, 1984. It therefore devised a scheme whereby the County issued revenue bonds under Chapter 166 prior to December 31, 1984, with the intention of later "converting" the bonds to industrial development revenue bonds under chapter 159. The first phase of this financing scheme was accomplished in December of 1984, when the revenue bonds were issued, with the validation of same being approved by this Court in _Broward I_, supra. After a period of negotiation of contracts, permitting, etc. as previously described, the County then applied to the Circuit Court in Broward County for validation of its "conversion" of the revenue bonds under Chapter 159, part 2. In this "conversion" plan as envisioned and argued by the

County below, the County asked that the "converted" bonds be viewed as industrial development bonds issued as of December of 1984 because the County had not obtained the required approval of the Division of Bond Finance as required by Florida Statute chapter 159.802, enacted after December of 1984 to be consistent with the Deficit Reduction Act. The County thus argued that, by virtue of their issuance of the Chapter 166 revenue bonds in December of 1984, they were "grandfathered" into the exemption provided in the Deficit Reduction Act, and that this "grandfathering" continues to 1988 to allow for the "conversion" of the Chapter 166 bonds into Chapter 159 bonds, as Chapter 159 existed in 1984. The trial court squarely rejected this contention in its February 5, 1988 order.

In so ruling, the Circuit Court looked to the express language of the statutes involved, as well as the facts of the case, which will be discussed below. A brief review of the applicable law indicates the following:

> 1. Florida Statute 159.803(7), and (8) indicate that, for purposes of that statute, the phrases, issued" or "issuance" have the same meaning as they do in the Internal Revenue Code.
>
> 2. As the County states in its Brief, the Internal Revenue Code, in Treasury Regulation section 1.103-13(b)(6), provides that the date of issue of an obligation is the date in which there is a physical delivery of the evidences of indebtedness in exchange for the amount of the issue price.
>
> 3. Finally, Florida case law has indicated that bonds are not "issued" until they have been "duly executed and delivered, the obligation of the bond being fixed as of the date of issuance and not necessarily as of the date of the bonds." Mize v. County of Seminole, 229 So.2d 841 (Fla. 1969).

Thus, based on the facts developed (which will be discussed in detail below), the trial court ruled in the final judgment that, based on the evidence, what was "issued" in December of 1984 was a series of Chapter

166 revenue bonds, and not Chapter 159 industrial development bonds, and that therefore the County has not complied with Florida Statute Chapter 159, part 6 as required by law. This conclusion is amply supported by the evidence.

Interestingly, the testimony presented at the bond validation proceeding was presented almost exclusively on behalf of the County, yet it is the testimony of their own witnesses which strongly support the trial court's judgment denying validation. Mr. Howard Whittaker, the County's bond counsel, testified at the hearing that in 1984 the bonds which were validated and upheld by this Court were chapter 166 revenue bonds, "because that's all they could be at the time." (T 339). Thus, they were not industrial development bonds at that time. Significantly, Mr. Whittaker also testified that the bonds were not industrial development bonds at the time of the validation proceeding, either, as he categorized them as "special obligation bonds" of Broward County, payable from investment bond proceeds of the 1984 issue. (T 21). Mr. Whittaker stated that, if they are permitted to be "remarketed" in 1988 as industrial development bonds, that the bonds would be considered private activity bonds under the Internal Revenue Code, but stated that he did not know if an issuing authority in 1988 could today issue bonds for a solid waste facility and circumvent the requirements of Chapter 159, part 6. (T 337-338; 329-330).

Thomas Henderson, Broward County's Director of the Resource Recovery Office, testified that the bonds under consideration at the validation proceeding were "private activity bonds," yet did not indicate that the County had complied to Florida Statute Chapter 159, part 6. (T 141). Mr. Peter Burros, Vice-President of the investment banking firm

acting as advisor to the County, however, testified that the bonds are not private activity bonds, but are industrial development bonds for federal purposes and Chapter 166 bonds for State purposes. (T 277-278; 283).

In essence, then, the County's own witnesses refuted their contention. The County necessarily was required to show (and did not) that the bonds they were seeking to "convert" or "remarket" were merely part and parcel of the initial bonds passed under Chapter 166 in 1984. Again, however, their own statements and testimony refuted this position.

For example, Mr. Burros stated that once the security for the bonds change, many of the former bondholders would cash in their bonds with new sales then occurring, and even the bondholders who opt in and wish to continue to be involved in the project with the bonds would be given new documents. (T 277). Importantly, the fact that new bond documents will be given to all new purchasers and prior purchasers who wish to be involved in the new issue is supported in documents presented by the County at the hearing. (See attached Appendix, Exhibit I). Clearly, the issuance of this new "paper" if the County's secondary financing scheme were approved, would constitute an "issuance" for both state and federal purposes, under the guidelines given above.

Significantly, the County has repeatedly stated, both to this Court and the Circuit Court, that the subject bond financing under Chapter 159 was actually a new issuance:

> 1. ". . . the County intends the plants be owned and operated by a private company or companies if satisfactory contractual arrangements can be negotiated, thus arguably making the bonds to be later issued to finance the plants through development bonds both for state law and federal tax

law purposes. . . " Case No. 66,187; Answer Brief of Appellee, Broward County, page 5; Emphasis added.

2. ". . . the Board of County Commissioners adopted Resolution 84-964 on April ;19, 1984, declaring its intent to finance the plants through a proposed issue of industrial development bonds. However, in order to actually issue and market such bonds, it would also have been necessary (a) to select a company or companies and complete lengthy and complicated construction and waste disposal service contracts, (b) to acquire all land required for the plants, (c) to obtain all federal, state and local permits required to construct and operate the plants, (d) to enter into local agreements . . . (e) to contract with Florida Power and Light . . . and, (f) to prepare all resolutions, indentures, offering circulars and other documentation required to issue the bonds." Case No. 66, 187; Answer Brief of Appellee, Broward County, page 6-7; Emphasis added.

3. "Should the tasks outlined in (a) to (f) above be completed in the future, the County, as required by the judgment entered below, will vlidate any industrial development bonds it may seek to issue under part 2 of Chapter 159. Only at that time, if ever, will it be appropriate to put the County to its proof as to compliance with the requirements of said part 2 of Chapter 159." Case No. 66, 187; Answer Brief of Appellee, Broward County, page 12; Emphasis added.

4. "The County is seeking to have the Court validate the issuance of the bonds and, as said by the Court in its owning remarks, we are asking the Court to decide essentially whether Broward County has the authority to issue the bonds and whether or not its exercised its authority properly." Opening Statement of County, T 19.

5. "The only remaining item that needs to be completed before the County can deliver a notice to proceed to the vendors so they can commence construction is the issuance in the sale of these bonds." County's Opening Argument, R 23.

Thus, the County has repeatedly admitted to this Court and the Circuit Court that what it is proposing to do in 1988 is to issue industrial development bonds under Chapter 159, yet in so doing, it has sought to avoid both the federal tax complications, and the clear mandate of chapter 159, part 6 of the Florida Statutes.

Thus, in a nutshell, the County now wishes to characterize its proposed Chapter 159 "conversion" bonds as being part and parcel of the

old Chapter 166 issuance, but the facts demonstrated, and the Court held, that any such "conversion" would be the issuance of new bonds. Significantly, the County's witness, County Commissioner Nicki Grossman, testified as follows:

> "Q: Now, when these bonds go through, the bonds based on these project now as part of this 87-88 validation proceedings, they're going to be new bonds; is that right?
>
> A: That's correct.
>
> Q: You just answered the last question that when these bonds would be issued that they would be new bonds.
>
> A: Well, they would be industrial development bonds as opposed to the bonds that originally the County sought to have validated which were revenue bonds.
>
> Q: You are not an expert on bonds?
>
> A: No.
>
> Q: So whether or not its legally new bonds - -
>
> A: I don't know. I would imagine they would be signed again, which in my mind, would make them new bonds." (T 360) (emphasis added).

These questions and answers of the County Commissioner clearly demonstrate the falsity of the County's position in this matter. While it is admitted that Commissioner Grossman is not an expert in bond validation proceedings, her common sense layman's approach to this issue is particularly instructive. Basically, her common sense tells her (and correctly so), that if the new issuance looks, acts, and is distributed like new bonds, then they are new bonds. The County's valiant attempts at twisting common sense and the plain meaning of the federal and state statutes on this subject should not control over the reality of the issuance, as recognized by Broward County Commissioner Grossman.

The County's Brief also attempts to argue that the matter of the "issuance" of the Chapter 159 bonds is somehow to be considered res

judicata, or law of the case, as a result of the prior decisions of the Circuit Court and this Court. The State would respond that, once again, the County blinds itself to the actual wording of the subject decisions. If one thing is absolutely clear from this Court's decisions in Broward I, and Broward II, it is that this Court did not previously decide whether or not the bond issue presently before it in the instant appeal should be validated or not, this Court expressly so declaring in both cases, as pointed out in the Statement of the Case and Facts, infra. Similarly, the Circuit Court, during its initial validation of the chapter 166 bonds in 1984, expressly stated that, prior to "converting" the bonds under chapter 159, the County would have to undergo validation of the bonds and the contractual and financial arrangements. (See attached Appendix, Exhibit VIII). Thus, both the Circuit Court and this Honorable Court have repeatedly indicated, whenever a case arising from the subject bond financing scheme has been brought before them, that no decision on the validity of the proposed issuance of Chapter 159 bonds was being decided at that time, and that such decision would await a validation proceeding. That validation proceeding is the subject matter of this appeal.

Quite clearly, then, the County's attempted end run around both the federal regulations and Chapter 159 of the Florida Statutes was properly short circuited by the Circuit Court when it denied validation. This Court should uphold the public policy as embodied in these laws which cite the need for volume cap and financing limitations on private activity bonds. The State would simply submit that there is no specific statutory authority, either state or federal, which supports the County's proposal in this matter, and it is only by virtually torturing the

state and federal laws governing industrial development and private activity bond financing that the County even can argue its case. The Circuit Court was correct in finding that, based on the record before it, the County's proposal was not a "conversion," or "reissuance" of old bonds, but constituted the issuance of entirely new bonds. The Court was further correct in therefore finding that the new industrial development bonds to be issued were not in compliance with the dictates of Florida Statute Chapter 159, part 6, and that consequently the bond validation is properly denied for this reason alone.

In addition to the above-styled reasons demonstrating the correctness of the trial court's decision denying validation, there exist additional reasons which would, irrespective of this Court's agreement with the rationale utilized by the trial court in denying validation, support on affirmance of the denial. It is clear that even were this Court to view the trial court's expressed reasons as being insufficient to deny validation, where the evidence established other grounds to support the trial court's judgment, an affirmance is still mandated. See Blake v. Xerox Corporation 447 So.2d 1348 (Fla. 1984); Firestone v. Firestone, 263 So.2d 223 (Fla. 1972); Choctawhatchee Electric Coop, Inc. v. Green, 132 So.2d 556 (Fla. 1961); Escarra v. Winn Dixie Stores, Inc. 131 So.2d 483 (Fla. 1961). Accordingly, the State will briefly demonstrate below basically three alternative theories which were supported by the evidence which, regardless of this Court's disposition on the expressed reasons underlying the Court's denial of validation, would support an affirmance in this case.

This Court, in Broward I, stated that it was upholding the prior issuance under Chapter 166 because that issuance did "not involve the

use of the County's taxing power or credit for a private vendor. . . " See Broward I, supra, at 969. It is the State's position here, as it was below, that the evidence amply demonstrates that both of these constitutional prohibitions are violated by the subject bond financing scheme.

The State submits that the evidence amply demonstrates that the County has run afoul of Florida Constitution, Article VII, Section 10, which forbids a political subdivision of the state from lending its credit to a private vendor. The subject financing scheme violates this constitutional provision in basically three ways. First, it was shown that the vendors or operators of the solid waste disposal facility, in order to obtain a federal tax incentive (pursuant to Rev. proclamation 75-21, 1975-1 C.B. 715), were to provide at least twenty percent of the capital cost involved in the project. As established in the attached Appendix, Exhibit II, the County has expressly agreed to "lend" the vendors this basic equity contribution. The State maintains that this is clearly in violation of the constitutional prohibition against the giving, lending, or using the County's credit to aid private industry.

Second, in a section of the solid waste disposal's service agreement entitled "monthly pass-throughs", (found in the attached Appendix, Exhibit III) it is stated that the County will pay to or reimburse the vendor (excluding a certain deductible) for all taxes, levies, fees, assessments or other charges directly or indirectly imposed by any governmental unit as a result of the vendor's operation of the facility. Again, the State would urge that this is an impermissible payment and/or lending of credit to aid private industry in violation of Article VII, Section 10 of the Florida Constitution.

The third instance of this impermissible lending of credit occurs in those portions of the agreements (in the attached Appendix, Exhibit IV) stating that if there is a revenue shortfall from the project due to insufficient collections from the tipping fee and user's fee, the County will provide funds for the shortfall from all non-ad valorem tax revenue sources. Again, this constitutes an impermissible lending of credit or giving of financial aid to private vendors, in violation of Article VII, Section 10 of the Florida Constitution. Such projects are supposed to be self-liquidating in order to be eligible for industrial development bond financing, and the County simply cannot lend or give its money to private industry in the three ways outlined above. See Nohrr v. Brevard County, 242 So.2d 304 (Fla. 1971); Wald v. Sarasota, 360 So.2d 763 (Fla. 1978); West Palm Beach v. State, 113 So.2d 374 (Fla. 1959).

Additionally, the evidence clearly demonstrated that a portion of the subject financing scheme violates this same subsection of the Constitution by impermissibly using its "taxing power" to aid this project. As previously stated, the evidence demonstrated that the County agreed to make up for certain revenue shortfalls in the project by setting up a scheme whereby a "user's fee" would be initiated and assessed against all improved real property within the boundary of the special solid waste disposal district being set up for this purpose. (See attached Appendix, Exhibit VI). It is the State's position that this "user's fee" is in reality a tax. As support for this position, it is clear that, pursuant to the attached exhibits contained in Exhibit VII, this "user's fee" can become a lien on a delinquent property owner's property equal in rank to the lien of the County ad valorem taxes and superior in rank to all other liens, encumbrances, titles, and

claims to and against the real property involved. It is further provided, that if the lien becomes delinquent, the tax collector is vested with the power and duty to collect payment of the charges, and further that such delinquent service charges will become a "tax lien" on the property which must be satisfied at the time the property is sold or conveyed. In other words, this "user's fee" looks, acts, feels, and is enforced like a tax, and the State would urge that it is.

The County has argued that the "user's fee" is not a tax because the fee is directly related to the benefits received by the property in waste disposal. However, as argued by the State below, it is important to realize that the "user's fee" is only designed to provide funds to the County to enable it to make up revenue shortfalls provided from the operation of the facilities. Therefore, there is no direct correlation between the benefits of waste disposal and the fee, but rather there is only a direct correlation between a revenue shortfall and the need to collect a "users fee." If there is no revenue shortfall, there will be no "user's fee" imposed, even though all improved real property within the district has arguably obtained the benefit of waste disposal. Thus, the fee is only related to the shortfall, and not to the overall benefit of waste disposal. Thus the County's argument is specious. (See Broward County v. Janis Development Corp. 311 So.2d 371 (Fla. 4 DCA 1975).

Additionally, there would appear to be serious equal protection and due process problems with this "user's fee" scheme, since it contemplates imposition upon all improved real property within the boundaries of the special district, whether or not the property is occupied or not, and thus utilizing the waste disposal services.

In addition to the impermissible lending of money or credit, and the impermissible use of the County's taxing power to augment this project for private industry, there was one additional ground which supported the trial court's ultimate denial of validation. Simply stated, the validation proceeding, as it occurred beginning in January of this year, was entirely premature. The evidence established that, as to the north site project, negotiations were ongoing which could, and probably would, substantially change the obligation, the obligors, and the support parties for the north site project. (See attached Appendix, Exhibit V). Thus, at the time of the validation proceeding, it is clear that, as to the north site project in particular, the trial court was ruling on the validity of documents submitted to it by the County which the County admitted would be substantially changed in the future. Underscoring this point was the testimony of Mr. Whittaker, bond counsel for the County, who indicated that the County was even, at the time of the validation proceeding, "maintaining a number of options which in truth remain to this day as to public and private ownership of this plant or how they want to go." (T 338). Therefore, it is clear that the County was asking the trial court in the validation proceeding to rule on the validity of agreements and options which were yet to be identified and specified, and thus the entire proceeding was premature.

Thus, it is the State's position that the Circuit Court was clearly correct in denying validation of the subject bond financing scheme. The rationale utilized by the Court was absolutely correct, based on the case law, constitutional and statutory provisions before the Court, as well as common sense. Also, although not specifically utilized by the Court in the final judgment as grounds for denial, it is equally clear

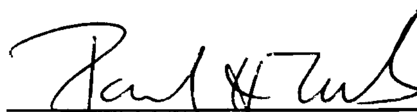
that the bond validation proceeding denial should be affirmed for the other reasons stated in this Brief of Appellee. The ruling of the Circuit Court should be affirmed, and Broward County should be required to follow the law as stated in Chapter 159, part 6 like any other governmental unit in Florida attempting to issue private activity industrial development bonds in 1988.

CONCLUSION

Based on the foregoing reasons and authorities, the State respectfully submits that the Circuit Court properly denied validation of the subject bonds, and that the Circuit Court's judgment in this regard should be affirmed.

Respectfully submitted,

MICHAEL J. SATZ
State Attorney



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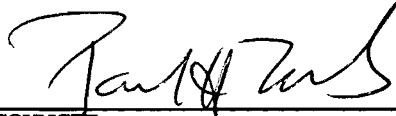
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Brief were furnished by U.S. Mail this 12th day of April, 1988 to Alan C. Sunberg, Esquire, CARLTON, FIELDS, WARD, EMMANUEL, SMITH, CUTLER & KENT, P.A., Suite 410, Lewis State Bank Building, P.O. Drawer 190, Tallahassee, Florida 32302; James K. Manning, Esquire, BROWN & WOOD, One World Trade Center, New York, New York 10048; Susan F. Delegal, Esquire, General Counsel for Broward County, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301 and Frank A. Kreidler, Esquire, 12 South Dixie Hwy., Suite 204, Lake Worth, Florida 33460-3737.



OF COUNSEL