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

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

The sole issues presented by the final judgment of the Circuit Court denying revalidation of $521,175,000 of Resource Recovery Revenue Bonds (the "Bonds") of appellant Broward County (the "County") are (1) whether the Bonds were properly issued in 1984 as industrial development bonds under Federal tax law, and (2) whether the conversion of the Bonds constitutes reissuance or new issuance of them. Both issues are plainly questions of Federal tax law and, if the Circuit Court was in error in its interpretation of the Internal Revenue Code, it follows that the Circuit Court's refusal to validate due to the County's admitted non-compliance with Part VI of Chapter 159, Florida Statutes, is also erroneous. (Chapter 159, Part VI is, on its face, inapplicable to industrial development bonds issued and sold prior to January 1, 1985. Indeed, Chapter 159, Part VI, was not passed until 1985 and did not become applicable until January 1, 1986.)

Notwithstanding that Federal tax law controls and the County's extensive citation to the applicable provisions of the Internal Revenue Code and regulations and rulings thereunder, neither the State nor the Intervenors cite <u>any</u> Federal tax precedent inconsistent with the County's contentions. Instead, the State (and, by adoption of the State's argument in this regard, the Intervenors) (1) seeks to reargue prior determinations by this and the Circuit Court as to the County's compliance with Federal tax law, (2) invents its own definition of the terms "industrial development bonds" and "issuance," and (3) interprets the evidence

below pursuant to those invented definitions, rather than the definitions supplied by the Internal Revenue Code and relevant authority thereunder.

Finally, and in an apparent concession of the weakness of their arguments under Federal tax law, both the State and the Intervenors seek to have this Court sustain the decision below by contending that there were other grounds upon which the Circuit Court could have refused to validate the Bonds. The various, alternative grounds advanced by the State and the Intervenors in support of the judgment below are either without merit or collateral to a bond validation proceeding.

POINT I

THE BONDS WERE PROPERLY ISSUED IN 1984 AS INDUSTRIAL DEVELOPMENT BONDS FOR FEDERAL TAX LAW PURPOSES AND WILL NOT BE REISSUED IN CONNECTION WITH THEIR CONVERSION.

In support of the articulated reasoning of the Court below, the State (with which the Intervenors join) argues (1) that the Bonds issued by the County in 1984 were not industrial development bonds for purposes of relevant Federal tax laws, (2) the Bonds sought to be revalidated will either be reissued or newly issued in connection with their conversion to Chapter 159 Bonds, and (3) the Bonds, thus, should have been issued in compliance with Part VI of Chapter 159 which governs industrial development bonds issued in Florida after January 1, 1986.

As to its argument that the Bonds issued by the County in December, 1984 were not industrial development bonds "grandfathered"

by the provisions of applicable Federal tax laws, the State persists in the erroneous assumption of the Circuit Court that that issue somehow relates to the Bonds' status under Florida law at the time of their issuance.

> Thus, . . . the trial court ruled in the final judgment that, based on the evidence, what was "issued" in December of 1984 was a series of [Florida Statutes] Chapter 166 revenue bonds, and not [Florida Statutes] 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.

(SB at 13-14).[1] As was the case with the Circuit Court, the State cites no authority for the startling proposition that the Internal Revenue Code (the "Code"), as amended by the Deficit Reduction Act of 1984 (the "Deficit Reduction Act"), defers to the various states for the definition of the term "industrial development bond". (Taken to its logical conclusion, the reasoning of the State and the Circuit Court in this regard would permit each and every State to avoid the volume cap restrictions imposed by the Deficit Reduction Act by defining or labeling all bonds issued by the states' municipalities as being something other than "industrial development bonds.") The simple fact remains that the Code expressly defines the term "industrial development bond" and does so without any reference to the status of the bonds as "industrial development bonds" or otherwise under the law of the various

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1. The symbol CB will refer to the County's Initial Brief and the symbol A will refer to the County's Appendix. The symbol SB will refer to the State's Answer Brief and the symbol IB will refer to the Intervenors' Answer Brief.

states. More specifically, and as pointed out in the County's Initial Brief, the Code (Section 103(b)(2) and (3)) defines "industrial development bond" as any municipal obligation "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 private entity. (CB at 25). As further pointed out in the County's Initial Brief, Revenue Rulings and Private Letter Rulings issued by the Internal Revenue Service under Section 103(b)(2) and (3) have emphasized that the qualification of bonds as industrial development bonds under the Code is dependent upon the intent of the municipal issuer, at the time that the bonds are issued and sold, as to the ultimate utilization of the bond proceeds. (CB at 26-27). Neither the State nor the Intervenors directly quarrel with the County's interpretation of the Code, nor do they cite any authority under the Code inconsistent with the County's position.

It is essentially undisputed that the County's intent, since the inception of the Project with respect to which the Bonds were issued, has been to sell or lease the Project to private parties for construction and operation by them. Indeed, the State concedes that the County's "original intention was to finance these disposal plants through the issuance of industrial development bonds." (SB at 11). (See also, CB at 26-28). The fact that the County, faced with the deadlines imposed in 1984 by the Deficit Reduction Act, issued the Bonds under Chapter 166, Florida Statutes, for subsequent conversion to bonds under Chapter 159, Florida Statutes, does not have the slightest bearing on its

intent with respect to the ultimate utilization of the Bond proceeds or on the controlling nature of that intent under the Code. Mr. Whitaker, in uncontroverted testimony, drew the appropriate distinction between the status of the Bonds under the Code, on the one hand, and state law, on the other.

> Ultimately, if this goes through as planned by the County, they will be industrial development bonds, and so we have to treat them as we move through time as being what they will eventually be for federal income tax purposes.
>
> At the present time for state law purposes they are, as I said before, special obligations of Broward County [under Chapter 166].

(A. Ex. 2 at 327) (emphasis supplied).

The State, in support of its contention that the Bonds are to be newly issued in connection with their conversion, attempts to graft on to the Federal definition of the term "issuance" Florida law considerations. In this regard, the State, reflective of the views of the Circuit Court, sets forth the following "review of the applicable law" with respect to the question of whether the Bonds will be reissued.

> 1. Florida Statute 159.803(7), and (8) [i.e., Part VI] 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).

(SB at 13). The County concurs that Sections 803(7) and (8) of Chapter 159, Part VI, adopt the Code's definition of "issuance" and that Treasury Regulations under the Code define "issuance" as the physical delivery of the Bonds in exchange for the issue price. The County completely disagrees, however, with the curious notion that the definition of the term "issuance" under the Code incorporates a decision of this Court (Mize v. County of Seminole, 229 So.2d 841 (Fla. 1969)) dealing with the term "issuance" as defined under the old Negotiable Instruments Law. 229 So.2d at 847-48. The simple fact is that the Bonds in question were the subject of "issuance" in 1984, as that term is defined under the Code (see CB at 31), and the State offers no Federal authority to the contrary. Instead, the State attempts to confuse the issue by reference to Florida, as opposed to Federal law. Moreover, the Bonds, upon conversion, will not be deemed to have been reissued under Rev. Rul. 79-262, 1979-2 C.B. 33, which ruling plainly holds that the substitution of the security for repayment of bonds will not constitute a reissuance if, as the testimony clearly indicated (CB 31-32), the terms of the Bonds otherwise remain the same.

Since the evidence and applicable Federal law clearly support the County as to the issuance of the Bonds in 1984, the State resorts essentially to semantics to further its contention. For

instance, the State contends that the provision of new documents to bondholders in connection with the conversion evidences a new issuance of the Bonds.

> 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 [quoted above, at 5-6].

(SB at 15). Of course, the State cites no authority for this conclusion, and there is none. As noted above and in the County's Initial Brief, applicable Treasury Regulations look, not to documentation received by bondholders, but to the initial exchange of the obligation for the issue price. Treas. Reg. § 1.103-13(b)(6). This exchange took place in 1984 and will not occur in connection with this revalidation. (CB 29-31).

As to the questions of when the Bonds were issued and their status under Federal law at the time of issuance, the State does not deal in any meaningful way with the arguments of the County (CB at 21-24) that the County's compliance with the "grandfathering" provisions of the Deficit Reduction Act was preclusively decided by the Circuit Court in the earlier validation proceeding, a decision affirmed by this Court in State v. Broward County, 468 So.2d 965 (Fla. 1985). As noted by the County in its Initial Brief, the Circuit Court and, by affirmation, this Court (1) specifically held that the County's actions in 1984 permitted the Bonds to be issued under the "grandfathering" provisions of the Deficit Reduction Act and (2) specifically approved the two-step financing process including the conversion

feature. (CB at 21-24). The State's response is limited to noting, correctly, that both this and the Circuit Court specifically declined, in the earlier validation, to address the issue of the County's compliance with Chapter 159. The County has never contended that the validation by this and the Circuit Court of the Bonds under Chapter 166 was controlling with respect to the issue of the County's authority to proceed under -- and its compliance with -- Chapter 159. The County's contention as to the preclusive effect of the earlier decisions is limited to the assertion that the holdings in the earlier validation proceeding, that the County had issued industrial development bonds "grandfathered" under the Deficit Reduction Act and that the two-step financing procedure was appropriate, are binding as to all parties to that earlier proceeding (which includes all parties to the instant proceeding). The position of the County in this regard is completely consonant with the decision of this Court in Rogers v. State ex rel Board of Public Instruction, 156 Fla. 161, 23 So.2d 154 (1945):

> '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.'

156 Fla. at 162, 23 So.2d at 155 (quoting 5 C.J.S. § 1832). While the earlier decisions of this and the Circuit Court are hardly dispositive of all issues presented in the revalidation, they certainly preclude the State and the Intervenors from relitigating

the issues of the County's compliance with the "grandfathering" provisions of the Deficit Reduction Act or of the propriety of the two-step financing procedure.

The final contention of the State -- that the County has not complied with Part VI of Chapter 159 -- is essentially moot if the State is wrong as regards the status under Federal law of the Bonds issued in 1984 and as to the question of reissuance. The State effectively concedes the controlling nature of those two questions. (SB at 12). The resolution of the questions as to the nature of the Bonds issued in 1984 and reissuance also moot the State's discussion of the use of the term "private activity bonds" by various of the County's witnesses. That term was effectively created by the Deficit Reduction Act and applies to industrial development bonds generally. However, the Deficit Reduction Act "grandfathered" certain private activity bonds from the volume cap limitations of that Act as long as they were issued by December 31, 1984. Thus, the issue is not whether the Bonds are "private activity bonds"; the issue is whether they were "grandfathered" under the Deficit Reduction Act and are, therefore, not subject to Part VI of Chapter 159.

POINT II

THE ADDITIONAL ISSUES RAISED BY THE STATE AND THE INTERVENORS ARE EITHER COLLATERAL TO A BOND VALIDATION PROCEEDING OR ARE WITHOUT MERIT.

In addition to attempting to justify the express reasoning of the Circuit Court, the State and Intervenors raise additional issues which, they contend, could have served as a basis for denying validation. For the most part, these contentions relate to various contractual agreements between the County and other parties involved in the Project which is to be financed, in part, by the Bonds. More specifically, the State and the Intervenors raise legal questions with respect to (1) the Service Agreements between the County and the companies which are to own, operate and maintain the Projects (the "Companies"); (2) the Interlocal Agreements between the County and those of its cities which are participating in the Project; (3) the Construction Agreements between the County and the Companies providing for the construction of the Projects; and (4) a mortgage to be provided by one of the Companies on property owned by it as security for its performance under the Service and Construction Agreements. Revenues generated under these various agreements are not pledged as security for payment of principal and interest on the Bonds and, clearly, the legality of the County's contractual arrangements with the various participants in the Project are collateral to this bond validation proceeding. As correctly noted by the Circuit Court, "[t]he scope of judicial inquiry in bond validation

proceedings is limited. Specifically, courts should (1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligations complies with the requirements of law. Taylor v. Lee County, 498 So.2d 424 (Fla. 1986)." (A. Ex. 1 at 1). The legality of the County's contractual arrangements with the other parties to the Project is clearly not encompassed within the narrow scope of such proceedings. This Court has consistently refused to entertain, in a bond validation proceeding, issues relating to the contractual obligations of an issuing municipality, even when such contractual obligations provide the revenues which are to be utilized in support of debt service of the bonds being validated. National Airlines, Inc. v. County of Dade, 76 So.2d 277 (Fla. 1954).

Finally, the various additional issued raised by the State and the Intervenors, even if not collateral, are without merit as a matter of law and on the record below.

A. The Provisions of the Service Agreements Are Not an Impediment to Validation.

The Project itself (as opposed to the Bonds after conversion) is supported by the Service Agreements between the County and the Companies pursuant to which the Companies have agreed to dispose of the waste generated in the County and to operate, maintain and repair the Project at their own expense. Pursuant to that agreement, the County has undertaken to deliver to the Companies a certain amount of waste annually and has agreed to pay the

Companies a fee for waste disposal services. The Service Agreements further provide that, under certain circumstances, the fees to be paid by the County will include reimbursements to the Companies for certain costs (the "monthly pass-throughs"), including certain taxes incurred by them, in the event certain cost assumptions of the parties are not borne out. (A. Ex. 2 at 59, 68, 73, 75). In the unlikely event that the fees collected by the County from the municipalities for the waste disposal services provided are insufficient to meet the fees owing to the Companies, the County, under the Interlocal Agreements, ultimately will have a Resource Recovery Board impose a service charge on their citizens sufficient to permit the County to meet its obligations to the Companies under the Service Agreements. (A. Ex. 2 at 75-76, 145-46). In the unlikely event the service charge imposed is insufficient and the County is still unable to meet its obligations to the Companies, the County has agreed the Companies to meet its obligations from its sources of revenues other than ad valorem tax revenues. [2]

The State and the Intervenors raise several legal issues with respect to the Service Agreements. While largely collateral to a bond validation proceeding, the issues raised by the State and the Intervenors fail as a matter of law. Contrary to the State's

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2. Any such short-term cash flow deficiency met with other than ad valorem revenues will be recouped by the County by subsequent adjustments of the fees under the Interlocal Agreements. (A. Ex. 2 at 158-56). Moreover, the County's commitment to use such County revenues is strictly a short-term contractual obligation. (A. Ex. 2 at 76).

assertions (SB at 21), the County's contingent contractual arrangement under the Service Agreements to satisfy any temporary shortfall in tipping fees and service charges with non-ad valorem tax revenue does not constitute an impermissible extension of credit under Article VII, Section 10 of the Florida Constitution ("Article VII, § 10"), because the County does not thereby obligate itself to pay the Companies' debts and no public property would be placed in jeopardy in the event of a default by the Companies. This Court has specifically stated that:

> [T]he lending of credit means the assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.

State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979), citing, Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971) (Where the purchasers of the bonds "may not look to any legal or moral obligation on the part of the state, county or authority to pay any portion of the bonds", Article VII, § 10 is not violated). The rights of the bondholders to payments of principal and interest are not secured by the Service Agreements. Instead, they are secured by the Installment Sales Agreements, pursuant to which the Companies will agree to purchase the Project from the County in return for payments of principal and interest on the Bonds. Therefore, the County's obligations under the Service Agreements

do not violate Article VII, § 10, because the County is not lending its credit to support the Project.

In addition, the State argues (SB at 22-23) that the imposition of the service charge on the citizens of the municipalities in the event the County is unable to meet its obligations to the Companies under the Service Agreements will create equal protection and due process issues, because, the State alleges, the service charge will be imposed on all improved property whether occupied or not. Mr. Henderson, the County's Project director, specifically testified that an owner of vacant property may obtain an exemption from the service charge. (A. Ex. 2 at 103). In addition, the County's contingent contractual arrangement under the Service Agreements to satisfy any temporary shortfall in tipping fees and service charges with non-ad valorem tax revenue is not a denial of due process or equal protection, because (1) as demonstrated below, the County's obligation is not a tax; and (2) even if the obligation were a tax, the revenues derived therefrom will be used to promote the general welfare of the County and thus do not violate the County's citizens' equal protection or due process rights. Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 521-23 (1937).

Furthermore, the Intervenors' contention (IB at 8) that the County has failed to comply with § 159.27(1), which provides that the Bonds must be "payable solely from the revenue derived from the sale, operation or leasing of any project or other payments received under financing agreements with respect thereto," is

incorrect. The Intervenors erroneously contend that the money to pay the principal and interest on the Bonds will be provided by the County under the Service Agreements. (IB at 2). As noted above, upon conversion of the Bonds, the County will have no obligation with respect to repayment of principal or interest on the Bonds, such obligation having been assumed by the Companies under the Installment Sales Agreements. (CB at 14; A. Ex. 2 at 85, 234, 325). Therefore, contrary to the Intervenors' assertions, the Project is entirely self-liquidating and does not violate § 159.27(1).

Moreover, the Intervenors' contention (IB at 9-10) that the County's contingent contractual obligation under the Service Agreements to satisfy any temporary shortfall with non-ad valorem tax revenues, will violate the Florida Constitution unless a referendum is held is incorrect. A referendum is not required in the present case, because the incidental effect on the use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject bonds so secured to the requirement of approval by a referendum pursuant to Article VII, Section 12 of the Florida Constitution. Town of Medley v. State, 162 So.2d 257 (Fla. 1964). Only a direct pledge of, and not an indirect impact on, the ad valorem taxing power requires referendum approval. State v. Alachua County, 335 So.2d 554 (Fla. 1976).

Finally, the State's contention (SB at 20) that the provision for the monthly pass-throughs under the Service Agreements

involves an impermissible lending of credit to aid private industry is incorrect. Although the County may be obligated under the Service Agreements to pay the Companies these monthly pass-throughs, the County is not obligated to operate or maintain the Project, nor is it in any way obligated to pay debt service to the bondholders. Furthermore, the monthly pass-throughs constitute nothing more than an agreement by the County to pay the Companies fees for solid waste disposal pursuant to a pricing formula that takes into account taxes accrued by them. This is particularly true since any such adjustments with regard to which the County agrees to reimburse the owners of the Project are for taxes which may be imposed after the Service Agreements are executed and which therefore could not have been taken into consideration when setting the tipping fee. § 159.28(3), Florida Statutes (1987) (local agencies are authorized to enter into contracts to facilitate the financing, construction, leasing, or sale of any project); Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla. 1984) (where legislative authorization exists, state entities have the power to enter into contracts.)

B. The Provisions of the Interlocal Agreements for the Imposition of a Service Charge Are Not an Impediment to Validation.

The Interlocal Agreements between the County and the municipalities which are participating in the Project provide that the municipalities (and their citizens) will deliver and pay for the disposal of solid waste generated by them. In the event that the fees collected by the County from the municipalities for the waste

disposal services provided are insufficient and the County is unable to meet its obligations to the Companies under the Service Agreements, then the County, under the Interlocal Agreements, will ultimately have the Resource Recovery Board (composed of County Commissioners and elected officials of the participating municipalities) impose a service charge on its citizens sufficient to permit the County to meet its obligations under the Service Agreements.

The State challenges this provision for the imposition of a service charge under the Interlocal Agreements, contending that the County will violate Article VII, § 10 by using its taxing power to aid the Project. The State erroneously contends that the service charge will somehow constitute a tax because it will be imposed against all improved real property within the participating municipalities. Mr. Henderson specifically testified that the service charge would have a direct correlation to waste disposal services being provided and would be based on a formula which takes into consideration classifications and sizes of property. (A. Ex. 2 at 67, 102-03). In addition, and as noted above, he testified that the owners of vacant improved property within the areas covered by the Interlocal Agreements could obtain an exemption from the service charge. (A. Ex. 2 at 103). Therefore, the service charge is not a tax because it will be imposed only against improved real property within the geographical boundaries of the areas covered by the Interlocal Agreements and because various provisions of those agreements and other related

agreements ensure that the service charge bears a reasonable relationship to the service provided. Contractors & Builders Association v. City of Dunedin, 329 So.2d 314 (Fla. 1976), cert. denied, 444 U.S. 867 (1979) (a fee will not be considered a tax if it bears a relationship to the costs of the services it is levied to provide). See also, Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983) (county ordinance requiring a developer/subdivider to dedicate land or pay a fee for expansion of county park system is permissible as long as there is a reasonable connection between the expenditures of the funds collected and the benefits accruing to the subdivision). Thus, the service charge in this case, in contrast to the land use fee considered in Broward County v. Janis Development Corp., 311 So.2d 371, 375 (Fla. 4th DCA 1975), is not a tax because it is not imposed solely for revenue purposes but, rather, to support a service the County will provide.

The State further argues (SB at 21-22) that the service charges are taxes because the Interlocal Agreements provide that, in the event the service charge is not paid, the amount due will become a lien against real property equal in rank to the lien of the County ad valorem taxes. That provision is merely a contractual provision in connection with a valid fee; it does not give rise to a tax. Contractors & Builders Association, 329 So.2d 314; Hollywood, Inc., 431 So.2d 606. Indeed, the failure to pay a service charge will only result in a judgment lien being filed in the land records of the County. A judgment lien does not enjoy

the same priority as an ad valorem tax lien. Therefore, the service charge is distinguishable from a tax.

C. The Provisions of the Construction Contracts Relating to the Companies' Equity Contributions Are Not an Impediment to Validation.

The Construction Agreements between the County and the Companies require the Companies to design, construct, start-up, test and provide expertise and technology with respect to the Projects. (A. Ex. 2 at 84, 126-27). Under the Construction Agreements, the cost of construction will be financed from the Bond proceeds (80%) and by equity contributions from the Companies (20%). (A. Ex. 2 at 84). The State challenges the Construction Agreements on the theory that the County has allegedly agreed to "lend" the Companies their equity contribution in violation of the prohibition of Article VII, § 10 against lending credit. (SB at 20). As testified to by Mr. Henderson, the equity contribution will be paid periodically by the Companies as required by the Federal tax laws to ensure that the Project remain tax-exempt facilities. Contrary to the State's assertions, Mr. Henderson clearly testified that the County has no obligation to lend monies to the Companies to finance their equity participation or for any other purpose. (A. Ex. 2 at 106-08).

D. The Mortgage to Be Granted to the County Will Not Constitute an Impediment to Validation.

The Intervenors also argue that a mortgage to be granted to the County in order to further secure one of the Companies' obligations to the bondholders will somehow constitute an

impermissible lending of credit under Article VII, § 10. However, Mr. Henderson testified unequivocally that the County will extend no loan or funds to that company in connection with that mortgage and security interest. (A. Ex. 2 at 130). In fact, an affiliate of that company presently owns the property to be the subject of the mortgage and the County's rights under the mortgage on, and security in, the property will be assigned to a trustee for the benefit of the bondholders. (A. Ex. 2 at 92). Therefore, no lending of credit can be said to have occurred.

E. The County's Formation of Two Corporations to Obtain Permits Does Not Violate the Florida Constitution.

In addition to the challenges with respect to the various agreements discussed, the Intervenors go so far as to attack the process by which the County has obtained the permits that will allow the Project to be constructed. The Intervenors argue that the County has impermissibly formed two Florida, for-profit corporations: North Broward County Resource Recovery Project, Inc. and South Broward Resource Recovery Project, Inc. (the "Corporations"). The Corporations were created in 1984, at the request of the County, by its bond counsel, Brown & Wood, to obtain the necessary local, State and Federal permits with respect to the Project, including zoning, siting and environmental permits. (A. Ex. 2 at 61-62). The Corporations were used solely for purposes of obtaining the permits and conforming with Federal tax law, were never capitalized and have never had either revenues or profits. (A. Ex. 2 at 62-63, 175). It is, and has been, the

County's intent to assign the permits obtained by the Corporations to the Companies on or after the date construction begins, and to have the Companies assume the County's rights and obligations under those permits and tax law requirements. (A. Ex. 2 at 164). Indeed, the County retained control over the Corporations to maintain bargaining leverage in negotiations with the Companies. There is no evidence in the record to suggest, and it has never been the County's intent, to have the Corporations operate or be operated for the purpose of generating profits. Therefore, the Intervenors' contention that the County has violated the Florida Constitution by forming the Corporations is incorrect. Moreover, this issue is clearly collateral to the question of whether the Bonds should be validated.

In any event, the cases cited by the Intervenors to support their contention that the formation of the Corporations violates the Florida Constitution are not applicable to the present case. (See IB at 13-14). Those cases simply state that public funds shall not be used to further a private enterprise that does not serve a public purpose. In the present case, the purposes to be achieved by the Project are explicitly defined by § 159.26(4) to be public purposes within the meaning of Article VII, § 10. Therefore, the County has not violated the Florida Constitution by creating the Corporations because it has acted solely for the purpose of facilitating the construction of the Project pursuant to the requirements of Chapter 159, Part II.

POINT III

VALIDATION IS NOT PREMATURE.

The State wrongly suggests that the validation proceeding held in January was premature because the County was still negotiating amendments to some of the agreements relating to the North site for the Project. The terms of critical agreements with respect to the Project have all been finalized. In fact, the amendments referred to by the State do not change the obligations of the Companies with respect to the development and construction of the Project. Indeed, and as noted in Exhibit V of the State's Appendix, the amendments are required because (1) certain environmental regulations were changed which required that Companies commit to adding certain pollution control equipment to the Project; (2) the delay in validation required that certain termination provisions in the Construction Contracts be changed; and (3) there had been tax law changes which had to be taken into consideration. (A. Ex. 2 at 82-83). Thus, the amendments did not affect the plans for the Project in any significant way. Indeed, the Installment Sales Agreement, the only agreement that will directly secure payment of principal and interest on the Bonds, has not been changed.

Moreover, this Court has held that the agreements that will eventually secure payments on the bonds need not be presented to the validating Court, as long as the documents presented to the Circuit Court set forth the requirements which any security device ultimately executed would have to satisfy. State v. Housing

Finance Authority of Pinellas County, 506 So.2d 397, 400 (Fla. 1987). The County has set forth, in the Circuit Court, all the requirements that will be contained in the agreements that will secure the payments on the bonds. Therefore, validation would not be premature. In any event, the County submits that under the standards set forth in State v. Housing Finance Authority of Pinellas County, to the extent that subsequent events or agreements relating to the Project do not satisfy the requirements of law, or are not in conformity with the resolutions passed by the County relating to the Project, validation would not preclude challenges to those matters that were not before the Circuit Court. 506 So.2d at 400 (Fla. 1987).

POINT IV

THE COUNTY HAS COMPLIED WITH THE REQUIREMENTS OF § 159.29(2).

In addition to raising the collateral issues addressed above, the Intervenors contend (IB at 11) that the County has not complied with the requirements of §159.29(2) because the County does not intend to enter into financing agreements with financially responsible companies. Section 159.29 sets forth the criteria and requirements that a municipality must consider in connection with undertaking a project pursuant to Chapter 159, Part II. Section 159.29 also provides that "the determination of the local agency as to compliance with such criteria and requirements shall be final and conclusive." This Court has consistently construed this statute in accordance with its terms and has stated

that it will not look beyond the determination of the local agency that the criteria of § 159.29 have been met. State v. Jacksonville Port Authority, 266 So.2d 1, 2-3 (Fla. 1972) (Where the local agency has passed a resolution determining that the criteria of Section 159.29 have been met, a conclusion that the requirements of § 159.29 have been satisfied is necessary). See also, International Brotherhood of Electrical Workers v. Jacksonville Port Authority, 424 So.2d 753, 756 (Fla. 1982); State v. Leon County, 410 So.2d 1346, 1347-48 (Fla. 1982).

The County presented abundant evidence, undisputed by the State or the Intervenors, that the County selected the Companies after considering -- and establishing close compliance with -- the criteria contained in § 159.29. (A. Ex. 2 at 92-94, 222, 314, 352-54). Indeed, the County adopted, on November 25, 1986, Resolution 86-4486 which set forth the County's determinations that each of the criteria of Section 159.29 had been satisfied. (See A. Ex. 9 at 21). Therefore, the requirements of § 159.29 have been met.

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 directions to the Circuit Court to enter its judgment validating the Bonds under Chapter 159, Part II, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been delivered by U.S. mail 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 9th day of May 1988.

By: _____
for F. TOWNSEND HAWKES
Carlton, Fields, Ward,
Emmanuel, Smith, Cutler
& Kent, P.A.