OA 9-6-96

SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 22 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

GORDON LOZIER,

Appellant,

v.

COLLIER COUNTY, FLORIDA,
a political subdivision,

Appellee,
_____/

CASE NO. 87,609

LOWER CASE NO. 95-4491-CA

BRIEF OF AMICUS CURIAE
MARCO ASSOCIATION OF CONDOMINIUMS, INC.

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PREFACE

Appellant, Gordon Lozier, will be referred to as "Appellant." Appellee, Collier County, will be referred to as the "County" or as "Collier County." Citations to Appellee's Appendix will be stated as "App. ____." Citations to Appellant's Brief shall be referred to as "Br. ____."

JURISDICTIONAL STATEMENT

This is an appeal under Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a final order issued pursuant to Chapter 75, Florida Statutes, validating a proposed loan obligation of the County.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Marco Association of Condominiums, Inc. ("MAC"), accepts the statement of the case and facts as presented in Appellee's Answer Brief. MAC would add that it is a non-profit corporation comprised of fifty-six (56) condominium associations located on Marco Island, Florida. MAC's member associations in turn represent Five Thousand Nine Hundred Thirty Eight (5,938) unit owners on Marco Island.

A. THE USE OF TOURIST TAX REVENUES TO SERVICE THE DEBT OF NOTE A-6-1 IS A VALID USE OF TOURIST TAX REVENUES.

Appellant's primary argument is that, because the proceeds of Note A-6-1 will be used to refund the Series 1989 bonds issued by Collier County instead of being used to actually apply sand to the beaches of Marco Island, the validation of Note A-6-1 by the Circuit Court was in error. Appellant argues that the refunding of the Series 1989 bonds with the proceeds of Note A-6-1 and the use of tourist tax revenues to repay Note A-6-1 will not further the renourishment program initially funded by the Series 1989. Appellant's arguments have no basis in fact[1] or law, and the absence of citations to relevant authority for his arguments indicates the precarious nature of Appellant's position.

First, Appellant states that none of the proceeds of Note A-6-1 will be used to construct any form of erosion control. Appellant admits, however, that portions of the erosion control system initially funded by the Series 1989 bonds are currently being constructed, specifically a breakwater adjacent to the renourished beaches. (Br. 10) It can, therefore, be argued that the proceeds of Note A-6-1 will be directly used for providing and maintaining the breakwater and other erosion control systems being constructed. Second, Appellant's argument that because the tourist tax revenues will, in effect, be utilized to refund bonds and not

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[1] It is interesting to note that while Appellant relies heavily upon the contents of relevant resolutions, ordinances, bonds, and other documents, Appellant fails to prepare an appendix containing the referenced documents for the Court's review.

finance beach renourishment and erosion control, is equally unavailing. Appellant fails to point out that Section 3(A)(2) of Ordinance 92-60 which authorized the use of tourist tax revenues to repay Note A-6-1, specifically provides that "revenues derived from the tourist development tax may be pledged to secure and liquidate revenue bonds in accordance with Section 125.104, Florida Statutes." (App. A-264) Section 125.0104(5)(a) and (c) Florida Statutes (1995), specifically authorizes Collier County to finance, among other things, "erosion control including shoreline protection," and to "refund bonds previously issued for such purposes." Therefore, Appellant's assertion that tourist tax revenues were intended to "provide a financing vehicle to undertake only future, not past beach projects," flies in the face of the clear and unambiguous language of Section 125.0104(5)(c), Florida Statutes (1995), and the relevant ordinances. (Br. 6)

This Court has repeatedly held that inherent in a local government's authority to issue bonds is the authority to refund such bonds. State v. City of Miami, 19 So.2d 790 (Fla. 1944); State v. Escambia County, 52 So.2d 125 (Fla. 1951). In State v. Escambia County, the county issued bonds of which a portion of the proceeds would be used to refinance previously issued county bonds. The appellant in Escambia County argued that the bonds should not have been validated because the special act of the legislature authorizing the bond issue did not specifically provide that the proceeds of the bonds could be used to refund prior obligations. Id. at 128-29. This Court rejected this argument by stating "that

the legislature by inference conferred the power and authority to [refund the bonds] on the County . . . ." 51 So.2d at 129. Therefore, Collier County could have issued Note A-6-1 to refund the Series 1989 bonds without the express authorization to use tourist tax revenues contained in Section 125.0104, Florida Statutes (1995). See State v. City of Miami, 19 So.2d 790 (Fla. 1994). In this case, and in addition to the inferred authority to refund, Collier County has been expressly authorized to refund the Series 1989 bonds and the use of tourist tax revenues by §125.0104(5)(a), Florida Statutes (1995).

In an effort to circumvent the express authorization for counties to use tourist tax revenues to refund previously issued bonds, Appellant argues that the Series 1989 bonds were not "county bonds" as contemplated by Section 125.0104(5), Florida Statutes (1995). (Br. 7) Appellant asserts that the Series 1989 bonds were issued by a separate and distinct taxing authority, i.e. the Marco Island Beachfront Renourishment Facilities Municipal Service Taxing Unit. Id.

As concisely stated in Appellee's brief, Municipal Service Taxing Units ("MSTU") are merely internal financing vehicles through which a county may fund the provision of a particular service by levying ad valorem taxes within an area that is less than the entire county. Gallant v. Stephens, 358 So.2d 536 (Fla. 1978). Counties are expressly authorized by Section 125.01(1)(9), Florida Statutes (1995), to "establish, and subsequently merge or abolish those created hereunder, Municipal Service Tax or benefit

units for any part or all of the incorporated area of the county, within which may be provided . . . beach erosion control . . . ." The statute further states that an MSTU is merely a unit of the county and that "the Board of County Commissioners shall be the governing body of any municipal service taxing or benefit unit created pursuant to paragraph (1)(a)." F.S. §125.01(2) (1995). A review of Collier County ordinance creating the Marco MSTU reveals that the Board of County Commissioners was indeed named the governing body of the MSTU. (App. A-21) Therefore, Appellant's argument that the tourist tax revenue should not be used to refund the Series 1989 bonds because the bonds were not "county bonds" as contemplated by Section 125.0104, Florida Statutes, is incorrect.

Appellant also inaccurately states that the Series 1989 bonds state that the bonds were issued by the Marco MSTU. (Br. 7) The Introduction in the Official Statement attached to the Complaint (Exhibit "B") recognized that these bonds were "county bond," when it specifically stated:

> The purpose of the Official Statement, which includes the cover page and the Appendices hereto, is to furnish information with respect to the issuance and sale of $5,000,000 in aggregate principal amount of Marco Island Beachfront Renourishment Facilities Municipal Service Taxing Unit Limited General Obligation Bonds, Series 1989 (the "Bonds") by the County. The Bonds are being issued under the authority of and in full compliance with the laws of the State of Florida, including but not limited to Section 12, Article VII, Florida Constitution, and Chapter 125, Florida Statutes, all as amended and supplemented (collectively, the "Act"), and Resolution No. , adopted by the Board of County Commissioners (the "Board") of the County, acting on its own behalf and as the Governing Body of the Marco Island Beachfront Renourishment Facilities Municipal Service Taxing Unit (the "MSTU"), on , 1989, as supplements, in particular by Resolution No. of the Board duly

adopted on , 1989 (collectively, the "Resolution").

(App. A-76) (Emphasis added).

Furthermore, Resolution 89-112 which authorized the issuance of the Series 1989 bonds specifically states that Collier County was the entity issuing the bonds.

Last, Appellant implies that the electorate of Collier County, or at least certain segments of it, would be "shocked" to learn of the use to which the tourist tax revenues were being put and that the burden of repaying the costs of the beach renourishment has been shifted from property owners within the Marco MSTU to other tax payers without their consent. (Br. 8) Appellant makes this assertion despite the fact that the use of the tourist tax revenues was approved by referendum vote on November 3, 1992, and that the ordinance authorizing the use of tourist tax revenues, Ordinance 92-60, states that the proceeds of Note A-6-1 could be used to fund previously issued bonds. (App. A-267) Therefore, the public was on notice that the tourist tax revenues could be used to refund previously issued obligations that funded the beach renourishment. Appellant's own brief discloses the fact that the relevant ordinances (92-60, 95-56) provided that a portion of the tourist tax imposed would be used to "finance beach improvement, maintenance, renourishment, restoration and erosion control, including pass and inlet maintenance." (App. A-266-67; App. A-276)

Accordingly, tourist tax revenues may be utilized to service the debt embodied by Note A-6-1, the proceeds of which may legally

be used to refund the Series 1989 bonds. Collier County is authorized by Section 125.0104, Florida Statutes, and case law to use tourist tax revenues to refund bonds and, in effect, refinance beach renourishment, maintenance and erosion control. The continued financing of the maintenance of the renourished beaches on Marco Island is of great importance to MAC's members, as is the construction of the breakwaters currently in progress. For the foregoing reasons, the Circuit Court's order validating Note A-6-1 should be affirmed.

B. APPELLEE HAS NOT PLEDGED AD VALOREM REVENUES.

Appellant's second argument is that Appellee should have held a referendum on the issuance of Note A-6-1 because it is supported by a pledge of ad valorem taxes. As concisely stated by Appellee, Ordinance 95-488, Section 3(G), and Section 6.01 of the Loan Agreement specifically state that the ad valorem taxing power and full faith and credit of Appellee was not being encumbered or pledged in any fashion. (App. A-260 & A-228)

Appellant's reliance on County of Volusia v. State, 417 So.2d 968 (Fla. 1982), for the proposition that the Appellee's ad valorem taxing power has been pledged without a referendum is clearly misplaced. As pointed out by Appellee, the instant case does not involve a pledge of all legally available non-ad valorem revenues combined with a covenant to maintain certain programs as was the case in County of Volusia. See 417 So.2d at 971. In County of Volusia, the Court quoted the general rule from its decision in

Town of Medley v. State, 162 So.2d 257 (Fla. 1964), stating:

> Only bonds or certificates of indebtedness which directly obligate the ad valorem taxing power are encompassed by [the constitutional referendum requirement]. The incidental effect on use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject such bonds or certificates to that constitutional requirement.

Id. The Court concluded that to "hold otherwise would prevent a local government from pledging non-ad valorem funds previously used for general operating expenses without a referendum." Id.

In County of Volusia, this Court also took great care in distinguishing the pledge of all non-ad valorem revenues and a commitment to maintain certain programs in that case from other cases in which a specific and limited pledge of non-ad valorem taxes would only have an incidental effect on the ad valorem taxing power. See, e.g., State v. Alachua County, 335 So.2d 554 (Fla. 1976) (holding that pledge of annual revenue sharing funds and racetrack proceeds had no direct effect on ad valorem taxing power); Town of Medley, 162 So.2d 257 (Fla. 1964) (pledge of water system revenues, cigarette taxes, franchise taxes, utilities taxes, and occupational license taxes found to have only incidental effect on ad valorem taxing power). The instant case only involves the pledge of 50% of the first 3% of the revenues generated by the tourist tax. (App. A-258) Clearly, the tourist tax is not an ad valorem tax and the pledge of only 50% of the first 3% of this single non-ad valorem revenue source will have only an incidental and insignificant effect, if any, on ad valorem taxation and is insufficient to trigger the application of this Court's holding in

County of Volusia. See City of Palatka v. State, 440 So.2d 1271 (Fla. 1983); State v. School Bd. of Sarasota County, 561 So.2d 549 (Fla. 1990). Further, it should be noted that there is not a pledge to maintain a specific program in the instant case.

Appellant's last argument is that, because Note A-6-1 is a variable interest rate note, the validation of Note A-6-1 without a referendum violates the requirement of Article VII, Section 12(a), Florida Constitution, that the issuance of bonds to refund prior bonds must result in "lower net average interest cost rate." (Br. 11) Appellant's argument is entirely without merit. Article VII, Section 12 of the Florida Constitution specifically states:

> SECTION 12. Local bonds. Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:
>
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or
>
> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

The plain language of Article VII indicates that this requirement is applicable only to bonds or certificates of indebtedness issued to refund previously issued bonds and which would be paid from ad valorem taxes.

In State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), the City of Sunrise sought to validate certain bonds the proceeds of which were to be used to refund previously issued bonds, which in

turn had refunded prior bonds. This method of refunding bonds, known as "double advance refunding," was novel at the time, and the bonds in question were to be serviced entirely by non-ad valorem revenues. Id. at 1208. The Appellants in that case argued that the net effect of the "double advance refunding" bonds would not result in a "lower net average interest cost." Id.

This Court rejected this argument holding that "the provisions of Article VII, Section 12(b) apply only to "bonds . . . payable from ad valorem taxation . . . and is not applicable to the issuance of revenue bonds." Id. at 1209. City of Sunrise is on point with the case at hand. In the instant case no ad valorem revenues have been pledged to repay Note A-6-1. Accordingly, the Circuit Court's decision validating Note A-6-1 should be affirmed.

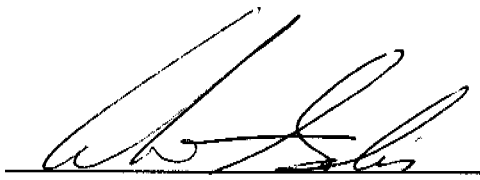
CONCLUSION

Appellee, Collier County, Florida, has the authority pursuant to case law and the Florida Statutes to refund its Series 1989 bonds with the proceeds of Note A-6-1 and to repay Note A-6-1 from tourist tax revenues. Inherent in the Appellee's authority to issue bonds is the authority to refund those bonds. Further, Section 125.0104, Florida Statutes, expressly authorizes Appellee to use tourist tax revenues to refund bonds previously issued to fund beach renourishment programs.

Appellant's allegation that Appellee has pledged future ad valorem taxes to pay Note A-6-1 is entirely without merit. The relevant ordinances and resolutions, as well as the loan and bond documents themselves, clearly state that no pledge of ad valorem

taxes was made to secure Note A-6-1. The case law cited by Appellant for the proposition that certain covenants in the loan documents will have the effect of pledging future ad valorem taxes is inapplicable. This Court has repeatedly held that incidental effects on ad valorem taxation by the pledge of non-ad valorem revenues does not trigger the referendum requirement contained in Article VII of the Florida constitution. Therefore, it is also abundantly clear from the plain language of Article VII, Section 12, Florida Constitution, that the "lower net average interest cost" requirement therein applies only to bonds payable from ad valorem tax revenues.

For the foregoing reasons, all of Appellants' arguments must fail and the order of the Circuit Court validating the issuance of Note A-6-1 should be affirmed.



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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to: David Weigel, Esq., 3301 Tamiami Trail East, Administration Building, Naples, Florida 33962; Robert C. Gebhardt, Gebhardt & Miller, 2500 Tamiami Trail North, Suite 112, Naples, Florida; and Gregory T. Stewart, Esq., 315 Calhoun Street, Suite 800, Tallahassee, FL 32302-3008 by regular, U.S. Mail, postage prepaid, this 20th day of MAY, 1996.

Andrew I. Solis

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