SUPREME COURT OF FLORIDA

GORDON LOZIER,

Appellant,

vs. CASE NO. 87,609

COLLIER COUNTY, FLORIDA, a political subdivision, LOWER COURT CASE NO. 95-4491-CA

Appellee.

_____/

ANSWER BRIEF OF APPELLEE,
COLLIER COUNTY, FLORIDA

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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. ____."

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

Appellee, COLLIER COUNTY, FLORIDA (the "County"), accepts the statement of the case and facts as presented within the Appellant's Initial Brief, subject to the following corrections and supplementation.

On June 14, 1988, the County adopted Ordinance 88-59 (App. A-20) (attached to the Complaint as Exhibit "A") which created the Marco Island Beachfront Renourishment Facilities Municipal Service Taxing Unit (the "Marco MSTU"). The purpose of the Marco MSTU was to provide a means of financing beach renourishment and erosion control at the Marco Island Beach through the assessment of an ad valorem tax upon property located within the boundaries of the Marco MSTU. The ordinance provided an annual ad valorem tax on all taxable property within the Marco MSTU, not exceeding one and one-half (1 1/2) mills.

On May 17, 1989, the County adopted Resolution 89-112 (App. A-28) (attached to the Complaint as Exhibit "B"), which sought the issuance of bonds ("Series 1989 Bonds") for the purpose of funding the beach renourishment program. The revenue source for such bonds was the ad valorem tax imposed within the Marco MSTU. The issuance of the Series 1989 Bonds and the pledge of the ad valorem tax for such purpose were approved by voters within the Marco MSTU on

November 8, 1988.[1] Such voter approval was pursuant to the constitutional requirements of Article VII, section 12, Florida Constitution. The Series 1989 Bonds were subsequently issued in the aggregate principal amount of $5,000,000, of which approximately $2,755,000 remains outstanding.

On March 26, 1991, the Board of County Commissioners of Collier County approved participation in a pooled commercial paper loan program of the Florida Local Government Finance Commission ("Finance Commission") (App. A-128). The Finance Commission is a legal entity and a public body corporate and politic created pursuant to Chapter 163, Part I, Florida Statutes. The Finance Commission created the pooled commercial paper loan program to make loans available to public agencies to provide funding for the acquisition and construction of capital improvements, purchasing of equipment and financing of other governmental needs. Public agencies which participate in the program are allowed to obtain funds from the Finance Commission from time to time in such amounts to provide such public needs. Pursuant to the Finance Commission's standard loan agreement, the particular loans received are secured by a covenant to budget and appropriate on an annual basis from legally available non-ad valorem revenues. Additionally, a

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[1]Appellant mistakenly states that the voter approval was obtained for the creation of the Marco MSTU.

participating public entity may pledge a specified revenue for the repayment of a loan used to finance a particular project.

On August 18, 1992, the County adopted a tourist tax ordinance as authorized by section 125.0104, Florida Statutes. The County's tourist tax ordinance, Ordinance 92-60 (App. A-264)(attached to the Complaint as Exhibit "F") provided for the enactment of a tourist development plan and collection of a two percent (2%) tourist development tax in accordance with the statute. On November 3, 1992, the voters of the County approved the 1992 tourist development tax ordinance and tourist development tax plan by a referendum vote. On October 24, 1995, the County adopted Ordinance 95-56 (App. A-276)(attached to the Complaint as Exhibit "G"), which amended the 1992 tourist development ordinance (Ordinance 92-60) and directed the levy and collection of an additional one percent tourist development tax during the period of January 1, 1996 through December 31, 1999. The levy and collection of the additional one percent was adopted by an extraordinary vote of the Board of County Commissioners of Collier County pursuant to the requirements of section 125.0104, Florida Statutes.

In September 1995, the County sought to borrow money under its loan agreement with the Finance Commission (the "Loan Agreement")(App. A-195) and proposed to issue its Collier County, Florida Revenue Note A-6-1, for the purpose of liquidating and refunding the previously issued Series 1989 Bonds. The County

elected to pledge a specific revenue for their payment of Loan Number A-6-1 (as evidenced by Note A-6-1). As contained within Resolution 95-488 (App. A-257) (attached to the Complaint as Exhibit "E") adopted on September 5, 1995, the pledged revenue was designated as follows:

> Loan No. A-6 shall be secured at such time it is made by a pledge of and lien on 50% of the first three percent (3%) of tourist development tax received by the County pursuant to Section 125.0104, Florida Statutes, and the County's Ordinance No. 92-60, adopted by the County on August 18, 1992, as amended. The pledge of and lien on such tourist development tax shall terminate upon (1) repayment of Loan No. A-6 in accordance with the terms of the Loan Agreement or (2) agreement by the County and First Union National Bank of Florida to so terminate such pledge and lien.

(App. A-263).

On November 7, 1995, the County filed its Complaint for Validation (App. A-11) and on November 9, 1995, the Circuit Court entered an Order to Show Cause directing the State of Florida and the several property owners, taxpayers and citizens of the County, including non-residents owning property in the County to appear before the Circuit Court on January 31, 1996, and show cause why the borrowing of a principal amount not to exceed $3,000,000 under the Loan Agreement and Note A-6-1 should not be validated. On January 31, 1996, after proper notice, a hearing was held before the Circuit Court. After hearing testimony and considering the exhibits submitted into evidence, the Court on February 16, 1996,

rendered its decision validating the borrowing and issuance of Note A-6-1 (App. A-1).

An appeal was filed on or about March 18, 1996 by Appellant Gordon Lozier. The Appellant did not intervene in the circuit court proceedings.

SUMMARY OF ARGUMENT

The pledge of tourist tax proceeds to liquidate or refund bonds which were previously issued and used to finance beach renourishment and erosion control is an authorized activity under section 125.0104, Florida Statutes. Further, the project originally funded by the Series 1989 Bonds, which are sought to be refunded by the loan from the Finance Commission, is a valid use of tourist development tax proceeds. No direct pledge of ad valorem taxes has been made for the purpose of repaying the loan from the Finance Commission which would invoke the referendum requirements of Article VII, section 12, Florida Constitution. The pledged revenues for the repayment of Note A-6-1 is expressly limited to a portion of the proceeds received from tourist development tax revenues. Nor does the pledge of a portion of the tourist development tax proceeds impact upon the revenues of the County to such a level as to constitute a general pledge of the ad valorem taxing power of the County.

ARGUMENT

A. THE PROCEEDS OF THE NOTES SECURED BY THE PLEDGE OF TOURIST DEVELOPMENT TAX REVENUES MAY BE UTILIZED TO LIQUIDATE AND RETIRE PREVIOUSLY ISSUED BONDS.

In Florida, the scope of judicial inquiry in bond validation proceedings is limited. The Supreme Court in Rowe v. St. Johns County, 668 So.2d 196 (Fla. 1996), recently reiterated this inquiry as follows:

> The scope of judicial inquiry in bond validation proceedings is limited to the following issues: 1) determining if the public body has the authority to issue the bonds; 2) determining if the purpose of the obligation is legal; and 3) ensuring that the bond issuance complies with the requirements of law.

Id. at 198 (citations omitted).

The primary issue raised by the Appellant is that the refunding of previously issued voter approved bonds through the use of a note primarily secured by the pledge of tourist development tax is not authorized by the Florida Legislature. Contrary to Appellant's arguments, the use of tourist development tax revenues for refunding previously issued bonds is not only expressly authorized by section 125.0104, Florida Statutes, but is also within the inherent power of the County. Further, the use of tourist development taxes for projects which fall within its authorized use, whether directly funding or through refunding of previously issued bonds, is clearly authorized and constitutes a public purpose.

Under the provisions of the Florida Constitution, Collier County has been granted home rule powers of self-government. Article VIII, section 1(f), Florida Constitution. Under the Constitution's broad grant of home rule powers, the County has the authority to do any act not deemed contrary or inconsistent to general law. Apart from the pervasive home rule powers which exist under the Florida Constitution, counties have also been given express legislative authority to provide numerous services and improvements. In regard to beach erosion control and renourishment, section 125.01(1)(j), Florida Statutes, expressly authorizes counties to:

> (j) Establish and administer programs of housing, slum clearance, community redevelopment, conservation, flood and beach erosion control, air pollution control, and navigation and drainage and cooperate with governmental agencies and private enterprises in the development and operation of such programs.

Id. (emphasis added).

Pursuant to this authority, the County in 1989 created the Marco MSTU for the purposes of providing erosion control and beach renourishment within that district. Pursuant to Resolution 89-112 (App. A-28), adopted on May 2, 1989, the County proposed the issuance of bonds to fund such project secured by a voter approved ad valorem levy within the boundaries of the MSTU. As originally contained in Resolution 89-112, the project was described as follows:

> Placement of fill at three separate beachfront locations within the Unit. The three locations comprise approximately 14,000 feet of shoreline. The Project will involve the placement of in excess of 1,000,000 cubic yards of fill, to create sand dunes and berms principally to replace prior erosion and provide protection against further erosion, all as provided by the plans and specifications on file or to be on file with the County, as the same may be amended from time to time.

(App. A-62).

The County now seeks to refund these bonds pursuant to a loan from the Finance Commission secured by Note A-6-1 in an amount not to exceed $3,000,000 in aggregate principal. The loan from the Finance Commission sought to be used for the refunding of the Series 1989 Bonds pledges a portion of the County's tourist development tax proceeds for its repayment. The tourist development tax in Collier County was adopted in 1992 and approved by the voters. An additional one percent (1%) was approved by the Board of County Commissioners in 1995 by extraordinary vote. Under section 125.0104(5)(a), Florida Statutes, the use of tourist development tax proceeds are restricted to certain purposes. Among these are to finance beach improvement, maintenance, renourishment, restoration and erosion control, including shoreline protection, enhancement, cleanup or restoration of inland lakes and rivers to which there is public access. section 125.0104(5)(a)4, Florida Statutes.

Resolution 95-488, which authorized the borrowing of money from the Finance Commission for the refunding of the Series 1989 Bonds ("Project A-6"), described Project A-6 as follows:

> "Project A-6" means the beach renourishment improvements described in the County's Resolution No. 89-112, adopted on May 2, 1989, as amended. Such improvements were funded by the County's Marco Island Beachfront Renourishment Facilities Municipal Services Taxing Unit Limited General Obligation Bonds, Series 1989. Such Bonds shall be refinanced by proceeds of Loan No. A-6.

(App. A-258-259).

Clearly, the project originally funded through the Series 1989 Bonds falls within the purview of beach renourishment and erosion control and would constitute an authorized use of tourist development taxes if directly funded. The sole issue is whether the County may pledge tourist development tax revenues to retire, refund or refinance previously issued bonds which were used for an authorized purpose.

The use of tourist development tax revenues to refund or retire bonds is specifically addressed in section 125.0104(5)(c), Florida Statutes. This provision states as follows:

> (c) The revenues to be derived from the tourist development tax may be pledged to secure and liquidate revenue bonds issued by the county for the purposes set forth in subparagraphs (a)1. and 4. or for the purpose of refunding bonds previously issued for such purposes, or both; however, no more than 50 percent of the revenues from the tourist development tax may be pledged to secure and liquidate revenue bonds or revenue refunding bonds issued for the purposes set forth in subparagraph (a)4. Such revenue bonds and

> revenue refunding bonds may be authorized and issued in such principal amounts, with such interest rates and maturity dates, and subject to such other terms, conditions, and covenants as the governing board of the county shall provide. The Legislature intends that this paragraph shall be full and complete authority or accomplishing such purposes, but such authority shall be supplemental and additional to, and not in derogation of, any powers now existing or later conferred under law.

Id. (emphasis added).

Further, the specific restrictions of section 125.0104(5)(c), Florida Statutes, as to the extent that tourist development tax revenues may be used for refunding purposes are expressly incorporated in the definition of "pledged revenues" contained in section 1 of Resolution 95-488. As defined in Resolution 95-488, the pledged revenues consist of "50% of the first three percent (3%) of tourist development tax received by the County, as more particularly described in Exhibit A attached hereto." (App. A-258) Exhibit "A" to Resolution 95-488 also incorporates the restrictions limiting the use of tourist development tax revenues to "50% of the first three percent (3%) of tourist development tax received by the County pursuant to section 125.0104, Florida Statutes, and the County's Ordinance No. 92-60, adopted by the County on August 18, 1992, as amended." (App. A-263)

Clearly, the Legislature has specifically contemplated that a portion (50%) of tourist development taxes may be used to refund, refinance previously issued bonds, provided that such previous bonds were for the purposes for which tourist development taxes

could be used. Nor does such language restrict or limit the ability to refund based upon the particular revenue which was pledged under the previous bonds.

Apart from the express legislative authority to utilize tourist development tax proceeds for refunding purposes, it is well established that the authority to issue bonds inherently carries with it the power to refund such obligations. State v. City of Miami, 19 So.2d 790 (Fla. 1944); State v. Escambia County, 52 So.2d 125 (Fla. 1951).

Appellant's argument is that any revenue source which is restricted to a particular use can never be utilized to refund bonds which were used to fund a previously constructed project since no new project is being built. This assertion is contrary to Florida law. The ultimate issue is whether the project sought to be refinanced falls within the authorized use of the tourist development tax revenues, not whether it was previously funded by some other revenue source. Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1996). An acceptance of Appellant's argument would render the express language of section 125.0104(5)(c), Florida Statutes, meaningless.

Appellant also raises the issue as to whether the use of tourist development tax, which is derived from the County as a whole, may be utilized to refund bonds secured by a voter approved ad valorem tax collected within a single municipal service taxing

unit. Appellant misunderstands the concept of a municipal service taxing unit. A municipal service taxing unit is not constitutionally or functionally a special district. It is purely a mechanism by which a county can fund a particular service from a levy of ad valorem taxes, not countywide, but within all or a portion of the unincorporated areas. Gallant v. Stephens, 358 So.2d 536 (Fla. 1978). An MSTU is a tax equity tool available to a board of county commissioners, within its legislative discretion, to place the burden of ad valorem taxes upon a geographic area less than countywide to fund a particular service or improvement.[2] Thus, in terms of function and accountability, an MSTU is no different than any other revenue source appropriated and budgeted by the County.

In the present case, the Board of County Commissioners created a municipal service taxing unit within the Marco Island area to fund beach renourishment. Subsequent to this action, the voters of Collier County, recognizing the necessity and benefit of providing for erosion control and beach renourishment on a countywide basis, approved the imposition of a tourist development tax. Such voter approval did not exist before the creation of the Marco MSTU and the issuance of the Series 1989 Bonds. Having subsequently

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[2]Contrary to Appellant's argument, the Series 1989 Bonds were not issued by the Marco MSTU, but by Collier County. Under the provisions of Resolution 89-112, the issuer of the Series 1989 Bonds is clearly designated as Collier County (App. A-32).

obtained voter approval, the County seeks to utilize the tourist development tax derived from the County as a whole to fund beach renourishment, in recognition that its benefits extend far beyond those immediately adjacent to a particular beach area. The availability of beaches as a recreational resource is a primary attraction to both tourists and residents alike. This resource adds revenue and benefits to the County as a whole and the funding of such improvements is more equitably allocated on a countywide basis, rather than within a single, discrete area.

B. THE OBLIGATIONS UNDER THE LOAN AGREEMENT DO NOT CONSTITUTE A PLEDGE OF AD VALOREM REVENUES.

Appellant argues that the Loan Agreement entered into between the Finance Commission and the County sets forth certain obligations which, when coupled with the pledge of the tourist development tax, constitute an encumbrance of the ad valorem revenues of the County, contrary to Article VII, section 12, Florida Constitution.

In State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980), this Court interpreted the words "payable from ad valorem taxation" in Article VII, section 12, and held that a referendum is not required when no direct pledge of the ad valorem taxing power exists. Under the Loan Agreement at issue, no direct

pledge of ad valorem taxes exists for the payment of the loan. In fact, section 6.01 of the Loan Agreement states as follows:

> Anything in this Loan Agreement to the contrary notwithstanding, it is understood and agreed that the ad valorem taxing power and the full faith and credit of the Public Agency has not been pledged to secure the obligations of the Public Agency hereunder, except to the extent ad valorem taxes are pledged pursuant to Section 6.03 hereof.[3]

(App. A-228). Further, Resolution 95-488, section 6, expressly provides that the obligation to repay Loan No. A-6 shall not be deemed a pledge of the faith and credit or taxing power of the County.

Though clearly no direct pledge of the ad valorem taxing power of the County has been made, Appellant relies on the case of County of Volusia v. State, 417 So.2d 968 (Fla. 1982). In County of Volusia, the County sought to issue bonds for the construction of a new jail, pledging all legally available unencumbered revenues other than ad valorem taxes. The County further covenanted to do all things necessary to continue receiving the revenue as security for the bonds. The Supreme Court affirmed the trial court's denial of the complaint for validation, holding that the combination of the pledge of all non-ad valorem revenues and the covenant to maintain programs "in effect constitutes a promise to levy ad

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[3]The Loan Agreement provides the general conditions for loans from the Finance Commission. However, the determination as to the specific revenue pledged for repayment is governed by the authorizing resolution for that particular note.

valorem taxes." Id at 971. None of the factors which the Court found determinative in the County of Volusia case are present here. First, the pledged revenues in the present case consist only of 50% of the first three percent of the tourist development tax revenues. No other revenue source is pledged. As stated in Resolution 95-488, section 3(G):

> Loan No. A-6 shall be repaid solely from the Designated Revenues. Such Designated Revenues shall include moneys derived from a covenant to budget and appropriate legally available Non-Ad Valorem Revenues. Such Designated Revenues shall also include 50% of the first three percent (3%) of tourist development tax received by the County which the County hereby grants a pledge of and lien on in accordance with the terms of Exhibit A attached hereto for purposes of repayment of Loan No. A-6. The ad valorem taxing power of the County will never be necessary or authorized to make the Loan Repayments.

(App. A-260). A similar argument to Appellant's was raised in City of Palatka v. State, 440 So.2d 1271 (Fla. 1983), where the City pledged only water and sewer revenues. This Court rejected that argument, and held that the County of Volusia case was applicable only when all revenues are pledged. As in the City of Palatka case, the County has only pledged a single revenue source.

Second, the County has not covenanted to maintain all existing revenue producing programs and services as the county did in the County of Volusia case. In that case, Volusia County covenanted to maintain all existing services to generate revenue for repayment of the bonds. Here, the County has specifically exempted such

covenants under its Loan Agreement. Section 6.04(a) of the Loan Agreement states in part:

> Notwithstanding the foregoing covenant of the Public Agency, the Public Agency does not covenant to maintain any services or programs, now provided or maintained by the Public Agency, which generate Non-Ad Valorem Revenues.

(App. A-229). Neither of the factors which led to the rejection of the validation complaint in the County of Volusia case are present here. See also State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990).

Though the general obligations of the Loan Agreement contain a covenant to budget and appropriate on an annual basis from non-ad valorem revenues lawfully available, such requirements do not rise to the level of constituting a pledge of the ad valorem taxing power of the County. First, this language is clearly a supplemental revenue source for the repayment of the loan apart from the pledged tourist development tax proceeds. Nor does such covenant to budget and appropriate create a lien upon or pledge of such other non-ad valorem revenues. As stated in section 6.04(b) of the Loan Agreement:

> (b) Such covenant to budget and appropriate does not create any lien upon or pledge of such Non-Ad Valorem Revenues, nor does it preclude the Public Agency from pledging in the future its Non-Ad Valorem Revenues, nor does it require the Public Agency to levy and collect any particular Non-Ad Valorem Revenues, nor does it give the Bank, the Commission, the Administrator, the Trustee or the Noteholders a prior claim on

> the Non-Ad Valorem Revenues as opposed to claims of general creditors of the Public Agency....

(App. A-229).

The covenant to budget and appropriate under the present obligation is a supplemental revenue source to the pledged revenues and, as such, does not violate the provisions of Article VII, section 12 of the Florida Constitution. Murphy v. City of Port St. Lucie, 666 So.2d 879 (Fla. 1995), amended 21 Fla. L. Weekly S75 (Fla. February 15, 1996).

Further, even if such covenant to budget and appropriate is considered to be a pledge of all non-ad valorem revenues, the absence of an interrelated covenant to maintain all revenue generating programs and services removes its applicability from the prohibitions of the County of Volusia case. State v. Brevard County, 539 So.2d 461 (Fla. 1989); State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990).

Appellant also argues that the proposed refunding of the Series 1989 Bonds violates the provisions of Article VII, section 12(b), Florida Constitution, in that no degree of certainty exists that a lower net average interest cost rate can be obtained due to the variable interest rate of the loan at issue. Appellant's reliance is misplaced. Article VII, section 12(b), Florida Constitution, provides as follows:

> **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.

Section 12(b) clearly applies only where ad valorem taxes are pledged for the purpose of refunding previously issued outstanding bonds. This situation is not present in the matter before the Court. No ad valorem taxes are being pledged and used to refund the Series 1989 Bonds, only tourist development tax proceeds.

Finally, Appellant argues that the requirements of administrative activities or the specter of environmental damages or litigation will necessarily be paid from ad valorem taxes, thereby requiring a referendum under Article VII, section 12, Florida Constitution. Apart from the pure speculation of this argument, the fact that additional expenditures exist which administratively are related to the loan program does not create a pledge of ad valorem taxing power, but is addressed through the covenant to budget and appropriate non-ad valorem revenues by Collier County to the extent necessary. This argument seeks to

raise issues of feasibility or legislative judgment in the review of the decision to refund the Series 1989 Bonds. Matters related to the financial or economic feasibility of revenue issues are beyond the scope of judicial interference. Town of Medley v. State, 162 So.2d 257 (Fla. 1964).

CONCLUSION

The pledge of tourist development tax proceeds for the refunding of the Series 1989 Bonds is authorized and proper. Further, no pledge of the ad valorem taxing power of the County has been made. Based upon the foregoing, Appellee prays the Court will affirm the Order of validation entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Collier County, Florida, has been furnished by U.S. Mail to MICHAEL PROVOST, ESQUIRE, Assistant State Attorney, Twentieth Judicial Circuit, Collier County, Post Office Drawer 2007, Naples, Florida 33939; and ROBERT C. GEBHARDT, ESQUIRE, Gebhardt & Miller, 2500 Tamiami Trail N., #112, Naples, Florida 33940, this 13 day of May, 1996.

GREGORY T. STEWART