IN THE SUPREME COURT OF FLORIDA

GORDON LOZIER,
Appellants,

-vs-

COLLIER COUNTY FLORIDA, a political subdivision
Appellee.

Appeal No. 87,609
Lower Court Case 95-4491-CA

APPELLANT'S INITIAL BRIEF

Robert C. Gebhardt, Esq.
Florida Bar No.: 343749
Gebhardt & Miller
2500 Tamiami Trail North
Suite 112
Naples, Florida 33940
(941) 263-3363
Attorney's for Appellant

TABLE OF CONTENTS

Table of Citations i

Statement of the Case and the Facts 1

Summary of the Argument 3

Argument 4

Conclusion 12

Certificate of Service 12

TABLE OF CITATIONS

Case Authorities:

County of Volusia v. State, 417 So.2d 968 (Fla. 1982) 8
Washington Shores Homeowner v. Orlando, 602 So.2d 1300 (Fla. 1992) 4
Wohl v. State of Florida, 480 So.2d 639 (Fla. 1985) 8

Florida Statutes:

§ 125.0104, Fla. Stat. (1995) 7
Ch. 75, Fla. Stat. (1995) 3
§ 125.010(5)(c), Fla. Stat. (1995) 7

Florida Constitution:

Article VII, § 12(a)(b), Fla. Const 8
Article VII, § 12(a), Fla. Const 11
Article VII, § 12(b), Fla. Const 11

Other Authorities:

Collier County Code, Ordinance 88-59 1
Collier County Board of Commissioners,Resolution No. 89-112 1
Collier County Board of Commissioners,Resolution No. 91-270 2
Collier County Code, Ordinance 92-60 2
Collier County Board of Commissioners,Resolution No. 95-488 2
Collier County Code, Ordinance 95-56 5
Collier County Code, Ordinance 92-60 5
Collier County Code, Ordinance 92-60 8
Collier County Code, Ordinance 95-56 8
Collier County Code, Ordinance 92-60 11
Collier County Code, Ordinance 95-56 11

I.

STATEMENT OF THE CASE AND THE FACTS

APPELLEE, Collier County, (the "County") is a political subdivision of the State of Florida. On June 14, 1988, by Ordinance 88-59, (attached to the Complaint as Exhibit "A") the County 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 the renourishment of the Marco Island beach through an assessment of those taxpayers located within the boundaries established by the Marco MSTU.

Those persons with properties within the Marco MSTU approved the creation of the Marco MSTU by a referendum vote. Under the referendum vote, the property owners in the Marco MSTU, in effect, agreed to undertake the obligation for the payment of the Marco Beach Renourishment.

On May 17, 1989, the County issued a series of bonds (the "1989 Series Bonds") pursuant to Resolution No. 89-112 (attached to the Complaint as Exhibit "B") enacted by the County's Board of Commissioners. The aggregate principal amount of the 1989 Series Bonds was $5,000,000. The 1989 Series Bonds are secured by, and payable from, a direct annual ad valorem tax on all taxable property within the Marco MSTU; the tax rate cannot exceed one and one-half (1/2) mills, sufficient in amount, together with other moneys available for such purpose, to pay principal and interest on the 1989 Series Bonds as they become due. The proceeds of the 1989 Series Bonds issue were used to pay for the Marco Beach Renourishment Project.

On March 26, 1991, the County undertook steps to lower its borrowing costs by utilizing the

Florida Local Government Finance Commission (the "Finance Commission"). On March 26, the County adopted Resolution 91-270 (attached to the Complaint as Exhibit "C"), which authorized the County to enter into a Loan Agreement with the Finance Commission (attached to the Complaint as exhibit "D"). The County subsequently executed a series of notes pursuant to the terms and condition of the Loan Agreement for the purpose of financing certain projects in the County.

On August 18, 1992 the County adopted a tourist tax ordinance as authorized by F.S. §125.0104. The County's tourist tax ordinance, Ordinance 92-60 (attached to the Complaint as Exhibit F), provided for the enactment of a tourist development plan and the collection of a two percent (2%) tourist development tax. Under the Ordinance, sixty percent (60%) of the proceeds from the tourist development tax are required to be used to finance beach improvement, maintenance, renourishment, restoration and erosion control.

On November 3, 1992, voters of the County approved the 1992 Tourist Development Ordinance and the Tourist Development Plan in a referendum vote. On October 24, 1995, the County by Resolution 95-488 (attached to the Complaint as Exhibit G) amended the 1992 Tourist Development Ordinance and the 1992 Tourist Development Plan, which amendment, among other things, directed the levy and collection of an additional one percent (1%) tourist development tax for a period of four years commencing on January 1, 1996 and ending on December 31, 1999. The amendment further provides that the entire amount of the receipts from the one percent (1%) additional tourist tax shall be applied to finance beach improvement, maintenance, renourishment, restoration and erosion control.

In September, the County sought to pay off the outstanding bonds of the Marco MSTU by the use of tourist tax monies. The vehicle in which this repayment was to be made was the Note A-6-

1 which is the subject of this litigation. On September 5, 1995, the County adopted resolution 95-488 (attached to the Complaint as Exhibit "E"), which authorized the County to borrow $3,000,000 from the Finance Commission on such terms and conditions as are set froth in the original Loan Agreement. The terms of the resolution mandated that, to the extent deemed necessary by bond counsel, the County Attorney was authorized to commence bond validation proceedings pursuant to Chapter 75, Florida Statutes to validate the issuance of Note A-6-1.

On November 7, 1995, the County filed its Complaint for Validation. 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 $3,000,000 under the Loan Agreement and Note A-6-1 should not be validated. On February 20, 1996 the Circuit Court rendered its decision validating the borrowing. This appeal followed.

Intervenor, Gordon Lozier is a resident of the County and owns property in the County.

II.

SUMMARY OF ARGUMENTS

The Note A-6-1 cannot be lawfully repaid from tourist tax proceeds. Both State statute and the local ordinances restrict the use of tourist tax proceeds only to financing beach renourishment and similar activities and not to refunding. In the instant case, the proceeds from Note A-6-1 are being used to repay obligations of the Marco MSTU. That taxing district agreed to pay for a prior renourishment of the Marco Island Beach. Note A-6-1 is intended merely to assume the obligation of the Marco MSTU. No beach renourishment will result from the issuance of this Note.

State statutes relating to the tourist tax permits only the refunding of revenue bonds with tourist tax proceeds. The bonds issued by the Marco MSTU are limited general obligation bonds and thus cannot be refunded under the state statute by the Proceeds of the Note A-6-1. Further, the State Statute only permits refunding of bonds issued by the County. In the instant case, the bonds to be refunded were not issued by the County, they were issued by the Marco MSTU.

The issuance of the Note A-6-1 is in violation of the Florida Constitution because it is a general obligation that is to be repaid by ad valorem taxes. This Court has held that where the County is required to maintain programs and pay for such programs from ad valorem taxes, the bond issue is tainted even if payment of the principal and interest is limited to tourist tax revenues. In the Loan Agreement, the County has obligated itself to pay significant expenses from general revenues and also to indemnify the various parties in the event of liability. This indemnification would also come from general ad valorem revenues. The Constitution also provides that general obligation bonds may not be refunded from ad valorem revenues unless there is a saving on the interest rate. Since the interest rate on the Note A-6-1 is variable, it cannot be determined whether in fact there would be a saving.

III. ARGUMENT

A. THE PROCEEDS OF THE NOTES ISSUED UNDER THE LOAN AGREEMENT CANNOT BE REPAID FROM TOURIST TAX PROCEEDS.

This Court has held in Washington Shores Homeowners v. Orlando, 602 So.2d 1300 (Fla. 1992) that:

> "Judicial inquiry into the validity of a bond issue is limited to "1) determining if a public body has the authority to issue the subject bonds; 2) determining if the purpose of the obligation is legal; and 3) ensuring that the authorization of the obligations complies with the requirements of law." Taylor v. Lee County, 498 So.2d 424, 425 (Fla.

1986); State v. Manatee County Port Authority, 171 So.2d 169 (Fla. 1965)."

The Tourist Development Tax Ordinances (Ordinance Nos. 92-60 and 95-56) sets forth very severe restrictions on the use of Tourist Tax dollars. Ordinance No. 92-60 as amended by Ordinance 95-56 states as follows:

> "The categories of use of the two percent (2%) tax revenues by specific project or special use are hereby listed in the order of priority and include the approximate cost or expense allocation for a twenty-four (24) month period for each project or use as follows:
>
> CATEGORY A- **To finance beach improvement, maintenance, renourishment, restoration and erosion control, including pass and inlet maintenance.**
>
> | Approximate cost Net revenue | Percentage of or expense allocation |
> |---|---|
> | $4,200,000 | 60% |
>
> CATEGORY B- To promote and advertise county tourism within the State of Florida, nationally and internationally, which encourages tourism with an emphasis on off-season visitors to Collier County.
>
> | Approximate cost Net revenue | Percentage of or expense allocation |
> |---|---|
> | $2,800,000 | 40% |
>
> The percentage of net revenue within Category B shall be further specifically allocated as follows:
>
> a) For tourism advertising and direct marketing -
>
> | | |
> |---|---|
> | $1,750,000 | 25% |
>
> b) For local projects and/or activities which promote tourism-
>
> | | |
> |---|---|
> | $1,050,000 | 15% |
>
> It is the intent of this Ordinance that the above uses shall be funded separately, but simultaneously in the above percentages regardless of the actual amount of net revenue collected.

Upon expiration of the additional 1% tourist development tax as described in this plan, the Tourist Development Council may request the Board of County Commissioners to review the funding allocations at five year intervals.

The additional one percent (1%) tax revenues collected pursuant to Section Two (F) shall be used to finance beach improvement, maintenance, renourishment, restoration and erosion control." [Emphasis added.]

A plain reading of the language of the Ordinance mandates the conclusion that the proceeds from the Note must be used to "**to finance beach improvement, maintenance, renourishment, restoration and erosion control, including pass and inlet maintenance.**"

Notwithstanding this clear and unequivocal language limiting the use of tourist tax dollars to beach renourishment activities, the proceeds from Note A-6-1 are intended to be used for an altogether unrelated and unauthorized purpose;- that is, to repay a prior obligation of the Marco MSTU. Use of the proceeds from Note A-6-1 will not add one grain of sand to the beaches. Use of the proceeds of Note A-6-1 will not be used to pay one dollar for maintenance of the beaches. Use of the proceeds of Note A-6-1 will not be used to add one iota of renourishment. Use of the proceeds of Note A-6-1 will not be used to construct any form of erosion control. And yet, proceeds from the tourist tax are intended to be used to repay Note A-6-1.

This attempted use of tourist tax proceeds to pay the obligations of the Marco MSTU is nothing more than a political ploy to use the Tourist Tax as a piggy bank to pay for any local obligation that is indirectly and remotely associated with beach renourishment. This attempt to use tourist tax dollars is for projects that have already been completed and previously financed. This clearly was not intended by the tourist tax ordinances. Instead, their purpose was to provide a financing vehicle to undertake future, not past beach projects.

One is reminded of the comparison of the Florida lottery as proposed to the voters and the actual administration of the lottery. Lottery funds were intended to supplement eduction, but the reality is that tax funds previously earmarked for education have been diverted to other governmental functions and lottery funds have made up the difference. The net addition to education through the enactment of the lottery according to most trained observers has been zero.

If this Court affirms the decision of the Trial Court, the result will be no different than the results of the lottery. The Marco MSTU recognized the need for beach renourishment in 1988. The voters established the MSTU to finance that renourishment. The affected taxpayers along Marco beach willingly undertook that obligation by agreeing to a special ad valorem tax on their properties. The money was spent and the renourishment construction was completed. The only thing left is the obligation to repay the bonds. Under no stretch of the imagination can this be classified as the financing of beach renourishment.

The County may argue that the proceeds of the Note are merely a refunding of a beach renourishment obligation as described in Fl. Stat. § 125.0104. There are two fallacies to this argument. First, Fl. Stat. § 125.0104 limits refunding to bonds issued by the County. Section 125.010(5)(c) states:

> "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 subparagraph (a)1. and 4. or for the purposes of refunding bonds previously issued for such purposes, or both . . ."

The bonds to be refunded in the instant case were not issued by the County. Instead they were issued by the Marco MSTU a separate and distinct taxing authority. Further, as evidenced by the bonds themselves, the bonds issued by the Marco MSTU were limited general obligation bonds and not revenue bonds as required by the Statute.

Second, unlike the State statute, the County's Ordinances No. 92-60 and No. 95-56 do not make any reference to refinancing. Reading the plain words of both ordinances clearly shows that only financing of such improvements is permitted. This distinction is important because the first ordinance initially authorizing the Tourist Development Tax was approved by the Count voters in a referendum. One can only imagine what the hotel industry, the other important parts of the Collier County tourist industry and the citizens who use and love the beach would say if they discovered the proposed use as contemplated by the issuance of Note A-6-1. They would be shocked to learn that instead of using the tourist tax funds for the specific purposes set forth in the Ordinance, these funds were being applied to the repayment of the indebtedness of a few people who had previously knowing and willing incurred that indebtedness. Cf. Wohl v. State of Florida, 480 So. 2d 639 (Fla. 1985) (local statute specifically authorized refunding).

As a result of the foregoing, the proceeds from the tourist tax cannot be used for debt service on Note A-6-1 and the Circuit Court's Order of Validation should be reversed.

A. THE BOND ISSUE IS PAYABLE FROM AD VALOREM TAXATION AND IS UNLAWFUL

The Bond issue is payable from ad valorem taxes and as a result is in violation of Article VII, Section 12 of the Florida Constitution because: (a) There was no referendum held on the bond issue as required by Article VII (a); and (b) the bonds in question are variable rate obligations and thus there can be no determination whether the net average interest cost rate of the bonds over the term of the bonds will be lower than the Marco MSTU Bonds that are the subject of refunding, all as require by Article VII, Section 12(b).

1. The Bond issue is supported by the pledge of ad valorem taxation. In County of Volusia v. State, 417 So.2d 968 (Fla. 1982) this Court held that a bond issue was supported by a

pledge of ad valorem taxation even though the bond issue itself pledged all legally encumbered revenues other than ad valorem taxation. In Volusia, this Court held that a pledge by the Volusia County to maintain the programs and services which generated the non-advalorem revenue was a pledge of ad valorem taxes within the meaning of Article VII. This court held that ad valorem taxes were pledged because the interrelated promises "in effect constitutes a promise to levy ad valorem taxes." Id. at 971.

In the instant case the same is true. Through the Loan Agreement and the tourist development tax ordinances, the County has established an elaborate structure for the administration, collection and audit of the tourist development tax collection procedure. This structure is required by the Loan Agreement and tourist development tax ordinances; the funding for such structure is the pledge of ad valorem taxes.

a. Covenants in the Loan Agreement. Article VI of the Loan Agreement sets forth the obligation of the County in connection with the administration of the Loan Agreement. Section 6.06 sets forth additional covenants other than the pledge of tourist tax revenues for repayment of principal and interest under the bond Loan Agreement and Note A-6-1.

All of the additional covenants set forth in Section 6.06 require the County to provide services and programs which are paid for by ad valorem taxes. Because the County has affirmatively promised to perform these administrative functions in the Loan Agreement, the County cannot delete these costs from its budget. Therefore to the extent that there are insufficient revenues to service the indebtedness evidenced by Note A-6-1, the County is obligated to fund these functions from ad valorem taxes.

For example, in the Loan Agreement the County is contractually obligated to expend funds to maintain the books and records of the Note issue (Section 6.06(a)); conduct and pay for an annual audit (Section 6.06(b)); provide information to the Trustee or the Bank (Section 6.06(d)); and most importantly as set forth in Section 6.06(e):

> "indemnify the Commission, the Bank, the Trustee and each member, officer, commissioner, employee and agent of the Commission, the Administrator, the Bank the Trustee for any and all liabilities, losses, damages, costs, expenses including reasonable attorneys fees), suits claims and judgments of whatsoever kind and nature arising or resulting from or connection with, this Loan Agreement, the Credit Agreement or the Projects or with the breach or violation of any agreement covenant, representation or warranty of the Public Agency set forth in the Loan Agreement or any document delivered pursuant hereto".

This indemnification provision is critical when viewed in connection with the project to be financed. The Project involves the renourishment of the Marco Island beaches (completed in 1991), the construction of two terminal groins (completed in 1991) and the construction of a yet to be completed segmented breakwater system in which 11,400 tons of rocks, each weighing not less than two tons, will be dumped into the Gulf of Mexico. Any environmental accident, including oil spills from the barges, destruction of environmentally sensitive plants or animals or other kinds of environmental damage caused by any one of these significant construction projects could result in substantial lender liability suits with legal costs running into the hundreds of thousands of dollars. Since Section 6.06(e) of the Loan Agreement is an affirmative covenant, the County would be contractually obligated to pay such costs and ad valorem taxes would be subjected to such suits. While twenty years ago, this risk would have been considered insignificant, in today's highly charged atmosphere, the costs of litigation many times exceeds the ultimate judgment.

Section 6.06(e)(ii) of the Loan Agreement further provides that

"to the extent allowed by law, the . . . [County] . . . will reimburse all other Public

> Agencies participating in the Pooled Commercial Paper Program to the extent the. . . [County] . . . has committed any act or failed to commit an act and the result of such actions or failure to act is that the cost of participating in the Pooled Commercial Paper Program of such Public Agencies is increased. Such reimbursement includes, without limitation, any increased costs incurred by other participating Public Agencies as a result of the Public Agency failing to make a Repayment or any other payment hereunder when due." This again is an affirmative covenant that requires payments which are not limited to ad valorem taxes."

Thus, in the Loan Agreement, the County is obligated to maintain programs under the Loan Agreement that constitute a pledge of ad valorem taxes.

The tourist tax ordinances (Ordinances Nos. 92-60 and 95-56) also mandate the use of County assets and personal to collect the tax and administer the program. The County Tax Collector must collect the Tax. Section ELEVEN of Ordinance 92-60 creates an elaborate program for the collection of the tax, the imposition of penalties and the administration of the funds.

In the event that there are insufficient revenues from the tax to make debt service payments, all of these administrative expenses will have to be borne by the County and will have to be funded with ad valorem taxes. No other conclusion can be drawn, since the County in the Loan Agreement has pledged all of the revenues from the tourist tax to the Commission for repayment of the Note. Thus, the Finance Commission has a priority claim to the revenues and in the event there are insufficient revenues to maintain the debt service under the Loan Agreement, the County would have to fund its administrative expenses from its general taxing authority.

b. Constitutional restrictions. Article VII, Section 12(a) of the Florida Constitution requires voter referendum for the issuance of any obligation payable from ad valorem taxes. No referendum was held on the issuance of Note A-6-1 under the Loan Agreement. Further, Section 12(b) provides that a refunding, as has been attempted in the instant case, must result in lower net average interest cost.

It is impossible to determine the net average interest costs from the Loan Agreement and Note A-6-1 because the Note is a variable interest rate note in which the interest rate at anytime could exceed the net average interest costs of the Marco MSTU bonds. For example, in January, 1981, the day President Regan took office, the prime rate was 21%. If interest rates ever achieve that level again, the net average interest cost for the Note A-6-1 would be dramatically in excess of the net average interest cost of the Marco MSTU bond. Thus for the reasons set forth above the Order of Validation of the Trial Court should be reversed.

IV.

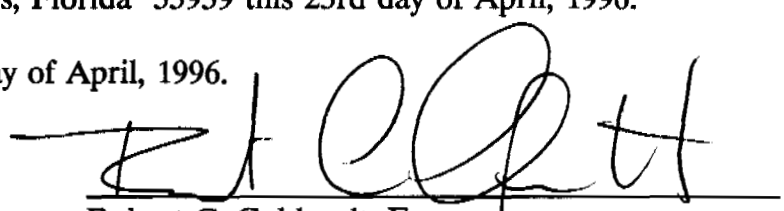
CONCLUSION

Based upon the foregoing Appelant prays that this Court reverse the order of validation of the trial court entered below and renders such other relief as deemed appropriate by this Court under the circumstances accordingly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal has been furnished to Gregory T. Stewart, Esq., Nabobs, Goblin & Nickerson, P.A., 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301, David E. Bryant, Esq., Office of the Collier County Attorney, 3301 Tamiami Trail East, Naples, Florida 33962 and Michael Provost, Assistant State Attorney, Post Office Drawer 2007, Naples, Florida 33939 this 23rd day of April, 1996.

Respectfully submitted this 23rd day of April, 1996.



Robert C. Gebhardt, Esq.
Florida Bar No.: 343749
Gebhardt & Miller
2500 Tamiami Trail N., #112
Naples, Florida 33940
(941) 263-3363