IN THE SUPREME COURT OF FLORIDA
CASE NO. 94,135

STATE OF FLORIDA,

Appellant,

Lower Tribunal: Osceola Circuit Court

v.

FILED
SID J. WHITE
DEC 15 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

OSCEOLA COUNTY, FLORIDA,
a political subdivision of the
State of Florida,

Appellee,

and

THE TAXPAYERS, PROPERTY
OWNERS AND CITIZENS OF OSCEOLA
COUNTY, FLORIDA, INCLUDING
NON-RESIDENTS OWNING PROPERTY
OR SUBJECT TO TAXATION THEREIN,
AND ALL 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.

REPLY BRIEF OF APPELLANT STATE OF FLORIDA

LAWSON L. LAMAR
STATE ATTORNEY
Ninth Judicial Circuit of Florida in and for Osceola County
CLOYCE L. MANGAS, JR.
ASSISTANT STATE ATTORNEY
P.O. Box 1673
Orlando, Florida 32802-1673
(407) 836-2492 /phone
(407) 836-2333 /fax

Attorneys for Appellant
State of Florida

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

REBUTTAL ARGUMENT 1

I. THE COUNTY'S TOTAL RELIANCE ON *POE* IS MISPLACED 2

A. The County Relies on *Poe*, to the Exclusion of the Applicable Statute and Evidence 2

B. *Poe* Is Inapposite to the "Issues Presented" on Appeal 3

i. The "Four-Cent" "Tourist Tax" versus the "Fifth-Cent" "Tourist Tax" Under the Act and the Record 3

ii. "Fifth-Cent" "Tourist Tax" Stadiums versus "Fifth Cent" "Tourist Tax" Convention Centers Under the Act 11

iii. "Initially for the Purpose..." Under the Act 12

iv. Primary Purpose Under the Bond Ordinance . . . 13

CONCLUSION 15

CERTIFICATE OF SERVICE 15

[This brief was prepared using a Courier 10cpi font. This is a 12 point type font which is not proportionately spaced and is a true ten-character per inch font.]

TABLE OF CITATIONS

CASES

Alachua County v. Adams, 702 So.2d 1253 (Fla. 1997) 7

Alsop v. Pierce, 155 Fla. 185, 19 So. 2d 799 (1944) 10

Dobbs v. Sea Isle Hotel, 56 So. 2d (Fla. 1952) 10

Nohrr v. Brevard County Educ. Facilities Auth., 247 So. 2d 304 (Fla. 1971) 9

Poe v. Hillsborough County, 695 So.2d 672 (Fla. 1997) 2-5, 7, 9

Raney v. City of Lakeland, 88 So. 2d 148 (Fla. 1956) 9

Rowe v. St. Johns County, 668 So.2d 196 (Fla. 1996) 7

Tamar 7600, Inc. v. Orange County, 686 So. 2d 790 (Fla. 5th DCA 1997) 11

Thayer v. State, 335 So.2d 815 (Fla. 1976) 10

FLORIDA STATUTES

§125.0104, Fla. Stat. 3, 4, 7-9, 12

§125.0104(3)(l), Fla. Stat. (Supp. 1996) 13

§125.0104(3)(l), Fla. Stat. 4

§125.0104(3)(l)(1), Fla. Stat. 12

§125.0104(3)(l)(2), Fla. Stat. 4, 8, 12

§125.0104(3)(l)(1), Fla. Stat. (1997) 12

§125.0104(3)(l)(2), Fla. Stat. (1997) 12

§125.0104(3)(l)(2), Fla. Stat. (Supp. 1998) 12

§125.0104(3)(l)(2), Fla. Stat. (Supp. 1996) 4

§125.0104(3)(l)(3), Fla. Stat. (1997) 12

§125.0104(3)(l)(3), Fla. Stat. (Supp. 1998) 12, 14

§125.0104(5), Fla. Stat. 7

§125.0104(5)(a)(1), Fla. Stat. 7

§125.0104(5)(a)(1), Fla. Stat. (1997) 8

§125.0104(5)(a)(1), Fla. Stat. (Supp. 1998) 8, 9

§125.0104(5)(d), Fla. Stat. (1997) 9

§125.0104(5)(d), Fla. Stat. (Supp. 1998) 9, 12, 13

§125.0104(3)(l)(3), Fla. Stat. 14

LAWS OF FLORIDA

Ch. 96-397, §44, at 2499 - 2500, Laws of Fla. 4, 12, 13

Ch. 98-106, §1, at 515 - 516, Laws of Fla. 14

OPINIONS OF THE ATTORNEY GENERAL OF FLORIDA

Op. Att'y Gen. Fla. 88-49 (1988) 10

Op. Att'y Gen. Fla. 97-48 (1997) 8, 9, 10

Op. Att'y Gen. Fla. 97-64 (1997) 8

OSCEOLA COUNTY ORDINANCES

Ordinances

Osceola County, Fla. Ordinance No. 97-13 (June 30, 1997) (the "Bond Ordinance") 3-7, 13, 14

Bond Ordinance, §1(B) 5

Bond Ordinance, §6 5

Osceola County, Fla. Ordinance No. 77-7 6

Osceola County, Fla. Ordinance No. 86-9 6

Osceola County, Fla. Ordinance No. 90-20 6

Osceola County, Fla. Ordinance No. 97-12 6

Osceola County Code

OSCEOLA COUNTY, FLA., COUNTY CODE, Ch. 13, Art. III, §13.61 5

OSCEOLA COUNTY, FLA., COUNTY CODE, Ch. 13, Art. III ("Tourist Development Tax"), Div. 1 ("Generally"), §§ 13-61 - 13-71, at pp. 749 - 756 (1998) 6, 13

OSCEOLA COUNTY, FLA., COUNTY CODE, Ch. 13, Art III (Tourist Development Tax), Div. 2 (Additional Tourist Development Tax), § 13-72 (1) & (2), at pp. 756 - 57 (1998) 5

OSCEOLA COUNTY, FLA., COUNTY CODE at 756 n. * ("Editor's note"). 5, 13

OSCEOLA COUNTY BOND RESOLUTION

Osceola County, Fla., Tourist Development Tax Revenue Bond Resolution (July 27, 1998) (the "Bond Resolution") 2, 3, 4, 14

SECONDARY AUTHORITIES

Acton & Campbell, "Public Funding of Sports Stadiums and Other Recreational Facilities: Can the Deal Be 'Too Sweet,'?," 27 Stetson L. Rev. 877 (1998) 2, 4, 9

REBUTTAL ARGUMENT

Appellant, the State of Florida (the "State"), files this reply brief in response and rebuttal to the Answer Brief, served November 17, 1998, by Appellee Osceola County (the "County").[1]

The Answer Brief proves to be a very close paraphrase, often virtually a photocopy, albeit without attribution, of the County's memo below.[2] Now the Answer Brief confirms once again, in spite of itself, the State's contention on appeal about that memo.[3]

---

[1]The State seeks to address the County's counterarguments on their own terms, even though the Answer Brief apparently does not contain any citation to either (i) the 900-page, six volume, separately bound Appendix (the "Appendix") to the State's initial brief in this Court (the "Merits Brief"), or (ii) the transcript of the September 18, 1998 show cause hearing below (the "hearing") (R731 - R790) (A788 - A847). In fact, the Answer Brief apparently does not refer to a single witness at the hearing, or to anything the judge actually said at the hearing. These material omissions in the Answer Brief say more about the County's approach to this case than anything this Reply Brief can say in fifteen pages about the Answer Brief and the state of the record below.

[2]See "Plaintiff Osceola County's Memorandum of Law in Support of Validation," written in advance of the hearing and served September 18, 1998 at the hearing (the "County's Memo") (R701 - R720) (A365 - A384). The County cited that 20-page memo (which was supported by "an authorities book [of 60 pages] which has pertinent cases from the memorandum for the [Osceola Circuit] Court's review") in its one minute initial closing argument below. (See A385 - A438) (Tr. 4, l. 15 - 19)(A794) (brackets added). (Tr. 43, l. 10) (A833, l. 10), all cited and discussed in Merits Brief at 29 - 30, esp. 29 n. 42. While the State, like the court below, had no opportunity to read the 80 pages during the hearing (id.), the State has looked at them since, even though the court below found it unnecessary to read them prior to entering judgment instanter at the end of the hearing.

[3]"That memo ... and this Court's past cases articulating the standard of review, with which the State agrees, tell the Circuit Court [and now this Court] virtually nothing about the merits of the defects, especially the statutory claims, alleged in the State's pleadings." Merits Brief at 30 n. 42 (continuation of footnote) (brackets added.); see, e.g., id. at vii ("Issues Presented" all re the defects in the Complaint) & id. at ii - iii ("Argument" headings).

I. THE COUNTY'S TOTAL RELIANCE ON *POE* IS MISPLACED.

A. The County Relies on *Poe*, to the Exclusion of the Applicable Statute and Evidence.

The County, in this Court, as in the court below (A369, A370, A374 - A376, A377), apparently continues to place total reliance on *Poe v. Hillsborough County*.[4] (A copy of *Poe* is at A409 - A415.)

Because this Court decided there was a valid public purpose in *Poe* (AKA the "*Tampa Stadium Case*"), the County's argument runs, it follows that this Court must affirm the decision below, which also found a paramount public purpose (R721 - R730).[5]

Moreover, according to the County, since *Poe*, supra, was, inter alia, a "tourist tax" case (Answer Brief at 14) under the

---

[4] 695 So.2d 672 (Fla. 1997), cited in Merits Brief at 27 n. 39 (continued on page 28) (law review citation omitted) & 30. See, e.g., Answer Brief at 7, 9, 14, & 16. See generally, e.g., Acton & Campbell, "Public Funding of Sports Stadiums and Other Recreational Facilities: Can the Deal Be 'Too Sweet,'?," 27 Stetson L. Rev. 877 (1998), cited in Merits Brief at 27 n. 39.

[5] After all, it too concluded (at ¶ 22), "The construction and operation of the Project [Convention Center] serves a valid and paramount public purpose." (A785) , quoted in Answer Brief at 12. And, besides, notes the County, citing the judgment below (at ¶ 15), "because the initial Project's paramount purpose is a public one, any private benefit is merely incidental and does not destroy the Project's public character." (A783). The County has so determined (id.), the trial court has so determined (id.), so, says the County, there is nothing to talk about. See Answer Brief passim; Plaintiff's Memo passim (R701 - R720) (same). To the same effect, the County (e.g., Answer Brief at 19) cites and quotes the corresponding language in the Bond Resolution (R372 - R693), in particular, Section 1.04 (A) & (C) ("Findings"). (A30 & A465), which tracks the language of the Complaint (at ¶ 11 & ¶ 18) (A5 & A7 - A8) (R1 - R343). Every aspect of these conclusions is self-proving; every incantation of these conclusions if of, by, and for the same ultimate author every time: the County or its lawyers.

Act,[6] and since this case too is a "tourist tax" case under the Act, the County contends the same result (viz., bond validation) must obtain here, repeatedly citing *Poe*.[7]

B. *Poe* Is Inapposite to the "Issues Presented" on Appeal.

The State continues to embrace *Poe* as a restatement of the applicable standard of review, and as a useful example of this Court's application and analysis under the "second condition" or prong of that three-part standard. See Merits Brief at 30 & 27 n. 39. Beyond that *Poe* is helpful only to show how artfully the County hides the ball. Here are why and how:

i. The "Four-Cent" "Tourist Tax" versus the "Fifth-Cent" "Tourist Tax" Under the Act and the Record.

1. In fact, *Poe* offers no support to the County's reading of the Act. First, a careful reading of *Poe* and the County's Answer Brief (at 14) reveals that both this Court and the County are aware that the Tampa Sports Authority in that case proposed to issue, inter alia, what this Court described as "[$]11.5 million in bonds supported by the local option four-cent tourist development

---

[6]Florida Local Option Tourist Development Tax Act, Section 125.0104, Florida Statutes (the "Act") (see, e.g., 1997 and 1998 versions, respectively, at A877 - A882 and A870 - A876).

[7]After all, the court below specifically validated the Bonds under the Act, holding (at ¶ 10) "[t]hat the Plaintiff [County] is duly authorized by the Act, the [Bond] Ordinance [No. 97-13], and the Bond Resolution to (a) issue the Bonds for the purposes described ...." (A781) (brackets added) (original context re the Bond Ordinance). Thus, says the County, citing *Poe* again, this case is just another routine case, where, "This Court has traditionally validated debt-financed projects that promote tourism and trade, despite the fact that some private benefit is derived." Answer Brief at 16.

tax, ..."[8]

2. But the local option four-cent tourist development tax is governed by a different section of the Act altogether (as well as by referendum requirements), namely the basic and incremental local option tourist development tax under various subsections of Section 125.0104, Florida Statutes (A870 - A876), not the "additional 1-percent tax" (viz., the "fifth-cent") non-referendum provisions of Section 125.0104(3)(l)(2) of the Act, the only section of the Act at issue in this case.[9]

3. The Complaint (at ¶ 5) (see R1 - R346) specifically alleges and defines the "Tourist Development Tax" here to mean the "fifth cent tourist development tax," (A3) (emphasis added), whose levy was approved, according to the Complaint, "pursuant to Ordinance No. 97-13 of the Plaintiff [County] enacted on June 30, 1997 (the '[Bond] Ordinance')... pursuant to the Act (particularly Section 125.0104(3)(l) thereof)...." (A3) (brackets added). The judgment below (at ¶ 9) specifically so found (A781).[10]

4. The Bond Ordinance itself (R694 - R700) (A332 - A338 &

[8]*Poe*, 695 So. 2d at 675 (A411, col. 2, top), quoted without indication in, Answer Brief at 14 and Acton & Campbell, supra, 27 Stetson L. Rev. 877, 883 n. 40. The tourist tax bonds represent a tiny fraction of the deal in that case. (See A411.)

[9]Amended Answer at ¶ 20 (iii) at A360 (R361 - R 368), quoted in Merits Brief at 31 -32; see id. at 44 - 45. See Ch. 96-397, §44, at 2499 - 2500, Laws of Fla. (A883 - A887), quoted in text at ¶¶ 9 & 15, infra. See §125.0104(3)(l)(2), Fla. Stat. (Supp. 1996).

[10]The County's Memo (R701 - R720) said the same (A366), and further noted, "The Tourist Development Tax Revenue is further limited by the Bond Resolution only to the fifth cent." Id. (A366 n. 2) (emphasis added) (see R372 - R693).

A767 - A774) also makes precisely the same distinction (at § 1 (B) (A333 & A770). After first specifically finding the fifth-cent "Tax will be levied for the initial purpose of financing the renovation of Osceola County Stadium, a professional sports franchise facility within the meaning of that term in Section 125.1014 [sic] [0104](3)(1), Florida Statutes (1996 Supp.)....," (Bond Ordinance at § 1(A),[11] the Board of County Commissioners further found, "The current contract with the Houston Astros for use of Osceola County Stadium requires renovation to the facilities and the Board has determined that such renovations should be funded from proceeds of the [fifth-cent] Tax imposed pursuant to this ordinance and not from proceeds of the four percent tourist development tax levied in Section 13.61, Chapter 13, Article III, Osceola County Code." Id. at §1(B).[12]

5. The County's actual "four percent tourist development tax" ordinances, of the kind involved in *Poe*, are not something the

[11]("Legislative Findings") (brackets added) (A333 & A770).

[12]Bond Ordinance at § 1 (B) ("Legislative Findings") (A333 & A770) (emphasis and brackets added) (original text), codified (per id. at § 6 at A336 & A773), in, OSCEOLA, FLORIDA, COUNTY CODE, Ch. 13, Art III (Tourist Development Tax), Div. 2 (Additional Tourist Development Tax), § 13-72 (1) & (2), at pp. 756 - 57 (1998). The State doubts whether the Bond Ordinance actually amended the Osceola County Code, even though formal amendment thereof would seem to be required here. (N.b.,"Ordinance No. 97-13, §§ 1 - 3, adopted June 30, 1997, did not specifically amend the [Osceola County] Code; hence, inclusion as Div. 2, §§ 13-72 - 13-74 was at the discretion of the editor." OSCEOLA, FLORIDA, COUNTY CODE at 756 n. * ("Editor's note").) See Merits Brief at e.g., 1, 7 & 7 n. 10, 22 - 23, 43 n. 56, 44 - 46 and nn. 57 - 65, esp. 44 n. 58. See note 25 infra.

State has challenged here.[13]

6. Consistent with the cross-references to the Osceola County Code in the Bond Ordinance (R694 - R700), the record on appeal confirms those "four percent tourist tax" ordinances' existence.[14] All the State knows for sure is that, on the one hand, the County's Joint Marketing Agreement cites four ordinances as adopting the initial four cents of the tourist development tax (A271 & A706), whereas, on the other hand, the County told the State there are two ordinances adopted by the County which imposed the initial four cents of the Tourist Development Tax (A775), but the County's counsel disclaimed having those ordinances (either) two days before the hearing (id.).[15] This is of no small concern

---

[13]The State is still in the dark about those ordinances, and is still waiting for the County to deliver those promised ordinances (R369 - R371) (A775). See also Merits Brief at 46 n. 63 (re A776).

[14]See Complaint, Ex. A, App. R. (A271 & A706). They are cited there (id.) (quoted in text ¶4, supra.) in the context of the Joint Marketing Agreement between the County and the World Expo Center Management Corporation (A263 - A295 & A698 - A730). See Merits Brief at 16 & n. 25. In that agreement, citing and distinguishing four prior tourist ordinances from the bond ordinance, the parties thereto state they do intend to utilize the four percent tourist taxes, and specifically disclaim the fifth cent levied in the Bond Ordinance because the fifth cent tax revenue can only be used for the Convention Center. Thus the Joint Marketing Agreement (at art. 1, § 1.01) ("Definitions and Construction") states, "'Eligible Tourist Development Taxes' means the four percent tourist development taxes initially levied by the County pursuant to Ordinance Nos. 77-7, 86-9, 90-20 and 97-12. The term 'Eligible Tourist Development Taxes' [in the Joint Marketing Agreement] does not include the one percent tourist development tax initially levied by the County pursuant to Ordinance 97-13 [i.e., the fifth cent in the Bond Ordinance]." Complaint, Ex. A, App. R (A271 & A706) (emphasis and brackets added).

[15]See, generally, OSCEOLA COUNTY, FLORIDA, COUNTY CODE Ch. 13, art. III ("Tourist Development Tax"), Div. 1 ("Generally"), §§ 13-

to the State because the County now tells this Court it has already proved up those ordinances![16]

7. In addition to *Poe*, the County also relies on another tourist tax case, also previously cited by the State for the standard of review, *Rowe v. St. Johns County*.[17] When this Court divided last year on the meaning of *Rowe*, supra,[18] all Justices understood that *Rowe* involved the Act, which "authorizes Florida's counties, after referendum to levy a tourist development tax, to be used for certain enumerated purposes."[19]

8. Those purposes governing the basic tourist tax are set out in Section 125.0104(5), Florida Statutes. Section 125.0104(5)(a)(1) of the Act provides:

> (5) AUTHORIZED USES OF REVENUE. -
> (a) All tax revenues received pursuant to this section [125.0104, Fla. Stat.] by a county imposing the tourist development tax shall be used by that county for the following purposes only:

---

61 - 13-71, at pp. 749 - 756 (1998).

[16]Answer Brief at 21 n. 2 (solely by virtue of the Bond Ordinance) ("No contrary evidence was presented."). But see Merits Brief at 464 n. 65 (re A775).

[17]668 So.2d 196 (Fla. 1996). Answer Brief at 7. But that case too apparently did not involve the "fifth cent" tourist tax either, but only, it appears, the basic local option four-cent tourist development tax under Section 125.0104, Florida Statutes.

[18]Compare *Alachua County v. Adams*, 702 So.2d 1253 (Fla. 1997) with id. at 1255 - 58 (Overton, J., joined by Anstead, J., dissenting).

[19]E.g., *Alachua County*, supra, 702 So.2d at 1257 (dissent). The majority and minority in *Alachua County* simply disagreed about the rest of *Rowe*. See id. at 1255 (majority) (explaining *Rowe* and holding special act violated Florida Constitution).

> 1. To acquire, construct, extend, enlarge, remodel, repair, improve, maintain, operate, or promote one or more publicly owned and operated convention centers, sports stadiums, sports arenas, coliseums, or auditoriums, or museums that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public, within the boundaries of the county or subcounty special taxing district in which the tax is levied. Tax revenues received pursuant to this section may also be used for promotion of zoological parks that are publicly owned and operated or owned and operated by not-for-profit organizations and open to the public. However, these purposes may be implemented through service contracts and leases with lessees with sufficient expertise or financial capability to operate such facilities.

§125.0104(5)(a)(1), Fla. Stat. at p. 297, col. 2 (Supp. 1998) (A873) (emphasis added). (See A880) (same in Fla. Stat. (1997)).[20]

9. Of course, the language of Section 125.0104(3)(1)(2), Florida Statutes, governing what the "fifth cent" tax can be spent for is radically different and much more narrow. See Merits Brief passim. Section 125.0104(3)(1)(2) says the fifth cent is to "[p]ay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a convention center,..." (id.) (emphasis added) (see page 12, infra.) and nowhere authorizes "acquisition." That is why the Act further provides:

> Any use of the local option tourist development tax revenues collected pursuant to this section [125.0104, Florida Statutes] for a purpose not expressly authorized by paragraph (3)(1) or paragraph (a), paragraph (b), or paragraph (c) of this subsection [(5)

---

[20]That is why the Florida Attorney General routinely cites that section for the proposition that Florida counties can, *inter alia*, "acquire," the enumerated items, including the above described convention centers. Op. Att'y Gen. Fla. 97-64 at p. 237, 238 & 238 n. 5 (1997); Op. Att'y Gen. Fla. 97-48 at p. 178 (1997).

"AUTHORIZED USES OF REVENUE"] is expressly prohibited.

§125.0104(5)(d), Fla. Stat. at p. 298, col. 1 (Supp. 1998) (A874) (emphasis added); see (A880) (same in Fla. Stat. (1997)).

10. Consequently, the Florida Attorney General has observed, "This office has consistently concluded that tourist development tax revenues may only be used for the purposes enumerated in Section 125.0104, Florida Statutes."[21]

11. Of course, the Answer Brief (e.g., at 18) insists, and the law reviews insist, that this Court look to legislative findings to determine paramount public purpose in a bond validation case.[22]

12. But the Answer Brief's hat trick is to look only at the

---

[21]Op. Att'y Gen. Fla. 97-48 at p. 179 & n. 4 (citations omitted).

[22] E.g., Acton & Campbell, supra, 27 Stetson L. Rev. at 891 & 897 & 897 n. 161 (conclusion) (noting *Poe* did not address).

> The question of what constitutes a valid public purpose is for the legislature to decide, and its decision is not subject to interference by the courts unless the court finds a clear or gross abuse of discretion, fraud, bad faith, or that the legislative finding was so clearly erroneous as to be beyond the power of the legislature. See *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971); *Raney v. City of Lakeland*, 88 So. 2d 148, 150 (Fla. 1956).

Id.; accord, id. at 891 & 891 nn. 111 - 13 ("In bond validation cases, courts will look to declarations made by the Legislature that a project serves a public purpose. The determination of what constitutes a valid public purpose is for the legislature to decide,... [rest is identical to above].") (case citations omitted)(brackets added).

County's "legislative findings," not the Legislature's, even though it is the latter this Court is to look to under this Court's cases to determine the existence *vel non* of a valid and paramount public purpose here. Thus the County, quite erroneously, instructs this Court, "This Court is guided by the legislative declarations of paramount public purpose that were made by the County with respect to the Project at issue here." Answer Brief at 18. But those findings cannot trump the Legislature's.

13. The Florida Attorney General, following this Court's rules of statutory construction, has said, with specific reference to the Act and this Court's precedents:

> Where a statute enumerates the things upon which it is to operate or forbids certain things, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned. The specific provisions in the statute limit the use of revenues generated from the tourist development tax to the purposes specified therein.[23]

14. This Court should rebuff the County's legislative findings as irrelevant because the purchase, with "fifth cent" "tourist tax" revenues, of a convention center from private parties to be operated by private parties is simply not authorized by the Act, and is therefore expressly barred by the Act, according to its

[23]Op. Att'y Gen. Fla. 97-48 at p. 179 & 180 nn. 2 - 3 (1997) (citing *Thayer v. State*, 335 So.2d 815 (Fla. 1976) & Op. Att'y Gen. 88-49 (1988) (expenditure of tourist tax development revenues is limited to those purposes set forth in the Act) (also citing *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952), and *Alsop v. Pierce*, 155 Fla. 1985, 19 So.2d 799, 805 - 06 (1944) for the proposition "legislative directive as to how a thing should be done is, in effect, a prohibition against its being done in any other way.").

own terms, and this Court's canons of statutory construction. *A fortiori*, for the same reasons, as a matter of law, it cannot be said there is a valid public purpose here if that purpose violates the Legislature's directive as to how things should be done under the Act.[24]

ii. "Fifth-Cent" "Tourist Tax" Stadiums versus "Fifth Cent" "Tourist Tax" Convention Centers Under the Act.

15. The Act provides:

> In addition to any other tax which is imposed pursuant to this section, a county may impose up to an additional 1-percent tax on the exercise of the privilege described in paragraph (a) by majority vote of the governing board of the county in order to:

---

[24]In this regard, see *Tamar 7600, Inc. v. Orange County*, 686 So. 2d 790 (Fla. 5th DCA 1997) and compare the text of that *per curiam* decision with the County's characterization thereof (Answer Brief at 7). *Tamar* is a case involving a "fifth cent" "tourist tax" dispute (at the pleadings stage), but one in which the State was not involved. In reversing the Orange Circuit Court's dismissal of the taxpayer case and ordering the lower court to permit the filing of a second amended complaint under the Act, the District Court of Appeal held:

> We conclude the County [Orange County] can't have it both ways - it cannot presently assess and accrue these tax dollars for the purpose of spending them on a baseball stadium under a specific agreement and simultaneously successfully contend that a taxpayer has no present right to challenge what they are doing. We think that if the County embarks on such an enterprise there must be a present right to challenge its legality since its legality is likely to affect the very existence of the tax. If the use to which the tax is to be put is invalid, the tax will either be withdrawn and a legal bargain made or the tax will be applied for its lawful purpose.

Tamar, supra, 686 So. 2d at 793 (Fla. 5th DCA 1997) (*per curiam*) (Dauksch, Cobb, and Griffin, JJ.) (emphasis and brackets added).

> 1. Pay the debt service on bonds issued to finance the construction, reconstruction, or renovation or a professional sports franchise facility, either publicly owned and operated, or publicly owned and operated by the owner of a professional sports franchise or other lessee with sufficient expertise or financial capability to operate such facility, and to pay the planning and design costs incurred prior to the issuance of such bonds.
>
> 2. Pay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a convention center, and to pay the planning and design costs incurred prior to the issuance of such bonds.

Ch. 96-397, §44, at 2499 - 2500, Laws of Fla. (A883 - A887) (adding last clause of subsection 2), codified at §125.0104(3)(1)(1) & §125.0104(3)(1)(2), Fla. Stat. (1997) (A878), current version at id. at Fla. Stat. (1998 Supp.) (same) (A872).

Thus Section 125.0104(3)(1)(1) of the Act explicitly authorizes private operation of a professional sports stadium, but Section 125.0104(3)(1)(2) of the Act contains no parallel provision for private operation of a "fifth cent" convention center. The Legislature took the distinction in the Act long before the State did in this case. And, as shown above, far less does the Legislature authorize "acquisition" there with "fifth cent" "tourist tax" revenues. Id.

iii. "Initially for the Purpose..." Under the Act.

16. Moreover, the 1996 amendments to the Act, cited above, amended Subsection 3 to provide:

> Only counties that elected to levy the tax initially for the purposes authorized in subparagraph 1 [i.e., "to finance the construction, reconstruction, or renovation of a professional sports franchise facility"] may

> use this tax for the purposes enumerated in subparagraph 2 [i.e., "to finance the construction, reconstruction, or renovation of a convention center"]."

Ch. 96-397, §44, at 2499 - 2500, Laws of Fla. (A887) (emphasis in original) (brackets added).

The Bond Ordinance (R694 - R700) levies the "fifth cent" "tourist tax" "initially for the purposes" of "financ[ing] the construction, reconstruction, or renovation of a professional sports franchise facility." See id. (brackets added). But the Bond Resolution betrays the Bond Ordinance's initial purpose. Moreover, the County's evidence does not answer whether the Bond Ordinance amended the Osceola County Code.[25]

iv. Primary Purpose Under the Bond Ordinance.

17. The Answer Brief's footnote 2, which seems to speak directly to the latter, cleverly omits the relevant question and the relevant answer and all the foregoing. Specifically, the County there omits to state that the Bond Ordinance was explicitly predicated on Section 125.0104(3)(1), Florida Statutes (1996 Supp.).[26] The Bond Ordinance at Section 2(B) confirms that the

[25]At best it remains impossible on the record to say whether the preconditions under the Act for imposing the fifth cent tax have been met. Thus, on this record, it is also impossible to say whether the County's own preconditions (i.e., in its own prior ordinances) for imposing the fifth cent tax have been met, since the Bond Ordinance failed specifically to amend the tourist tax provisions of the Osceola County Code, contrary to the requirements of the apparent codifications of one or more prior County tourist tax ordinances. See generally, id. and id. at 56 n. * ("Editor's note"), quoted in note 12, supra.

[26]See Merits Brief 44 n. 58 (quoting Bond Ordinance).

revenue from the new fifth cent "[t]ax shall first be expended for the purpose of financing improvements to Osceola County Stadium prior to any use of the revenues for financing a convention center."[27] The Answer Brief never quotes the text of the Bond Ordinance with good reason: it simply does not say what the County desperately wants it to say and so, apparently, millions of dollars in fifth cent taxes are being collected annually by the County under the Bond Ordinance, for the purposes therein stated, while the Bond Resolution essentially contradicts and disregards the stated purposes in the Bond Ordinance. The stated "additional purpose" in the Bond Ordinance (i.e., the Convention Center) has become the alpha and the omega in the Bond Resolution, which forgets the stadium.[28]

---

[27]See A335 & A772), quoted in Merits Brief at 44 n. 58. Accord, A837.

[28]To be sure, almost one year after the Bond Ordinance, "Subsection 3" of the Act (i.e., Section 125.0104(3)(l)(3), Florida Statutes) was later further amended, changing its meaning, as well as adding to its content, by means of the Legislature deleting existing Subsection 3 altogether, and substituting new Subsection 3, to remove a condition on use of tax revenues for a convention center, as follows:

> 3. Pay the operation and maintenance costs of a convention center for a period of up to 10 years. Only counties that have elected to levy the taxes for the purposes authorized in subparagraph 2. may use the tax for the purposes enumerated in this subparagraph.

Ch. 98-106, §1, at 515 - 516, Laws of Fla. (became a law without the Governor's approval May 22, 1998), codified in §125.0104(3)(l)(3), Fla. Stat. (Supp. 1998) (p. 296, col. 1, at A872). See Merits Brief at 45 n. 59 (how County induced trial court to believe this was a 1997 amendment).

But the 1998 amendment to the Act did not change the text or purposes of the Bond Ordinance. Neither did the 1998 amendment to "Subsection 3" authorize acquisition.

CONCLUSION

For these reasons, the decision below should be reversed.

LAWSON L. LAMAR
STATE ATTORNEY
NINTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR OSCEOLA COUNTY

LAWSON L. LAMAR
Florida Bar No. 147830

CLOYCE L. MANGAS, JR.
Assistant State Attorney
Florida Bar No. 287830
P. O. Box 1673
Orlando, Florida 32802-1673
(407) 836-2492, phone
(407) 836-2333, fax
Attorneys for Appellant
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant State of Florida has been served by U. S. mail this 14th day of December, 1998 upon the following:

Gregory T. Stewart
Maureen McCarthy Daughton
Virginia Saunders Delegal
Bond Counsel
Nabors, Giblin & Nickerson, P.A.
315 S. Calhoun St., Ste. 800
Tallahassee, Florida 32301

Jo Thacker
County Attorney
Osceola County
17 South Vernon Avenue
Kissimmee, Florida 34741

John R. Stokes
Bond Counsel
Nabors, Giblin & Nickerson, P. A.
2502 Rocky Point Dr., Ste. 1060
Tampa, Florida 33607

CLOYCE L. MANGAS, JR.
Assistant State Attorney