IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

THE CITY OF OLDSMAR,

Plaintiff-Appellant,

v. Case No. SC002695

THE STATE OF FLORIDA, and the property owners and citizens of the City of Oldsmar, Florida, including non-residents owning property in, or subject to taxation by, the City of Oldsmar, and STATE OF FLORIDA, DEPARTMENT OF TRANSPORATION,

L.T. No. 00-004479-CI-21 taxpayers,

Defendants-Appellees.
_______________________________________/

ON DIRECT APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT,
CITY OF OLDSMAR, TO ANSWER BRIEFS OF
FDOT AND STATE OF FLORIDA

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TABLE OF CONTENTS

PAGE

ARGUMENT

I. A PROCEEDING BROUGHT UNDER CHAPTER 75 IS THE ONLY WAY FOR THE CITY TO FORECLOSE ALL CHALLENGES TO THE VALIDITY OF THE JPA. . . . 1

II. APPELLEES' EQUITABLE ARGUMENTS ARE WITHOUT MERIT. THE CITY'S CHALLENGE TO THE JPA IS TIMELY AND THE CITY PROVIDED APPROPRIATE. . . . 4 NOTICE TO ALL NECESSARY PARTIES

III. THE DOCTRINES OF ELECTION OF REMEDIES, COLLATERAL ESTOPPEL, AND PRIORITY DO NOT BAR THE PRESENT CASE. 6

IV. A CHAPTER 75 PROCEEDING IS THE APPROPRIATE MEANS TO DETERMINE THE VALIDITY OF THE JPA. . 10

V. A PROCEEDING BROUGHT PURSUANT TO CHAPTER 75 CAN BE BROUGHT AFTER THE DEBT HAS BEEN ISSUED. 11

VI. THE APPELLEES FAIL TO DEMONSTRATE THAT THE JPA IS ANYTHING BUT A LONG-TERM DEBT OBLIGATION. 14

CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Case	Page
Andrews v. City of Winter Haven, 3 So.2d 805 (Fla. 1941)	12
Beck v. Colbath, 70 U.S. (3 Wall.) 334 (1865)	9
Brown v. City of Lakeland, 54 So. 716 (Fla. 1911)	13
Feinberg v. Naile, 561 So.2d 1307 (Fla. 3d DCA 1990)	7
Frankenmuth v. Escambia County, 769 So.2d 1012 (Fla. 2000) ..	12
Hirsch v. Gaetano, 732 So.2d 1177 (Fla. 5th DCA 1999)	9
Kitter Electric of Florida, Inc. v. U.S. Fidelity & Guaranty Co., 530 So.2d 475 (Fla. 5th DCA 1988)	8
Lowry v. Logan, 650 So.2d 653 (Fla. 1995)	7
Madison v. Williams Island Country Club, Ltd., 606 So.2d 687 (Fla. 3d DCA 1992)	8
McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980)	10
Monroe v. Reeves, 71 So. 922 (Fla. 1916)	2, 13
Merrill Lynch Pierce Finner & Smith, Inc. v. Ainsworth, 630 So.2d 1145 (Fla. 2d DCA 1993)	9
Nuveen v. City of Quincy, 156 So. 53 (Fla. 1934)	2, 13
People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So.2d 1373 (Fla. 1991)	1
State ex. rel. Harrington v. City of Pompano, 188 So. 610 (Fla. 1939)	12

State ex. rel. Nuveen v. Greer, 102 So. 739 (Fla. 1924) 2, 13

State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983) 11

State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 631 (Fla. 1980) 10

State v. Town of Bellair, 170 So. 434 (Fla. 1936) 12

St. Lucie County v. Town of St. Lucie Village, 603 So.2d 1289 (Fla. 4th DCA 1992) 4, 6

Stone v. City of Maitland, 446 F.2d 83 (Fla. 1971)…………... 7

Steinhardt v. Steinhardt, 445 So.2d 352 (Fla. 3d DCA 1984) 8

Williams v. Duggan, 153 So.2d 726 (Fla. 1963) 7

Williams v. Robineau, 168 So. 644 (Fla. 1936) 7

Weigh Less for Life, Inc. v. Barnett Bank of Orange Park, 399 So.2d 88 (Fla. 1st DCA 1981) 8

Statutory Authorities **Page**

Florida Constitution, Article VII, Section 12 (1968) 6, 7, 15

Florida Statutes, Chapter 75 . . . . *passim*

ARGUMENT

I. A PROCEEDING BROUGHT UNDER CHAPTER 75 IS THE ONLY WAY FOR THE CITY TO FORECLOSE ALL CHALLENGES TO THE VALIDITY OF THE JPA.

The purpose of litigation brought pursuant to Florida Statutes, Chapter 75, is to provide an efficient and expeditious method to determine the validity of a public debt. See Palm Beach v. State, 111 So. 640 (Fla. 1927). Section 75.02 allows a municipality to name as defendants "the state and the taxpayers, property owners, and the citizens of the county, municipality or district, including nonresidents owning property or subject to taxation therein."

Section 75.02 provides a means to bring all persons with standing to challenge the debt into one proceeding. Once all persons with standing are joined in the proceeding, they are bound by the outcome of the litigation. If the debt is deemed valid, then all future challenges are barred. See §75.09, Fla. Stat. (2000). Absent joinder of the taxpayers *et al.*, the debt would be subject to repeated challenges by any taxpayer or property owner at essentially any time. The validity and enforceability of the debt literally never would be assured, and any payments in satisfaction of the debt could be barred or disgorged. Chapter 75 provides a method to "quiet all claims" that could be brought regarding the propriety of the debt. See People Against Tax Revenue Mismanagement v. County of Leon, 583

So.2d 1373 (Fla. 1991). In contrast, if the validity of a public debt is challenged in a lawsuit other than a Chapter 75 suit, then the only persons bound by the determination would be the parties named in that suit. Starr Tyme, Inc. v. Cohen, 659 So.2d 1064 (Fla. 1995).

For example, in the Hillsborough County litigation[1], only the FDOT, Kimmins, and the City would be bound by a judgment rendered in that proceeding. None of the other persons with standing to challenge the validity of the Joint Project Agreement ("JPA") debt, such as the taxpayers and property owners within the City of Oldsmar, would be bound. If at the conclusion of the trial of the Hillsborough County case, the JPA is determined to be a valid City debt, then, at the time the FDOT seeks to collect the debt, the debt will again be subject to challenge by any City of Oldsmar taxpayer or property owner who would be free to seek an injunction to prevent payment of an unconstitutional debt. See, e.g., Monroe v. Reeves, 71 So. 922 (Fla. 1916); State ex rel. Nuveen v. Greer, 102 So. 739 (Fla. 1924); Nuveen v. City of Quincy, 156 So. 53 (Fla. 1934)(discussed in greater detail below).

The City determined that it would be better to adjudicate the validity of the JPA

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[1] Kimmins Contracting Corp. v. State of Florida, Department of Transportation v. City of Oldsmar, Case No. 99-2257, which Appellees argue is the proper forum to determine the validity of the municipal debt created by the JPA.

debt once and for all in a Chapter 75 lawsuit, rather than prolong the question and subject the JPA, the citizens, and the City to innumerable challenges. Accordingly, the City filed suit pursuant to Chapter 75, in an effort to resolve all potential challenges to the JPA by joining all persons with standing. In that manner, the City sought to "quiet the title" regarding the validity of the debt.

The Appellees' argument that the title of Chapter 75, "Bond Validation," precludes the City's attempt to determine the validity of the JPA is specious. In any proceeding brought pursuant to Chapter 75, whether the action is a "validation" action, or an "invalidation" action depends upon the litigants' perspective.[2] In a more typical Chapter 75 proceeding, where the bond issuer seeks a ruling that the debt is valid, and opponents seek a ruling that the debt is invalid, the opponents view the matter as a bond invalidation proceeding, just as assuredly as the bond issuer considers the proceeding to be a bond validation proceeding. Therefore, whether a proceeding brought under Chapter 75 is a

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[2] In its recitation of the facts, the State Attorney contends that the City admitted during the hearing below that the Pinellas County suit was not a bond validation suit. The State Attorney cites to the hearing transcript, page 13 (Appendix Tab 4). A fair and complete reading of the discussion between counsel and the Trial Judge makes it apparent that the State Attorney was taking the undersigned's answer out of context. When the Trial Judge asked whether "We're not doing a bond validation?" Counsel answered, "No," expressing disagreement with the Trial Judge's position. Counsel's argument in pages 13 et. seq. (Appendix Tab 4) makes it clear that counsel never admitted that the suit was anything other than a Chapter 75 action.

validation or an invalidation proceeding is merely a matter of perspective. Every suit brought under Chapter 75 contains both arguments. It is inescapable that if the City had sought validation of the JPA before the debt was incurred, the correct result would have been a judgment that the JPA was an unconstitutional debt instrument. The fact that the City is seeking a judicial determination now, does not alter the fact that the debt is invalid.

II. APPELLEES' EQUITABLE ARGUMENTS ARE WITHOUT MERIT. THE CITY'S CHALLENGE TO THE JPA IS TIMELY AND THE CITY PROVIDED APPROPRIATE NOTICE TO ALL NECESSARY PARTIES.

The Appellees harp on the fact that the JPA is being challenged four and one-half years after it was executed. The Appellees fail to acknowledge, however, that the City challenged the validity of the JPA as soon as the FDOT tried to collect payment under the JPA.

The City and FDOT signed the JPA in 1995, and the FDOT contends that the costs the FDOT incurred throughout the life of the project should now be reimbursed by the City. It was not until 1999, when the FDOT filed suit against the City to collect those costs, that the FDOT sought to enforce the JPA. As soon as the City was served with the FDOT's Third Party Complaint, the City immediately raised the defense that the JPA was an unconstitutional debt, similar or identical to that created by the FDOT in St. Lucie County v. Town of St. Lucie Village, 603 So.2d

1289 (Fla. 4th DCA 1992). The defense was initially raised in the Hillsborough County litigation, but the City determined that it would be in the best interest of the City and taxpayers to resolve the constitutional question in the most efficient and expeditious manner possible, which, by definition, required that a separate lawsuit be filed utilizing the procedure set forth in Chapter 75, Florida Statutes.

Section 75.06, Florida Statutes, requires that notice be provided to all named defendants by publication. The record below establishes that the City complied with the statutory notice requirements. (Appendix Tab 5). The Appellees try to make an issue of the fact that the FDOT was not aware of the Pinellas County lawsuit apparently until just before the Pinellas County suit was to be heard. That argument merely casts the State Attorney's Office in a poor light. The Pinellas County Complaint filed by the City expressly states that the debt instrument at issue is the JPA between the City and the FDOT. The State Attorney received ample notice of the hearing, and if the State Attorney chose to wait until just prior to the hearing to seek input from the FDOT, then that was a strategic failing by the State Attorney and is irrelevant to the issues in this appeal.

The FDOT impliedly argues that the Pinellas County suit was in some way an attempt at improper forum shopping. The argument is absurd, but warrants brief rebuttal, if for no other reason than to assure the Court that the City's motives in

bringing the Pinellas County suit were proper. Section 75.02, Florida Statutes, dictates where a suit brought under Chapter 75 is to be filed. In this instance, it had to be filed in Pinellas County, the City's county of residence. Furthermore, the only judge that had made a substantive ruling in the Hillsborough County case was Judge Steinberg, who recused himself at the FDOT's request. The City filed the Pinellas County suit simply in an effort to obtain an efficient and expedient determination of whether the JPA debt violated Article VII, Section 12 of the Constitution.

With broad brushstrokes and bold, but unsupported innuendoes of deceit and wrongdoing by the City, the Appellees paint a picture that equity should prevent the JPA from being deemed invalid. The facts do not support Appellees' arguments, and noticeably absent from the picture painted by the Appellees is the St. Lucie case. The St. Lucie case establishes that the FDOT had the knowledge and ability to avoid the constitutional defects that exist in the City of Oldsmar JPA, but failed to draft a defect-free document. Equity should not save the FDOT from the FDOT's own error.

III. THE DOCTRINES OF ELECTION OF REMEDIES, COLLATERAL ESTOPPEL, AND PRIORITY DO NOT BAR THE PRESENT CASE.

Appellees incorrectly assert that the City is barred from seeking a determination regarding the validity of the JPA debt in the case below merely because the City

raised the issue as an affirmative defense and filed a compulsory counterclaim against the FDOT in the pending Hillsborough County case. For the doctrine of election of remedies to apply, a remedy must be pursued to a final determination or a conclusion on the merits. See Lowry v. Logan, 650 So.2d 653 (Fla. 1995); Williams v. Duggan, 153 So.2d 726 (Fla. 1963)("An election is matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other.") A litigant is entitled to pursue alternative remedies prior to a final determination. See Feinberg v. Naile, 561 So.2d 1307 (Fla. 3d DCA 1990). The mere bringing of a suit that is dismissed prior to judgment does not constitute an election of remedies. Williams v. Robineau, 168 So. 644 (Fla. 1936); Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971).

In the Hillsborough County case, the City filed a Motion for Summary Judgment against the FDOT on the basis that the JPA violates Article VII, Section 12 of the Florida Constitution and is void *ab initio*. (Appendix Tab 3C.) The Hillsborough County Circuit Court denied the City's Motion for Summary Judgment on the grounds that the Court believed that factual issues remained to be determined, preventing summary judgment. (Appendix Tab 3D.) The Hillsborough County lawsuit is still pending and the issue of the JPA's validity has not been resolved. Because the Hillsborough County court has not reached a

final determination of the JPA's validity, the doctrine of election of remedies does not apply to the issues before this Court. Moreover, Hillsborough County's denial of the City's Motion for Summary Judgment cannot serve as the basis for collateral estoppel, because such a denial is not a final adjudication. See Weigh Less for Life, Inc. v. Barnett Bank of Orange Park, 399 So.2d 88 (Fla. 1st DCA 1981); Steinhardt v. Steinhardt, 445 So.2d 352 (Fla. 3d DCA 1984)(collateral estoppel is not applicable, because a denial of summary judgment is not a final adjudication on the merits.)

The FDOT and State Attorney argue that future collateral estoppel also bars the City's Pinellas County bond validation suit. There is no Florida precedent that recognizes the use of future collateral estoppel as a basis for dismissing a suit. Future collateral estoppel appears to be a new concept created by Appellees, and supported only by a citation to a dissenting opinion in Madison v. Williams Island Country Club, Ltd., 606 So.2d 687, 690 (Fla. 3d DCA 1992). Madison, however, does not stand for the proposition that future collateral estoppel even exists, much less supports the dismissal of the Pinellas County case by the Trial Court below. Similarly, Kitter Electric of Florida, Inc. v. U.S. Fidelity & Guaranty Co., 530 So.2d 475 (Fla. 5th DCA 1988), cited by the Appellees does not discuss future collateral estoppel. Instead, Kitter discusses whether subsequent litigation

between a subcontractor and a surety should be stayed because of a previously filed arbitration proceeding between the identical parties. The Court recognized that the issues in both cases were identical, the parties were identical, and for that reason the subsequent litigation should be stayed.

The present case is factually distinguishable from Kitter because the Pinellas County case and the Hillsborough County case do not share identical parties. Kimmins is not a party to the Pinellas County case, and the City taxpayers and property owners are not parties to the Hillsborough County case.

The FDOT also argues that the principle of priority precludes the City from seeking relief in a bond validation proceeding, because the City was sued as a third-party defendant in Hillsborough County, prior to filing the Pinellas County action. The principle of priority only applies to cases filed in two different states that have concurrent jurisdiction and identical parties. See Beck v. Colbath, 70 U.S. (3 Wall.) 334 (1865); Hirsch v. Gaetano, 732 So.2d 1177 (Fla. 5th DCA 1999)(cases filed in Florida and Massachusetts where both courts have concurrent jurisdiction); Merrill Lynch Pierce Finner & Smith, Inc. v. Ainsworth, 630 So.2d 1145 (Fla. 2d DCA 1993)(the principle of priority may be applied as a matter of comity if courts of different states have concurrent jurisdiction over the same parties and subject matter).

The Hillsborough County case and the Pinellas County case obviously do not involve litigation in two separate states. More importantly, the two courts do not share concurrent jurisdiction. The only jurisdiction in which all potential challengers to the JPA could be brought, is Pinellas County Circuit Court pursuant to Section 75.02, Florida Statutes. The Hillsborough County court did not have jurisdiction to hear a Chapter 75 lawsuit concerning a Pinellas County debt instrument. Also, the Hillsborough County case and Pinellas County case do not share identical parties.

IV. A CHAPTER 75 PROCEEDING IS THE APPROPRIATE MEANS TO DETERMINE THE VALIDITY OF THE JPA.

The Appellees incorrectly assert that a contractual debt obligation is inappropriate for a Chapter 75 proceeding, because the propriety of a contract is a collateral issue to a bond validation suit. The cases cited by Appellees are not on point because the cases involve contractual agreements that do not constitute a debt instrument itself.

Appellees cite State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 631 (Fla. 1980), in which a recreation district sought to validate bonds secured by ad valorem taxes. The district also asked for an interpretation of a collateral operating agreement for recreational facilities located in the district. This Court held that issues involving the operating agreement were collateral to the district's debt

obligation, and therefore, could not be resolved in a bond validation proceeding.

Similarly, in McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980), also cited by Appellees, the Greater Orlando Aviation Authority sought to validate bonds issued for the expansion and improvement of the Orlando International Airport. The Orlando taxpayers, as appellants, sought a judicial declaration regarding the validity of collateral lease agreements between the tenant airlines and the aviation authority. This Court held that the lease agreements were not part of the debt obligation incurred by the Aviation Authority and, as such, should not be considered in a bond validation proceeding.

In contrast, this Court held in State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983) that an interlocal agreement was subject to Chapter 75 because the interlocal agreement was the debt instrument, and ruled that the interlocal agreement may be validated under Chapter 75, because it is evidence of an indebtedness. Id. at 982.

Unlike the collateral contracts in Sunrise and McCoy, the JPA that is the subject of this proceeding is the debt instrument itself that is being challenged, and because the JPA itself reflects the debt obligation, the JPA is properly subject to Chapter 75.

V. A PROCEEDING BROUGHT PURSUANT TO CHAPTER 75 CAN BE BROUGHT AFTER THE DEBT HAS BEEN ISSUED.

Appellees' argument that a proceeding under Chapter 75 may only be brought prior to the issuance of the debt is misplaced. Most of the reported decisions concerning Chapter 75 involve the issuance of bonds to be sold on the secondary market. When a bond issue is to be sold, the bond issuer typically brings a Chapter 75 suit to increase the marketability of the bond prior to actual issuance of the bonds. Once a court has ruled that the bond debt is legitimate, then the purchasers can purchase the bonds with confidence that the bonds will not be subject to future attack when the bonds mature and payment is due. See State ex rel. Harrington v. City of Pompano, 188 So. 610 (Fla. 1939). In those situations, the bond validation suit typically is brought before the bonds are issued and sold. Accordingly, it is more common for a Chapter 75 suit to be brought before the debt is issued, but there is nothing in the statute that requires the suit to be brought prior to the issuance of the debt. In fact, there are reported cases where validation of the debt was sought after the debt had been incurred. See, e.g., State v. Town of Bellair, 170 So. 434 (Fla. 1936). Also, the historical note to Section 75.02 reveals that the 1927 statute authorized a bond validation suit for any public entity "desiring to incur any bonded debt or to issue certificates of indebtedness." (emphasis added). In contrast, the current statute allows validation suit to determine the legality of "taxes levied" which contemplates a judicial determination of authority after the fact.

Furthermore, there is no case law supporting Appellees' argument that a governmental entity cannot challenge an unconstitutional debt after the debt has been incurred. In fact, several cases support the City's challenge of the unconstitutional JPA. See Andrews v. City of Winter Haven, 3 So.2d 805 (Fla. 1941); Frankenmuth v. Escambia County, 769 So.2d 1012 (Fla. 2000).

Appellees incorrectly assert that the City is seeking to attack a contract that was completed years ago. The JPA was entered into years ago, but it was not fully performed, as evidenced by the FDOT's Third Party Complaint against the City in the Hillsborough County case whereby the FDOT seeks to obtain reimbursement from the City under the JPA for payments allegedly advanced by the FDOT on the City's behalf. Even if the JPA had been fully performed, Florida law provides that a debt obligation may be challenged after the obligation has been issued. See, e.g., Monroe, 71 So. at 922; Greer, 102 So. at 739; City of Quincy, 156 So. at 53, collectively the Nuveen cases.

In the Nuveen line of cases, an election was held in 1909 approving bonds issued by the City of Quincy to finance school construction. Because there was no statute at that time providing for validation of the bonds, the Legislature passed a special act declaring the bonds valid. Mr. Nuveen purchased several of the bonds. Two years after Nuveen purchased the school board bonds, this Court, in an unrelated

case, Brown v. City of Lakeland, 54 So. 716 (Fla. 1911), ruled that Florida cities could not issue bonds to finance school construction and that bonds like Nuveen's bonds were, therefore, void. Years later, when Nuveen sought payment under his bonds, taxpayers sought and obtained an injunction against the collection of further taxes to pay the school board bonds. See Monroe, 71 So. at 922. In 1920, eleven years after Nuveen had purchased his bonds, Gadsden County held an election to approve new bonds to replace the invalid bonds issued by the City of Quincy. However, because original bonds were void, validation of the replacement bonds was ultimately denied. Then, 14 years after purchasing his bonds, Nuveen sued for mandamus to obtain payment. While acknowledging the apparent harshness of the result, this Court denied mandamus because the original bonds were invalid. See Greer, 102 So. at 739.

The Nuveen line of cases demonstrates that a bond or certificate of indebtedness may be challenged and ruled void long after it has been issued. Just as importantly, the Nuveen line of cases illustrate that absent a bond validation suit to determine the validity of the debt once and for all, payment of the debt can be subject to challenge at any time, and the debtor and creditor can be subjected to prolonged and expensive litigation.

VI. THE APPELLEES FAIL TO DEMONSTRATE THAT THE JPA IS ANYTHING BUT A LONG-TERM DEBT OBLIGATION.

The FDOT unpersuasively argues that the JPA did not create a debt because the City paid the FDOT $1,094,817.19 prior to the start of the work. The FDOT ignores the fact that the JPA also allowed the FDOT to pay all costs in excess of the $1,094,817.19 advanced, and to obtain reimbursement of all amounts in excess of the advanced payment plus interest after the 715 day project was complete. It is the amount sought as reimbursement, i.e., the amounts that the FDOT contends were paid to Kimmins on the City's behalf that are the unconstitutional debt.

CONCLUSION

The Trial Court clearly erred when it dismissed the City's Complaint for lack of jurisdiction, and alternatively, because the doctrine of collateral estoppel applied. The City respectfully requests that the Supreme Court reverse the Trial Court, and rule, as a matter of law, that:

The JPA constitutes a bond or certificate of indebtedness that is subject to Article VII, Section 12 of the Florida Constitution and Chapter 75, Florida Statutes;

As a bond or certificate of indebtedness, the dismissal by the Trial Court is reversed because the Trial Court clearly had jurisdiction; and

Collateral estoppel has no application and cannot serve as a bar because there has been no final adjudication in the Hillsborough County lawsuit.

The City also respectfully requests that the Supreme Court rule, as a matter of law, that, because the JPA lacks any of the judicially recognized savings provisions, Article VII, Section 12 mandates that the JPA be approved in a referendum, and absent a referendum, the JPA violates Article VII, Section 12 and is void. The Trial Court's dismissal should be reversed and the case remanded with directions that the City is entitled to a factual determination regarding the existence of a referendum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to C. Marie King, Assistant State Attorney, Pinellas County, P.O. Box 5028, Clearwater, FL 33758; Raymond C. "Chet" Conklin, Florida Department of Transportation, Hayden Burns Building, MS-58, 605 Suwannee Street, Mail Station 58, Tallahassee, Florida 32399-0458; and to Marianne A. Trussell, Deputy General Counsel, Florida Department of Transportation, Haydon Burns Building, MS-58, 605 Suwannee Street, Tallahassee, FL 32399-0458 on this 21st day of March, 2001.

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Attorney

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I HEREBY CERTIFY that the foregoing Reply Brief was typed in Type Style Times New Roman, Type Size 14.

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Attorney