IN THE SUPREME COURT OF FLORIDA

BREVARD COUNTY, FLORIDA,

Cross-Appellant/Appellee,

v. Case No.: SC06-1091

THE STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS, AND CITIZENS OF BREVARD COUNTY, FLORIDA, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAX THEREIN,

Lower Tribunal Case No.: 06 CA 0033074

Cross-Appellees,

BOND VALIDATION PROCEEDINGS

and

SCOTT ELLIS, in his capacity as CLERK OF THE BREVARD COUNTY CIRCUIT COURT,

Cross-Appellee/Appellant.
_____/

CORRECTED BRIEF OF CROSS-APPELLANT/APPELLEE, BREVARD COUNTY, FLORIDA

On Direct Review from the 18th Judicial Circuit Court, in and for Brevard County, Florida

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STATEMENT OF THE CASE AND FACTS

In 2001, Brevard County, Florida issued three series of Limited Ad Valorem Tax Bonds, Series 2001A, Series 2001B, and Series 2001C, pursuant to Resolutions Nos. 01-213, 01-214, and 01-215 respectively, to finance the cost of completing the acquisition, construction and equipping of three separate and distinct parks and recreation projects located in the northern, central and southern portions of Brevard County. See Final Judgment ¶ 13-15 (A. O)[1]. All three were approved by referendum on November 7, 2000. See id. at ¶ 13-15 (A. O).

Due to construction costs, land values, changes in permitting requirements, hurricanes, requested changes by review committees, and other unforeseen events, the proceeds from the 2001 Bond Issues were insufficient to complete these projects. See id. at ¶ 16 (A. O). To obtain the funding necessary to complete the projects, Brevard County, Florida sought to issue three different series of Brevard County, Florida, Sales Tax Revenue Bonds in 2006 pursuant to and in accordance with article VIII, section 1, Constitution of the State of Florida; Chapter 125, Florida Statutes; Chapter 159, Florida Statutes; Chapter 212, Florida Statutes; Chapter 218, Part VI, Florida Statutes;

[1] All references in this brief to "A." are to Appellant's Appendix to his Initial Brief.

its Home Rule Charter; and other applicable provisions of law (collectively "the Act"). See id. at ¶ 4 (A. O).

On March 21, 2006, the Plaintiff duly and validly adopted three Bond Resolutions. Resolution 06-081 provided for and authorized the issuance of Series 2006A Bonds in an aggregate principal amount not to exceed $9.1 million to finance the completion of the North Brevard County Parks and Recreation Projects. See id. at ¶ 4-5 (A. O). Resolution 06-082 provided for and authorized the issuance of Series 2006B Bonds in an aggregate principal amount not to exceed $8.1 million to finance the completion of the Central Brevard County Parks and Recreation Projects. See id. at ¶ 4-5 (A. O). Resolution 06-083 provided for and authorized the issuance of 2006C Bonds in an aggregate principal amount not to exceed $19.1 million to finance the completion of the South Brevard County Parks and Recreation Projects. See id. at ¶ 4-5 (A. O).

In each Bond Resolution, Brevard County ascertained, determined and declared that completion of the construction of the 2001 parks and recreation projects is necessary and in the best interests of the County and that each project is a capital project within the meaning of section 218.64(3), Florida Statutes (2005). See id. at ¶ 17 and 19 (A. O). In section 3(C) of each Bond Resolution, Brevard County ascertained, determined and declared that each project is part of a

countywide program for parks and recreation within the meaning of the Act and section 218.64(1), Florida Statutes. See id. at ¶ 22(a) and (c) (A. O). In section 3(D) of each Bond Resolution, Brevard County ascertained, determined and declared that the residents will receive real and substantial benefits from the completion of the projects and that each project will be used by a geographically diverse group of residents. See id. at ¶ 22(b) (A. O). In section 3(J) of each Bond Resolution, Brevard County ascertained, determined and declared that each project is not physically connected to another project, will be constructed independently from the other projects, and therefore is a separate and distinct project. See id. at ¶ 27 (A. O).

The Bonds are payable from and secured by the pledge of and lien on Sales Tax Revenues, defined as Brevard County's share of the local government half-cent sales tax derived from the Local Government Half-Cent Sales Tax Clearing Trust Fund, as permitted by section 218.64, Florida Statutes (2005). See id. at ¶ 9, 18, and 22 (A. O). The Bonds are also payable from any additional sales tax revenues distributed to Brevard County and monies held in funds and accounts established in accordance with the Base Resolution[2] and the 2006 Bond Resolutions, including certain

[2] County Resolution No. 93-431, adopted on November 10, 1993, as supplemented and amended.

investment earnings thereon ("pledged funds"). See id. at ¶ 9 (A. O).

Neither the faith and credit nor the taxing powers of Brevard County, the State of Florida, any special district, municipal taxing unit or political subdivision is pledged to pay the principal, premium, interest or costs of the Bonds. See id. at ¶ 10 (A. O). No bondholder has the right to compel the exercise of Brevard County's ad valorem taxing power or taxation in any form on any property in order to pay the Bonds or their interest; no bondholder is entitled to payment from any funds except from the pledged funds. See id. at ¶ 10 (A. O). Furthermore, under section 4.05(4)(E) of the Base Resolution, Brevard County can use any legally available monies for payment of the Bonds. See id. at ¶ 12 (A. O).

Under Brevard County's Home Rule Charter (the "Charter"), no referendum is required for any bonds payable from non-ad valorem tax revenues less than $19,158,316 ("the cap").[3] Because none of the 2006A, 2006B and 2006C Bond Issues are individually

[3] Pursuant to section 5.3.1 of the Charter, no referendum is required for bonds payable from non-ad valorem tax revenues which do not exceed $15 million when combined with other issues for the same project within the previous two (2) years. See id. at ¶ 23 (A. O). Section 5.3.4 of the Charter provides that this $15 million cap may be adjusted. See id. at ¶ 25 (A. O). On March 22, 2005, Brevard County adopted Resolution No. 2005-076 and determined in accordance with section 5.3.4 of the Charter and Ordinance No. 2002-65 that the maximum amount of debt which could be issued for each project was $19,158,316. See id. at ¶ 26 (A. O).

greater $19,158,316 and because no issues have been made within the preceding two years to finance these projects, no referendum is required with the 2006 Bond Issue. See id. at ¶ 24 and 28 (A. O).

Pursuant to Chapter 75, Florida Statutes (2005), Brevard County filed a complaint for validation in the circuit court which properly joined the State of Florida, the taxpayers, property owners and citizens of Brevard County, Florida, including nonresidents owning property or subject to taxation therein. In the complaint, Brevard County sought the additional relief of having the option to use the ad valorem millage collected pursuant to the 2001 Referenda which exceeds the debt service on the 2001A, 2001B and 2001C Bonds ("surplus millage") to pay the debt service on the 2006A, 2006B and 2006C Bonds respectively.

On April 21, 2006, a hearing was held before the Eighteenth Judicial Circuit. Both sides presented their arguments. Brevard County argued that: (1) these proceedings involved three separate and distinct bond issues; (2) each series of bonds should be validated by the Court; and (3) the Court should declare, as part of the bond validation proceedings, that the County would be permitted the option to use the surplus millage from the 2001 Bond Issue to pay the debt service on the 2006 Bonds. See Transcript of Proceedings (Apr. 21, 2006) at 8-16;

35-43 (A. P). The Appellant countered these arguments by asserting that: (1) Brevard County is deliberately attempting to circumvent the referendum requirement by inconsistently finding that there are three separate and independent projects for one, countywide program of parks and recreation so as to keep all the 2006 Bond Issues under the cap; and (2) the surplus millage issue is collateral to the proceedings and cannot be addressed in these proceedings. See Transcript of Proceedings (Apr. 21, 2006) at 16-29; 43-46 (A. P).

On April 25, 2006, the Court issued a final judgment validating the 2006 Bond Issue. After consideration of the record, the Court rejected the Appellant's first argument and found that each of the three series of Bonds, 2006A, 2006B and 2006C, funded three separate and distinct projects, the "North Brevard Projects", the "Central Brevard Projects", and the "South Brevard Projects" respectively. See id. at ¶ 13-15 (A. O). The Court added:

> The 2006A Bonds, the 2006B Bonds and the 2006C Bonds may be issued without a referendum in accordance with Section 5.3 of the Plaintiff's Home Rule Charter because each of the North Brevard Projects, the Central Brevard Projects and the South Brevard Projects listed on Exhibits "B-1", "B-2" and "B-3," of the Complaint, respectively, are separate and distinct projects for purposes of the Home Rule Charter Cap and therefore the allocable portion of the 2006A Bonds, 2006B Bonds and 2006C Bonds (including the portion thereof

> applied to costs of issuance) issued for each of the respective projects identified on Exhibits "B-1," "B-2" and B-3" of the Complaint will not exceed, individually or in combination with other issues for each of the individual projects authorized within the preceding two (2) years, $19,158,316.

Id. at ¶ 28 (A. O) (emphasis added).

The Court also held that: (1) Brevard County has the authority to issue the 2006 Bonds, to incur the bonded debt, and to approve their issuance; (2) the proceedings essential to the 2006 Bonds, the pledged funds, the redemption premium (if any) and the interest thereon, and their use by Brevard County to pay the debt service on the 2006 Bonds, the Base Resolution and the Bond Resolutions are all valid and in conformity with the law; (3) the 2006 Bonds will constitute legal, valid and binding obligations of Brevard County and will be enforceable by the terms established in the Base Resolution and the Bond Resolutions; and (4) the determination of whether Brevard County shall have the option to use the surplus millage to pay the debt service on the 2006A, 2006B, and 2006C Bonds is a collateral issue and should be decided at a future proceeding.

The Appellant appeals the Court's judgment validating the 2006 Bond Issue. Brevard County cross-appeals the Court's refusal to rule on the surplus millage issue.

SUMMARY OF THE ARGUMENT

Appellant argues that Brevard County is attempting to circumvent the $19,158,316 cap in the Charter by issuing three series of bonds to finance one parks and recreation project for the whole county. He alleges that the County has engaged in this scheme so as to avoid having to hold a referendum. Alternatively, he asserts that if the projects were separate and independent, then they could not constitute a "countywide program" under section 218.64(1), Florida Statutes (2005).

Appellant's position is meritless. Even prior to 2001 when these projects commenced, it has been the legislative determination of Brevard County that there are three separate and distinct parks and recreation projects. The County did not suddenly embrace its position in 2006 prior to the instant bond issuance. The County has consistently found and determined that each project, described in Exhibits B-1, B-2 and B-3 of the Complaint, has a specific and distinct plan and design, that no two projects are contiguous or dependent in any way on any other project, and that although all of these projects are grouped together for financing purposes, each is separate and distinct within the meaning of section 5.3.1 of the Charter.

Furthermore, while these projects are separate and independent, the County has determined that they are all part of a comprehensive, countywide program of parks and recreation that

will be accessible for the enjoyment of all the County's residents. Consequently, each of these projects are "countywide programs" within the meaning of section 218.64(1). Since these legislative determinations are not erroneous, this Court must affirm the bond validation judgment.

Nevertheless, the Court below erred when it failed to address the issue of whether Brevard County would be permitted to elect to use the surplus millage to pay the debt service on the 2006A, 2006B and 2006C Bonds. This issue is not collateral to the validation proceedings because it goes directly to the issue of how the 2006 Bonds will be paid.

Section 200.181(3), Florida Statutes (2005) provides that "[t]he county or municipality may use the surplus revenue for any lawful purpose solely related to the capital project for which the voted millage was approved, including operations and maintenance." Here, the projects to be funded with proceeds from the 2006A, 2006B and 2006C Bonds are the very same projects for which the surplus millage was collected. Thus, the requirements of the statute are satisfied. Furthermore, since the surplus millage is not pledged to pay debt service on the 2006 Bonds and since the bondholders cannot require the levy of ad valorem taxes of any kind to pay debt service on the 2006 Bonds, there is no need for a referendum approval. As a result, Brevard County should be permitted the option to use the surplus

millage to pay the debt service on the 2006 Bonds under section 200.181(3).

ARGUMENT

I. THE FINAL JUDGMENT VALIDATING THE 2006 BOND ISSUANCE SHOULD BE AFFIRMED

A. Standard of Review

"A final judgment validating bonds comes to this Court with a presumption of correctness.[4] The burden of proof is on the appellant, who must demonstrate that the record and the evidence fail to support the lower court's conclusions." Boschen v. City of Clearwater, 777 So. 2d 958, 962 (Fla. 2001) (citations omitted). Accord Turner v. City of Clearwater, 789 So. 2d 273, 276 (Fla. 2001). "Thus, only where the legislative

[4] In fact, in the vast majority of bond validation cases, this Court has affirmed the bond validation judgment below. See, e.g., Boschen, 777 So. 2d at 959 (affirming the bond validation judgment for roadway and related capital improvements); Turner, 789 So. 2d at 275 (affirming the bond validation judgment for replacing the Memorial Causeway Bridge); Panama City Beach Comm. Redev. Agency v. State, 831 So. 2d 662, 669-70 (Fla. 2002) (reversing trial court's denial of bond validation for redevelopment of the City's park and recreation facilities); Murphy v. Lee County, 763 So. 2d 300, 300 (Fla. 2000) (affirming the bond validation judgment for a water and sewer project); State v. Osceola County, 752 So. 2d 530, 531 (Fla. 1999) (affirming the bond validation judgment for renovation of a stadium and construction of a convention center); State v. Inland Protection Fin. Corp., 699 So. 2d 1352, 1357 (Fla. 1997) (affirming the bond validation judgment for cleanup of contamination); Washington Shores Homeowners' Ass'n v. City of Orlando, 602 So. 2d 1300, 1301 (Fla. 1992) (affirming the bond validation judgment for a roadway project); Warner Cable Comm., Inc. v. City of Niceville, 520 So. 2d 245, 246 (Fla. 1988) (affirming the bond validation judgment for the establishment of a municipally owned cable television system); Wilson v. Palm Beach County Housing Auth., 503 So. 2d 893, 893 (Fla. 1987) (affirming the bond validation judgment for low income housing).

determination and conclusions are clearly erroneous should a court refuse to validate the bond issue." Panama City, 831 So. 2d at 665.

This Court sits "not in a position to reweigh the evidence, but must solely determine whether competent, substantial evidence supported the [County's] decision." Boschen, 777 So. 2d at 968. "The sole purpose of a validation proceeding is to determine whether the issuing body had the authority to act under the constitution and laws of the state and to ensure that it exercised that authority in accordance with the spirit and intent of the law." McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252, 253 (Fla. 1980).

"This Court's inquiry in bond validation proceedings is limited to three legal issues: whether the public body has the authority to issue the bonds; whether the purpose of the obligation is legal; and whether the bond issuance complies with the requirements of law." Boschen, 777 So. 2d at 962. Accord City of Oldsmar v. State, 790 So. 2d 1042, 1049 (Fla. 2001); Turner, 789 So. 2d at 276; Inland Protection, 699 So. 2d at 1355. It is undisputed that Brevard County satisfied all three prongs of this test.

B. The Circuit Court Did Not Err in Ruling that the Proposed Bond Issues Constitute Both Countywide Programs and Separate and Distinct Projects

The only objection raised by the Appellant in the instant case, and the only issue that this Court needs to address regarding the validation of the 2006 Bonds, is whether there are three separate and independent projects or whether there is one countywide project which exceeds the Charter cap so as to require a referendum of the voters. The Appellant raised this issue before the Circuit Court, and the Circuit Court properly rejected it, deciding based upon the record that there are three separate and independent projects so that no referendum is required.

The 2006 Bonds are payable in part from, and secured by, the pledge of and lien on Sales Tax Revenues, defined as Brevard County's share of the local government half-cent sales tax derived from the Local Government Half-Cent Sales Tax Clearing Trust Fund, as permitted by section 218.64, Florida Statutes (2005). Under section 218.64(1), Florida Statutes (2005), "[t]he proportion of the local government half-cent sales tax received by a county government based on two-thirds of the incorporated area population shall be deemed countywide revenues and shall be expended only for countywide tax relief or countywide programs."

The Appellant takes issue with Brevard County and the Circuit Court's position that these projects are countywide programs within the meaning of section 218.64(1) and, at the same time, separate and distinct projects. The Appellant asserts that the two parts of said position are incongruous, and therefore, the County cannot use the sales tax revenue to pay the 2006A, 2006B and 2006C Bonds.

To the contrary, there is nothing inconsistent about these two arguments. Multiple projects can each provide a countywide benefit. Thus, as shown below, Brevard County was correct when it determined that each project was separate and that each project benefited the County as a whole.

Separate Projects. Consider first the issue of whether these projects are separate. The trial court answered this question by determining that there are three separate and distinct projects here. First, there is a project to finance the cost of completing the acquisition, construction and equipping of parks and recreation projects in North Brevard County which was initially funded in 2001 by the 2001A Bonds in the amount of $15.1 million and will be further financed by the 2006A Bonds in the amount of $9.1 million.[5] Second, there is a

[5] In particular, the North Brevard Projects which are under construction and need the additional funding from the 2006A Bonds consist of the following: (1) Chain of Lakes Recreation Complex; (2) Gibson Field; (3) Cuyler Park; (4) Harry T &

project to finance the cost of completing the acquisition, construction and equipping of parks and recreation projects in Central Brevard County which was initially funded in 2001 by the 2001B Bonds in the amount of $13 million and will be further financed by the 2006B Bonds in the amount of $8.1 million.[6] Third, there is a project to finance the cost of completing the acquisition, construction and equipping of parks and recreation projects in South Brevard County which was initially funded in 2001 by the 2001C Bonds in the amount of $45 million and will be further financed by the 2006C Bonds in the amount of $19.1 million.[7]

The fact that each of the three projects concerns parks and recreation does not make them one project. Suppose the County

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Harriette V Moore Memorial Park; (5) WW James Park; (6) Sandrift Community Center; (7) Holder Park; (8) Parrish Park Scottsmoor; and (9) Titusville Veterans Memorial Pier.

[6] In particular, the Central Brevard Projects which are under construction and need the additional funding from the 2006B Bonds consist of the following: (1) Edgewood Junior High – Babe Ruth Baseball & Central Brevard Soccer; (2) MILA Elementary – North MI Little League; (3) Rotary Park; (4) Tropical Elementary – South MI Little League; (5) Jefferson Junior High – Central Brevard Soccer; (6) Mitchell Ellington Sports Complex; (7) Manatee Cove Park; (8) Kelly Park East/West; and (9) Woody Simpson Park.

[7] In particular, the South Brevard Projects which are under construction and need the additional funding from the 2006C Bonds consist of the following: (1) Valkaria Community Park; (2) POW/MIA Park; (3) Rodes Park; (4) South Beach Community Park; (5) South County Boat Ramp; (6) Canova Park; (7) Viera Regional Park; (8) Flutie Athletic Complex; (9) Micco Park; (10) Palm Bay Regional Park; (11) Juan Ponce Deleon [sic] Landing; (12) Wickham Park; (13) Brevard Zoo Linear Park; and (14) South Mainland Community Center.

sought to build a performing arts center for the local symphony orchestra and, at the same time, a smaller entertainment venue in another location. Would the two projects have to be funded together just because they both concern entertainment venues? Of course not! The County could choose to build one or both, but neither is so intertwined with the other that it could not be built separately.

It would be entirely different if the County took one performing arts facility and divided it into three issues. Obviously, those issues would concern one project because they are entirely interrelated. No one wants one-third of a performing arts center.

Similarly, each of the three projects here are separate and independent. The County could make the decision to fund one, two or all three, but any one could be built on its own. The County has the right to exercise its discretion as to what would be built and when and how it would be funded. Brevard County simply elected, in its discretion, to group these separate projects into three separate financings based on the geographic location of the projects to be financed.

This Court has noted that "[i]t is not the function of courts to pass upon the wisdom of [county] officials or to substitute its opinion for theirs, but only to determine if their action was unlawful." City of West Palm Beach v.

Williams, 291 So. 2d 572, 575 (Fla. 1974). A court should presume a finding by a legislative body to be valid unless it is so clearly erroneous as to go beyond the power of the legislature. "[L]egislative determinations are entitled to a presumption of correctness and should be upheld if supported by competent, substantial evidence in the record." Panama City, 831 So. 2d at 667.

The determination that these three projects are separate and distinct from one another was made by the County in its discretion. The Circuit Court wholeheartedly agreed and explicitly found that each of the North Brevard Projects, the Central Brevard Projects and the South Brevard Projects listed on Exhibits "B-1", "B-2" and "B-3," of the Complaint, respectively, are separate and distinct projects". Final Judgment at ¶ 28 (A. O). Because competent, substantial evidence supported the County and Circuit Court's decision, this Court must affirm. Boschen, 777 So. 2d at 968.

A March 3, 2006 memorandum from the Interim Director of the Parks and Recreation Department (the "Parks and Recreation Memo") not only supports, but led to, the County's determination. It was provided to the Board of County Commissioners prior to the adoption of these Bond Resolutions, and in it, the Director found, determined and declared, based upon his experience and knowledge, that each project is

independent of the other projects. A copy of the Parks and Recreation Memo is attached to the Complaint as Exhibit "D." Parks and Recreation Memo (A. H).

Furthermore, even prior to the 2001 Bond Issue, Brevard County was aware of this issue. In the minutes of the June 10, 1994 meeting of the Charter Commission, the proposed wording in the Charter was changed from "purposes" to "project" in order to clarify that even though several projects might involve one particular area of concern, they are still separate and independent undertakings and should not be combined together. Minutes of Brevard County Charter Comm'n Meeting (June 10, 1994) (A. B).

Appellant's "single subject" cases are off point. The courts in those cases addressed whether multiple, separate but related projects were sufficiently related so as to be grouped together into a simple referendum question in order to avoid "logrolling." In other words, the question was whether the particular projects were related enough that the Legislature could choose to include them in one bill, if it so desired. Nothing in these cases suggested that the Legislature was required to deal with the subject of those cases in a single bill. Nothing in these cases limits the Legislature's discretion to deal with related topics in separate bills, if that is the Legislature's decision.

Obviously, the instant case has nothing to do with logrolling. This case involves the question of whether there are three projects or one project and whether they benefit the whole county or only portions thereof, issues which were not addressed in the single purpose rule cases cited by the Appellant.

County-wide benefit. The trial court also correctly determined that each of the three projects had county-wide benefits. In the three Bond Resolutions, Brevard County specifically ascertained, determined and declared that each of the projects would benefit the residents of the whole County. The Resolutions state in pertinent part:

> Section 2. Definitions
>
> "2006[A][B][C] Projects" means each of the separate and distinct parks and recreation projects located in [north][central][south] Brevard County originally authorized pursuant to Resolution No. 01-[213][214][215]
>
> Section 3. Findings
>
> (C) The 2006[A][B][C] Project is a "countywide program" within the meaning of the Act and particularly Section 218.64(1), Florida Statutes, available for the use and enjoyment of all residents of Brevard County.
>
> (D) The residents of Brevard County will receive real and substantial benefits from the completion of each of the 2006[A][B][C] Projects, and each such project is expected

> to be used by a geographically diverse group of County residents. The 2006[A][B][C] Projects will be part of a countywide program for parks and recreation.
>
> (J) The 2006[A][B][C] Bonds may be issued without a referendum in accordance with Section 5.3 of the Issuer's Home Rule Charter because the proceeds of the 2006[A][B][C] Bonds (including the portion thereof applied to costs of issuance) used to fund the 2006[A][B][C] Projects will not exceed, individually or in combination with other issues for the 2006[A][B][C] Projects (or any portion thereof) authorized within the preceding two (2) years, $19,158,316. In addition, each of the 2006[A][B][C] Projects listed in Exhibit "A" is not physically connected to any other such project, will be constructed independently from each other project and therefore constitutes a separate and distinct project within the meaning of the Issuer's Home Rule Charter to which the Cap is applicable.

Appellant focuses on the fact that these parks and recreation facilities will each be largely utilized by those residents that live closest to the parks. This argument is irrelevant to the legality of the instant bond validation. The governing constitutional provisions and statutes do not require that the property or services directly benefit all or most of the taxpayers in Brevard County. See Tucker v. Underdown, 356 So. 2d 251, 253 (Fla. 1978). In fact, "many capital improvements undertaken by county governments directly benefit only a limited geographic area within the county." State v. Sarasota County, 372 So. 2d 1115, 1117 (Fla. 1979).

Nevertheless, parks and recreation facilities have been found to provide a countywide benefit under Article VIII, section 1(h) of the Florida Constitution where the parks were not "neighborhood parks" located solely in unincorporated areas and provided benefits for only the residents of the unincorporated portions of the county. Alsdorf v. Broward County, 373 So. 2d 695, 698 (Fla. 4th DCA 1979). Because the parks and recreation facilities at issue here will benefit the incorporated areas of the county, these three projects will provide a countywide benefit.

Because the Circuit Court did not err in ruling that the proposed bond issues constitute both countywide programs and separate and distinct projects, this Court should affirm the bond validation judgment below.

II. BREVARD COUNTY SHOULD BE PERMITTED THE OPTION TO USE THE SURPLUS MILLAGE TO PAY THE DEBT SERVICE ON THE 2006 BONDS UNDER SECTION 200.181(3), FLORIDA STATUTES (2005)

A. The Circuit Court Erred in Holding that the Surplus Millage Issue was Collateral to the Bond Validation Proceeding

In the final judgment below, the Circuit Court held that the determination of whether Brevard County could use the surplus millage to pay some of the debt obligation incurred by the 2006 Bond Issue was collateral to the validation proceedings. Nevertheless, this issue is not collateral to the

validation proceedings because it goes directly to the issue of how the 2006 Bonds will be paid.[8] In fact, it is common practice in bond validation cases for this Court to directly examine the stream of funding for the bonds, and it should do so here. See, e.g., Turner, 789 So. 2d at 277; State v. Alachua County, 335 So. 2d 554, 557 (Fla. 1976); State v. Dade County, 70 So. 2d 837, 840 (Fla. 1954); City of Orlando v. State, 67 So. 2d 673, 674 (Fla. 1953). Thus, the Circuit Court erred in failing to address it.

[8] In those cases where this Court has determined that an issue was collateral to the bond validation proceeding, the issue was completely irrelevant to the bond issue itself. Such is not the case here, for the surplus millage issue directly impacts the payment of the debt service of the 2006 Bonds. See, e.g., Osceola County, 752 So. 2d at 540, n.13 (determinations of whether the development and operating agreement of a convention center were proper or complete and whether the county had complied with the S.E.C.'s disclosure requirements); Washington Shores, 602 So. 2d at 1302 (advisability of a proposed road extension); State v. Sunrise Lakes Phase II Special Recreation Dist., 383 So. 2d 631, 633 (Fla. 1980) (determination of the validity of a contract between a recreation district and a private condo association whereby the condo association would operate the public recreation facilities on behalf of the district); State v. City of Miami, 103 So. 2d 185, 187 (Fla. 1958) (determinations of whether county was authorized or permitted pursuant to its charter to acquire all or part of the city's waterworks system or take any action affecting its operation and whether said system was exempt from taxation); City of Gainesville v. State, 366 So. 2d 1164, 1166 (Fla. 1979) (determinations of whether city had the authority to impose a 10% surcharge on the electricity bills of customers located outside the city's limits and how the revenues from the operation of the utility would be used).

B. Surplus Millage Can Be Used to Pay the Debt Service on the 2006 Bonds

Brevard County has levied the maximum millage rate approved by each of the 2006 Referenda which has resulted in collecting revenues in excess of the debt service on each of the 2001 Bonds. The 2001A Bonds and 2001B Bonds were secured by the levy of a voted ad valorem tax of not to exceed .8 mills on all taxable property within the North Brevard Recreation Special District and the Merritt Island Recreation Municipal Service Taxing Unit (the "Central Brevard MSTU"), respectively, to be used for the repayment of the 2001A and 2001B Bonds, respectively, and for the operation and maintenance of the respective, authorized, recreational improvements. The 2001C Bonds were secured by the levy of a voted ad valorem tax of not to exceed .6 mills on all taxable property within the South Brevard Special District to be used for the repayment of the 2001C Bonds and for the operation and maintenance of the authorized, recreational improvements.

Section 200.181(3), Florida Statutes (2005), provides that "[a] county or municipality may levy voted millage at the maximum millage rate approved by referendum even if the levy would raise revenue in excess of that necessary for debt service as authorized by a vote of the electors pursuant to s. 12, Art. VII of the State Constitution." Section 200.181(3) also

provides that "[t]he county or municipality may use the surplus revenue for any lawful purpose solely related to the capital project for which the voted millage was approved, including operations and maintenance."

Under section 200.181(3), Brevard County may use the surplus millage to pay the debt service on the 2006 Bonds because these Bonds are being used for the lawful purpose of funding the completion of the capital projects (i.e., the construction of the three identical parks and recreation projects which were originally authorized by the 2001 Referenda) for which the voted millage was approved. Furthermore, section 4.05(E) of the Base Resolution provides the County can use any legally available monies for payment of the 2006 Sales Tax Revenue Bonds. The County Commission has expressed its legislative intention to exercise its legal right, if it so chooses, to levy the maximum millage rate authorized in the respective November 7, 2000 referenda and use the surplus millage to pay the debt service on the respective 2006 Bonds. This Court has "consistently ruled that questions of business policy and judgment incident to the issuance of revenue issues are beyond the scope of judicial interference and are the responsibility and prerogative of the governing body of the governmental unit in the absence of fraud or violation of legal

duty." Town of Medley v. State, 162 So. 2d 257, 258-59 (Fla. 1964).

Since no one has alleged that Brevard County has perpetrated a fraud and since it has been shown that Brevard County did not violate any legal duty, this Court should hold that Brevard County has the authority to levy the maximum millage and use any Surplus Millage for "any lawful purpose, solely related to the capital project" as provided by section 200.181(3).

The surplus millage is not pledged to the payment of the 2006 Bonds and, therefore, does not require referendum approval. This Court has expressly held that "[o]nly bonds or certificates of indebtedness which directly obligate the ad valorem taxing power" of the local government must be approved by referendum. Town of Medley, 162 So. 2d at 258. Accord Betz v. Jacksonville Transp. Auth., 277 So. 2d 769, 772 (Fla. 1973). "The incidental effect on use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject such bonds or certificates to that constitutional requirement." Town of Medley, 162 So. 2d at 258.

This Court has held that ad valorem tax revenues which are not pledged can nevertheless be used to make debt service payments on bonds without triggering the referendum requirement. See Tucker, 356 So. 2d 251; DeSha v. City of Waldo, 444 So. 2d

16 (Fla. 1984); Speer v. Olson, 367 So. 2d 207 (Fla. 1978). Brevard County has only pledged the sales tax revenues and the pledged funds to the payment of each respective series of the 2006 Bonds. No referendum is required to use the surplus millage to pay debt service on the 2006 Bonds because the 2006 Bond Resolutions will not directly, indirectly or contingently bind the County to make debt service payments on the 2006 Bonds with this surplus millage and the County has not pledged the surplus millage to the 2006 Bonds.

Consequently, because the requirements of section 200.181(3), Florida Statutes, have been satisfied, Brevard County should be permitted the option to use the surplus millage to pay the debt service on the 2006 Bonds.

CONCLUSION

Brevard County has the authority to issue the bonds. The purpose of the obligation legal. The 2006 Bond Issuance complies with the requirements of the law. As a result, this Court should affirm the final judgment.

In addition, because the 2001 Bond Issuance and the 2006 Bond Issuance are directly related to the same projects, this Court should hold that Brevard County has authority to levy the maximum millage and use any Surplus Millage for "any lawful purpose, solely related to the capital project" as provided by section 200.181(3), Florida Statutes (2005). Furthermore, this

Court should hold that Brevard County may use the surplus millage from the North Brevard Special District, Merritt Island Recreation Municipal Service Taxing Unit, and South Brevard Special District, at the sole option of Brevard County, to pay debt service on the 2006A Bonds, 2006B Bonds, and 2006C Bonds, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Norman R. Wolfinger, State Attorney and Philip Archer, Assistant State Attorney**, 400 South Street, Titusville, Florida 32780; **Henry Morgan, Jr., Esquire**, Post Office Box 32092, Lakeland, Florida 33802-2092; and **Joseph C. Mellichamp, III, Esquire and Christine R. Davis**, 215 S. Monroe Street, Suite 500, Tallahassee, Florida 32301, this 1st day of August, 2006.

_____
Attorney

CERTIFICATE OF TYPE SIZE AND FONT COMPLIANCE

I HEREBY CERTIFY that the type size and style used throughout this brief is 12-point Courier New double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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