IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA, Defendant/Appellant	:	
v.	:	Case No. 66,449 Cir. No. CA84-2568
FRONTIER ACRES COMMUNITY DEVELOPMENT DISTRICT PASCO COUNTY, FLORIDA, Plaintiff/Appellee	:	Bond Validation Appeal

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT, PASCO COUNTY

JAMES T. RUSSELL
State Attorney for the Sixth
Judicial Circuit, Pasco County

C. Marie King
Assistant State Attorney
P.O. Box 5028
Clearwater, Florida 33518
(813) 530-6221

Attorney for Appellant

TABLE OF CONTENTS

	Page
Table of Citations.....	ii
Statement of Facts.....	1
Argument	
ISSUE I: SECTION 190.006(2), FLA. STATS. (1983) IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION CLAUSE IN THAT IT A) RESTRICTS THE RIGHT TO VOTE, AND B) PERMITS A CORPORATION TO VOTE.....	2
ISSUE II: CHAPTER 190, FLA. STATS. IS UNCONSTITUTIONAL AS APPLIED TO FRONTIER ACRES BECAUSE ISSUANCE OF THE BONDS IS NOT FOR A PUBLIC PURPOSE.....	7
ISSUE III: THE COURT ERRED IN VALIDATING BONDS FOR THE DISTRICT BECAUSE THE COUNTY WAS WITHOUT AUTHORITY TO GRANT PETITION FOR CREATION OF THE DISTRICT THAT DID NOT CONTAIN AN ECONOMIC IMPACT STATEMENT AS REQUIRED BY SEC. 190.005(1)(b)8., FLA. STATS. (1984 SUPP).....	8
ISSUE IV: THE COURT ERRED IN VALIDATING BONDS FOR A PROJECT AND RESOLUTION THAT CAN BE CHANGED WHETHER WITH OR WITHOUT THE CONSENT OF THE BONDHOLDERS.....	11
Conclusion.....	13
Certificate of Service.....	14

TABLE OF CITATIONS

Case Law	Page
Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114 (1968).....	2,3
Ball v. James, 451 U.S. 355, 101 S.Ct. 1811 (1983).....	6
Cipriano v. Houma, 395 U.S. 701, 89 S.Ct. 1897 (1969)..	4
City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990 (1970).....	4
City of Opa Locka v. State ex rel. Tepper, 257 So.2d 100 (Fla. 3d DCA 1972).....	9
Dept. of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983).....	10
Hadley v. Junior College Dist. of Metro Kansas City, Mo., 397 U.S. 50, 53, 90 S.Ct. 791, 793 (1970).....	3
Hillsborough County Board of County Commissioners v. Public Employees Relations Commission et al., 424 So.2d 132 (Fla. 1st DCA 1982).....	1
Police Jury of the Parish of Vermilion, 404 U.S. 807, 92 S.Ct. 52 (1971).....	4
Polk v. School Board of Polk County, 373 So.2d 960 (Fla. 2d DCA 1979).....	10
Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964)...	2
School Board of Broward County v. Gramith, 375 So.2d 340 (Fla. 1st DCA 1979).....	10
Seashole v. F & H of Jacksonville, Inc., 258 So.2d 316 (Fla. 1st DCA 1972).....	1
Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (Fla. 2d DCA 1975).....	9
Tyson v. Aikman, 31 So.2d 272 (Fla. 1947).....	1

Statutes

	Page
Fla. Stat. Chapter 75, ...	11
Fla. Stat. Chapter 190.....	2,6,11
Fla. Stat. Sec. 120.54(2).....	9
Fla. Stat. Sec. 120.54(2)(a).....	10
Fla. Stat. Sec. 190.002(2)(b) (1984 Supp.).....	4
Fla. Stat. Sec. 190.005.....	9
Fla. Stat. Sec. 190.005(1)(a).....	8
Fla. Stat. Sec. 190.005(1)(a)8.....	8
Fla. Stat. Sec. 190.005(2)(a).....	8
Fla. Stat. Sec. 190.011.....	5
Fla. Stat. Sec. 190.012.....	5
Fla. Stat. Sec. 190.016(11).....	12

Other Authority

Wilkes, "Community Developmment Districts: The Delusion that Tax-Exempt Financing for Developers Improves Growth Management," Fla. Environmental and Urban Issues, July, 1983..... 6

STATEMENT OF FACTS

Appellee's appendix A-1 is not a proper record for consideration by this Court because it was not before the lower court. Appellee's claim that the unsigned summary document, A-1, which purports to have been prepared by an asssistant county attorney for the county commission, was received by the county commission is unsubstantiated before this Court. Because it was not in evidence before the lower court, it is irrelevant in the appellate proceedings to review the lower court's decision. Appellee may not use the Appeal as a vehicle to introduce pleadings that were omitted in the lower court. Tyson v. Aikman, 31 So.2d 272 (Fla. 1947); Seashole v. F & H of Jacksonville, Inc., 258 SO.2d 316 (Fla. 1st DCA 1972). The appellate court may not even take judicial notice pursuant to Fla. Evid. Code. Hillsborough County Board of County Commissioners v. Public Employees Relations Commission et al., 424 So.2d 132 (Fla. 1st DCA 1982).

ARGUMENT

ISSUE I

SECTION 190.006(2), FLA. STATS. (1983) IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS AND THE EQUAL PROTECTION CLAUSE IN THAT IT
A) RESTRICTS THE RIGHT TO VOTE, AND
B) PERMITS A CORPORATION TO VOTE.

A) Appellee agrees that Chapter 190 restricts the right to vote but maintains that it does so lawfully in accordance with the equal protection clause as interpreted by the U.S. Supreme Court. Appellant contends that Chapter 190 does not establish the kind of limited-purpose, special districts that have been found not to violate the equal protection clause although voting rights therein are based on land ownership.

The governing case law establishes that the one-man, one-vote requirement is applied if the election of the governing officials involves a district which exercises sufficiently general governmental powers of sufficient impact throughout the district, regardless of label of the district as a special district. In Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114 (1968), the Court extended to local elections the one-man, one-vote rule held applicable to state legislatures in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964).

> "[A] qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised 'general governmental powers over the entire geographic

> area served by the body.'" Hadley v. Junior College Dist. of Metro Kansas City, Mo., 397 U.S. 50, 53, 90 S.Ct. 791, 793 (1970), citing Avery at 485, 88 S.Ct. 1120.

The Court in Hadley refused to make exceptions depending on the purpose or the importance of the election. The Court also refused to distinguish between elections for legislative or administrative officers. The state's decision to select the official by popular vote was held sufficient to establish the importance, and the general rule was announced that:

> "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, . . ." Hadley at 56, 90 S.Ct. 795.

The Hadley Court recognized the possible exception of remote functionaries "whose duties are so far removed from normal governmental activities and so disproprotionately affect different groups" as not to require the equal vote protection, but found that the junior college district at issue did so require because "[e]ducation has traditionally been a vital governmental function" and the trustees were therefore held to be government officials." Id.

The Court did not find, and has never found, that a school district can ever be less than one of general governmental powers. The operation of schools is specifically one of the permitted functions of a community development district pursuant

to Chapter 190. Although Frontier Acres has not yet announced the operation of schools as part of the Project, it insists on the right to amend the Project at any time within the parameters of Chapter 190.

Similarly, the Court has required application of the one-man, one-vote rule to districts whose governing board will maintain streets and parks, Police Jury of the Parish of Vermilion, 404 U.S. 807, 92 S.Ct. 52 (1971); City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990 (1970), or provide, operate or maintain utilities or sanitation services, Cipriano v. Houma, 395 U.S. 701, 89 S.Ct. 1897 (1969); City of Pheonix, supra.

Appellee's arguments that the community development districts do not exercise general governmental powers, despite the legislature's empowering them "to manage and finance basic services for community development," Sec. 190.002(2)(b) (1984 Supp.), are all equally applicable to argue that any local government body exercises less powers than those of the state legislature and the state legislature less than the federal legislature. The arguments have been repeatedly rejected by the U.S. Supreme Court if the Court finds that the governmental entity provides and maintains a variety of basic services affecting all residents equally. Obviously, that the community developmment district is subject to government-in-the sunshine restrictions of the state legislature and subject to land-use plans developed by the county, does not automatically relegate

the remaining governmental functions performed by the district to categories sufficiently special and limited to avoid rquirements of the equal protection clause.

Broad governmental powers delegated to community development districts are enumerated in Sec. 190.011 General Powers, and Sec. 190.012, Special powers; public improvements and community facilities. General powers include the right to sue and be sued; to hire employees who will be covered by state retirement funds; to engage in public bidding and contract for professional consultant services; to adopt administrative rules and regulations pursuant to Chapter 120 governing business and any project of the district; to hold property, including the right of condemnation and eminent domain; to contract with other governmental agencies; to impose ad valorem taxes, benefits taxes and maintenances taxes; to levy user charges and special assessments liens and foreclose thereon; and to borrow money and issue bonds. Special powers include the right to build, maintain and operate water management, control and supply; roads and bridges; and sewer systems. With the consent of the applicable, local county or municipal government, the community development district may also build, maintain and operate parks, and recreational, cultural and educational facilities; school buildings; fire stations and facilities; security, including guardhouses, security systems and patrol cars but all to be short of police powers; mosquito control; and refuse collection and disposal. The

Chapter 190 community development districts, unlike Ball v. James, 451 U.S. 355, 101 S.Ct. 1811 (1983), do not have a "narrow and primary government function" such as was the water management function of the Ball special district.

Appellee's counsel, Mr. van Assenderp, quotes himself as to the constitutionality of Chapter 190, but there are commentators of differing opinion. See Wilkes, "Community Developmment Districts: The Delusion that Tax-Exempt Financing for Developers Improves Growth Management," Fla. Environmental and Urban Issues, July, 1983. While the emphasis of the democratic federalism form of our government becomes more decentralized and parochial, the necessity for protecting every man's right to an equal vote is increasingly important to preserve our democracy of individual rights and freedoms and to prevent a government of special interest groups.

B) Appellant agrees with Appellee that the corporate ownership of the landowners, and thus, the right of the corporation to vote for the district trustees, is immaterial if the district is found to be one of sufficiently limited purpose to avoid the necessity for equal voting rights. Appellant does not intend to suggest, as characterized by Appellee, that corporations are in any way politically undesirable. (The Disney World corporaton might well run a more efficient and pleasant government than our elected version.) Appellant merely points out that the people of the state of Florida, consistent with the

federal government, have not yet seen fit to enfranchise corporations. To do so by legislation is contrary to the Florida Constitution.

Community Development districts have such broad powers normally associated with elected governments as to require that the board of trustees exercising those powers be elected by popular vote, safeguarded by equal protections. That the corporation owning Frontier Acres can create, for example, Florida retirement benefits in some individuals should, if nothing else, require the popular vote be applicable to those persons having that power.

ISSUE II

CHAPTER 190, FLA. STATS. IS UNCONSTITUTIONAL AS APPLIED TO FRONTIER ACRES BECAUSE ISSUANCE OF THE BONDS IS NOT FOR A PUBLIC PURPOSE.

Appellee does not address how it is in the public interest to apply Chapter 190 governing community development districts to the purpose of development of a private corporation's mobile home rental and recreational vehicle rental park. There is no indication that the legislature intended a community development district to be a mobile home and recreational vehicle park for rent.

ISSUE III

THE COURT ERRED IN VALIDATING BONDS FOR THE DISTRICT BECAUSE THE COUNTY WAS WITHOUT AUTHORITY TO GRANT PETITION FOR CREATION OF THE DISTRICT THAT DID NOT CONTAIN AN ECONOMIC IMPACT STATEMENT AS REQUIRED BY SEC. 190.005(1)(b)8., FLA. STATS. (1984 SUPP.)

Although not now denying the applicability of the 1984 amendment, as done in the lower court (Ap. ex. 6, p. 47), Appellee claims that the legislative requirement of an economic impact statement, as part of the petition for creation of a community development district, can be waived by the county. The plain meaning of the words of the statute are to the contrary, and the record does not support that the county waived the requirement. The final judgment recites that the petition was in the form required by law, Ap. ex. 1, p. 3, but is wrong as to the 1984 amendment. Creation of a district of less than 1000 acres is governed by Sec. 190.005(2)(a), which requires the petition to include the same information as required by Sec. 190.005(1)(a), for larger districts. Both (1)(a) and (2)(a) of Sec. 190.005 use mandatory legislative language rquiring inclusion of the enumerated items. "The petition shall contain the same information as required in paragraph (1)(a)." Sec. 190.005(2)(a). "The petition shall contain: . . . 8. An economic impact statement in accordance with the requirements of s. 120.54(2)." Sec. 190.005(1)(a)8.

Despite the plain meaning and mandatory language, Appellee argues that the county, as opposed to the Florida Land and Water Adjudicatory Commission, is not subject to requirements of s. 120.54(2), within the Administrative Procedure Act. Cases relied on by Appellee as authority for this merely address the general authority of passing legislation and not one specifically regulated by specific legislation. Thus, in City of Opa Locka v. State ex rel. Tepper, 257 So.2d 100 (Fla. 3d DCA 1972), the court addressed the city's right to pass an ordinance ousting the city manager without invoking administrative rights of review outside of those provided in the City Charter. The administrative Procedure Act was held inapplicable as any relief for the ousted employee. Appellee admits that Chapter 120 may be made applicable to counties and municipalities by general or special laws or judicial decision, citing Sweetwater Utility Corp. v. Hillsborough County, 314 So.2d 194 (Fla. 2d DCA 1975), as authority. Appellant maintains that Sec. 190.005, as amended and reenacted by the 1984 legislature, is a general law specifically making Chapter 120 appicable to the counties for purposes of passing ordinances concerning the establishment of community development districts.

Appellee next argues that the requirement of the 1984 amendment for an economic impact statement should not be applied to Frontier Acres because it filed its petition with the county prior to the effective date of the act and the requirement is merely procedural, not substantive. As authority, Appellee cites

cases which turn on the legislative requirement for agencies to prepare an economic impact statement before adopting any rule as being merely procedural. Dept. of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983); Polk v. School Board of Polk County, 373 So.2d 960 (Fla. 2d DCA 1979); School Board of Broward County v. Gramith, 375 So.2d 340 (Fla. 1st DCA 1979). These cases are inapplicable to the county's requirement under Chapter 190 to pass an ordinance to permit establishment of a community development district, which is, unlike adoption of a rule of procedure, creation of a political entity.

Appellee finally claims substantial compliance from the county's consideration of elements of the formal impact statement set forth in Sec. 120.54(2)(a). Appellee refers to his statement of case and facts for those considerations. Citation there is to R exh 8(3) and 8(4) which contain nothing to indicate the county commission either heard or considered:

> "An estimate of the cost of the economic benefit to all persons directly affected by the propsed action;" or
>
> "An estimate of the impact of the proposed action on competition and the open market for employment, if applicable; and
>
> A detailed statement of the data and method used in making each of the above estimates." Sec. 120.54(2)(a).

There is no indication that the county commission was informed of the change in the law to require economic impact statement,

although they were informed of other changes. There was no economic impact statement presented with the petition nor considered by the county commission, both as legislatively required for establishment of a community development district. The requirement may not be waived, just as the other requirements for establishing the district may not be waived.

ISSUE IV

THE COURT ERRED IN VALIDATING BONDS FOR A PROJECT AND RESOLUTION THAT CAN BE CHANGED WHETHER WITH OR WITHOUT THE CONSENT OF THE BONDHOLDERS.

Appellee admits that the Bond Resolution and Trust Indenture can be changed to alter the Project. Appellee claims that such change is permitted, even after validation, so long as the Project remains within those things legislatively permitted. Appellant cannot accept that the Project as delineated at the time of validation can be altered in any regard. Chapter 190 requires validation pursuant to Chapter 75. Proceeds of Bonds so validated can only be utilized for the specific purpose established at the time of validation. This long-recognized legal requirement preserves the reaons for notice to the public and the State Attorney and the validating judge's passing on the validity of the project. Notice of a Project that can be changed is no notice at all. The judge's passing on the legal validity of a certain Project does not mean that a different Project would also be legally valid. Permitting changes in the Project can affect the taxable nature of the bonds as well as the public purpose that is to be served.

The list in Sec. 190.016(11) of permitted provisions that may appear in the bond resolution does not mean those provisions may be added at a later time. The validation is the cut off time that any such provisions may appear.

CONCLUSION

WHEREFORE, the lower court erred in validating the Frontier Acres Community Development District bonds because Chapter 190, Fla. Stats. is unconstitutional in denying equal protection of the right to vote and permits a corporation to vote. The Chapter is unconstitutional as applied to Frontier Acres because the Project planned is not for a public purpose, and Frontier Acres purports to do only what is permitted by Chapter 190. The District did not comply with statutory requirements for creation of the District by not including an economic impact statement in the petition required by Sec. 190.005. The County was without authority to grant the petition and establish the District by passing the County Ordinance because the petition was not in compliance with the statutory requirement of including an economic impact statement. The court erred in validating the bonds for an indefinite Project which provides in the bond document that the Project can be changed at any time in any regard. This Court should reverse the validation order.

Respectfully submitted,

JAMES T. RUSSELL, State Attorney
Sixth Judicial Circuit of Florida

By: C. Marie King

C. Marie King
Assistant State Attorney
P.O. Box 5028
Clearwater, FL 33518
(813) 531-3622

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished to Robert L. Williams, Esquire, Suite B, 2100 Tamiami Trail, Venice, Florida 33595, and to Ken van Assenderp, Esquire, Young, van Assenderp, Varnadoe, & Benton, P.A., Gallie's Hall, 225 So. Adams St., Tallahassee, Florida 32302, by certified mail, this 19th day of March, 1985.

By: C. Marie King
C. Marie King
Assistant State Attorney

CMK/js/29/0318mk1-15