IN THE SUPREME COURT OF FLORIDA

DR. GREGORY L. STRAND,

Appellant,

CASE NO. SC06-1894
L.T. CASE No. 2006-CA-881

v.

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

Appellee.

_____/

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF COUNTIES

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STATEMENT REQUIRED PURSUANT TO FLA.R.APP.P 9.370(b)

The Florida Association of Counties is a not-for-profit corporation organized specifically to protect, promote, and improve the mutual interests of all counties within the State of Florida. The Association believes that the issues in this case are of great public concern because they affect all counties within the State and their fundamental ability to exercise their statutory and constitutional authority. The Association further believes that its participation will assist the Court in resolving the issue raised in Appellant's Initial Brief regarding the authority of a county to issue bonds secured by tax increment financing without express legislative authorization, establishing a community redevelopment agency, or holding a bond referendum.

SUMMARY OF ARGUMENT

Counties in Florida are clothed both by the Constitution and by statute with broad powers of self-government. The Constitution divides counties into charter counties and non-charter counties. Charter counties are free to act on any subject not in conflict with general law or special law approved by the voters; non-charter counties are given broad powers of self-government by the Florida Legislature.

Among the powers conferred by the Legislature on non-charter counties is the power to issue bonds. Although before the adoption of the 1968 Constitution a Legislative Act was required to authorize a county to issue bonds, since 1968, a county may adopt an ordinance authorizing such issuance. The ordinance so adopted has the same force in authorizing the issuance of bonds as would a Legislative enactment.

Counties are not limited in their use of tax increment financing by Part III of Chapter 163 (the "Community Redevelopment Act"). That chapter provides a mechanism for local governments to establish special purpose units of local government for community redevelopment purposes called Community Redevelopment Agencies (CRAs). Because a CRA is a creature of statute, it was necessary for the Legislature to enumerate the powers of a CRA. Included is the power to issue bonds secured by tax increment

financing. However, this power to issue bonds has been deemed "supplemental" to the powers counties and municipalities already enjoy for issuing bonds. There is no express preemption of any county power in the Community Redevelopment Act, nor is there any manifest intent by the Legislature to implicitly preempt any county powers.

Tax increment financing does not pledge ad valorem taxes and may be implemented through a county's home rule power. Tax increment financing uses a measure of the difference between present and future ad valorem taxes. Because the increment is a measure and not the underlying tax, a pledge of the increment is not the same as a pledge of the underlying tax. A pledge of the tax increment does not confer any rights on a bondholder to compel a county to levy any taxes which would implicate the constitutional requirement that bonds payable from ad valorem tax revenues be subject to referendum approved.

ARGUMENT

I. FLORIDA COUNTIES POSSESS THE CONSTITUTIONAL AND STATUTORY AUTHORITY TO CREATE A TAX INCREMENT FINANCING PROGRAM AND ESTABLISH A TAX INCREMENT TRUST FUND BY ORDINANCE.

A. FLORIDA COUNTIES HAVE SUFFICIENT POWER OF SELF-GOVERNMENT TO CREATE A TAX INCREMENT FINANCING PROGRAM.

Under the Florida Constitution, counties are afforded broad powers of self-government. The Constitution contemplates two forms of counties, those operating under a county charter approved by the voters (charter counties) and counties not operating under a charter approved by the voters (non-charter counties). The Constitution grants to charter counties "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VIII §1(g), Fla. Const. The Constitution grants to non-charter counties "such power of self-government as is provided by general or special law." Art. VIII §1(f), Fla. Const. In addition, Art. VIII §1(f) authorizes non-charter counties to "enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict." Id. This Court has construed "inconsistent" as used in Art. VIII

§1(f) as meaning "contradictory, in the sense of legislative provisions which cannot coexist." State v. Orange County, 281 So. 2d 310, 312 (Fla. 1973).

In 1971, the Legislature enacted Chapter 71-14, Laws of Florida, "to enlarge the powers of counties to govern themselves through home rule." Taylor v. Lee County, 498 So. 2d 424, 425 (Fla. 1986); Speer v. Olson, 367 So. 2d 207, 210 (Fla. 1979) (purpose of "recent amendments to Chapter 125" was to "enlarge the powers of counties through home rule to govern themselves"). Chapter 71-14 is now codified at section 125.01, Florida Statutes.

Section 125.01(1) grants to non-charter counties "the power to carry on county government." Section 125.01(1) further provides that:

> To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to: ….
>
> (w) Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

In construing the grant of powers to non-charter counties in Chapter 125, this Court has observed, "Unless the Legislature has pre-empted a particular subject relating to county government by either general or special

law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power." Speer, Id. at 211.

The Legislature has also expressly authorized counties to "issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law." Section 125.01(1)(r), Fla. Stat. (2006). One court has noted that Section 125.01(1), Fla. Stat. "broadly implements the constitutional provision" such that "the specific powers enumerated under section 125.01 are not all-inclusive," Santa Rosa County v. Gulf Power Company, 635 So. 2d 96, 99 (Fla. 1st D.C.A. 1994). The same court noted that an enumerated power under Chapter 125 includes with it authority "reasonably implied or incidental to carrying out its enumerated powers." Id. In Penn v. Florida Defense Finance and Accounting Service Center Authority, 623 So. 2d 459 (Fla. 1993), for example, this Court approved a tax increment financing scheme proposed by an entity created only by home rule ordinances of a cooperating county and municipality.

A county does not need an act of the Legislature to issue debt to finance infrastructure. Instead, a county may, by ordinance, accomplish the same object as special legislation pursuant to its home rule power under the authority of Chapter 125, and issue bonds authorized only by a home rule

ordinance. State v. Orange County, 281 So. 2d 310, 312 (Fla. 1973); See also, Rowe v. St. Johns County, 668 So. 2d 196, 198 (Fla. 1996). While taxation is preempted to the state, other forms of financing are not. See, Boca Raton v. State, 595 So. 2d 25, 28-29 (Fla. 1992). Unless there is an inconsistent statute or other general law, a county may, by ordinance, create a tax increment financing program to provide essential infrastructure.

B. THE PROVISIONS OF CHAPTER 163, PART III, FLORIDA STATUTES, AUTHORIZING THE CREATION OF A TAX INCREMENT FINANCING PROGRAM BY COMMUNITY DEVELOPMENT DISTRICTS FOR SLUM OR BLIGHTED AREAS ARE NOT INCONSISTENT WITH A TAX INCREMENT PROGRAM CREATED BY ORDINANCE TO PROVIDE ESSENTIAL INFRASTRUCTURE.

Part III of Chapter 163, Florida Statutes, (the "Community Redevelopment Act" or the "Act") establishes the procedures through which local governments may work to revitalize areas afflicted with blight, slum, decay or other similar conditions. To address these issues, the Legislature has authorized counties and municipalities to create special districts called "Community Redevelopment Agencies (CRAs)." Section 163.356, Fla. Stat. Under section 163.358, Fla. Stat. (2006), each county or municipality has all powers necessary to carry out and effectuate the purposes of the Community Redevelopment Act, "including those powers granted in s.163.370." A

CRA only has those powers expressly delegated to it in the Act, and does not have home rule powers of self-government. See, Roach v. Loxahatchee Groves Water Control District, 417 So. 2d 814, 816 (Fla. 4th D.C.A. 1982). Accordingly all powers that a CRA might exercise must be enumerated in the statute.

Section 163.370, Fla. Stat. (2006) does not confer upon the local governments or CRAs any additional power to levy taxes or impose fees to fund community redevelopment agencies. Section 163.387 Fla. Stat. (2006) provides that funding for the redevelopment activities is provided by mandatory payments from each non-exempted taxing authority that levies ad valorem taxes within the geographic area based on the increment described in section 163.387(1), Fla. Stat. (2006). These payments are deposited in a "redevelopment trust fund," established pursuant to section 163.387, Fla. Stat. (2006).

The increment that each taxing authority must deposit is defined as ninety-five percent of the difference between:

> 1. The amount of ad valorem taxes levied each year by each taxing authority, exclusive of any amount from any debt service millage, on taxable real property contained within the geographic boundaries of a community redevelopment area; and

> 2. The amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for each taxing authority, exclusive of any debt service millage, upon the total of the assessed value of the taxable real property in the community redevelopment area as shown upon the most recent assessment roll used in connection with the taxation of such property by each taxing authority prior to the effective date of the ordinance providing for the funding of the trust fund.

Section 163.387(1)(a), Fla. Stat. (2006). In other words, a tax increment is a unit of measure of future growth in the amount of ad valorem taxes levied within the confines of a specified area. The tax increment is a finite and defined number. The number represents the funds available to be pledged from any legally available source of revenue, and not the pledge of the underlying taxes or revenues themselves. Other than these payments from other taxing authorities, a CRA has no other legally compelled revenues available to it.

The Act further provides a mechanism under which a CRA may issue bonds to finance projects. Section 163.385, Fla. Stat. (2006). Such authorization is necessary since CRAs lack home rule power. The bonds must be authorized by a resolution of the governing body of the entity that created the CRA. Sections 163.385(1)(a) and 163.385(3), Fla. Stat. (2006).

However, the statute mandates that the bonds issued under the authority of the Act must be secured by the "revenues pledged to and received by a community redevelopment agency and deposited in its redevelopment trust fund." Section 163.387(4), Fla. Stat. (2006).

The Act therefore only creates a mechanism for counties and municipalities to create CRAs and authorizes the CRAs to issue debt following a specified procedure and a legislatively mandated security for that debt. The question is whether the Act preempts any area of municipal or county home rule or is otherwise inconsistent with an exercise of home rule, particularly the use of home rule powers to authorize infrastructure financings secured by a pledge of revenues measured by tax increment.

Preemption can be both express and implied. Express preemption requires that a statute contain specific language of preemption directed to the particular issue at hand. Santa Rosa County, 635 So. 2d at 101; see also, Hillsborough County v. Florida Restaurant Association, 603 So. 2d 587 (Fla. 2d D.C.A. 1992). This Court has held that the Community Redevelopment Act does not expressly prohibit counties and municipalities from engaging in other activities of community redevelopment. State v. Pensacola, 397 So. 2d 922 (Fla. 1981). Indeed, this Court found that the Community Redevelopment Act authorized the establishment of community

redevelopment agencies "whose powers to issue bonds are *supplemental* to those of counties and municipalities." Id. at 924 (emphasis added). There is no express preemption under the Act.

Implied preemption occurs when a state regulatory scheme is so pervasive it occupies the entire field, creating a danger of conflict between local and state laws. Santa Rosa County, 635 So. 2d at 101. Courts should be careful in imputing intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers. Tallahassee Memorial Regional Medical Center v. Tallahassee Medical Center, 681 So. 2d 826, 831 (Fla. 1st D.C.A. 1996). Merely because the state has implemented a regulatory scheme does not, in and of itself, indicate intent by the state to be the sole regulator and thus implicitly preempt a field from local government activity, particularly in the area of finance. Id. at 832.

This Court has found in the context of school funding that notwithstanding the overlay of state regulation of school districts, nothing in that statutory scheme implicitly preempts counties from involvement in school finance. St Johns County v. Northeast Florida Builders Association, Inc., 583 So. 2d 635, 642 (Fla. 1991). See also, Santa Rosa County, 635 So. 2d at 100 (state regulation of electric utilities does not preempt non-charter counties from imposing electric utility franchise fees).

Since CRAs have only those powers expressly enumerated by the Legislature, it was therefore necessary for the Legislature to specify those powers. Enumerating powers for a creature of statute is not the same as precluding a county or municipality from exercising enumerated power of a CRA, absent of some other conflicting general law. This distinction is reinforced by this Court's finding that the provisions of the Act authorizing the issuance of bonds are "supplemental" to powers already held by counties and municipalities. Pensacola, 397 So. 2d at 924. Since the power to issue bonds under the Act is "supplemental," there is no requirement that a county follow the procedures of the Act when acting under its powers of self-government to issue bonds secured by tax increment financing. See, Boca Raton v. State, 595 So. 2d 25, 30 (Fla. 1992). As a result, there is no manifest intent for implied preemption of county or municipal powers in the Act.

Not every enumerated CRA power necessarily is supplemental. For example, a non-charter county might not be able to require mandatory contributions from other taxing authorities absent an express authorization in general law. A charter county would be able to do so to the extent allowed by the county charter. However, whether or not a county may compel other taxing authorities to contribute funds to a trust fund is not at issue in this

matter. The only issue here is whether a county may use its home rule power to issue bonds to finance infrastructure improvements secured by its own tax increment financing and unrelated to a CRA established pursuant to the Act.

In the absence of any language expressly preempting community redevelopment financing to the state, or any intent from the statute either that the state should be the sole regulator or that counties and municipalities are precluded from exercising any of the powers the Legislature has authorized a CRA to exercise, the Act is neither an express nor an implied preemption of the power of local self-government. Moreover, given that the bond issuing powers in the Act are supplemental to powers already enjoyed by counties and municipalities, there cannot be an inconsistency between a county exercise of a home rule power to issue bonds and a CRAs bond issuing power.

The provisions of Part III of Chapter 163 are not inconsistent with a tax increment financing program for infrastructure created by county ordinance.

II. THE CONSTITUTIONAL ANALYSIS OF THIS COURT OF ARTICLE VII, SECTION 12, FLORIDA CONSTITUTION, IN STATE V. MIAMI BEACH REDEVELOPMENT AGENCY, 392 SO. 2D 875 (1981) APPLIES TO A TAX INCREMENT FINANCING PROGRAM CREATED BY COUNTY ORDINANCE.

This Court has previously considered whether tax increment financing implicates the referendum requirement set out in Fla. Const. Art. VII §12(a). That provision provides in pertinent part:

> **SECTION 12. Local bonds.**--Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:
>
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation;

In State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), this Court directly considered the validity of bonds secured by a trust fund established under the provisions of the Act. The trust fund itself consisted of the monies that the taxing authorities were required to contribute by statute and also by the tax increment as defined in section 163.387(1), Fla. Stat. (1977). In addition, section 163.387(4), Fla. Stat. (1977) provided: "The lien created by such bonds or notes shall not attach

until the revenues referred to herein are deposited in the redevelopment trust fund at the times, and to the extent that, such revenues accrue." That section further provided that the redevelopment trust fund would receive increment revenues only "as, if, and when such taxes are collected." Id. The Act expressly disclaimed any lien or right of the bondholders to compel payment from any source other than the trust fund pledged to the bonds. Miami Beach Redevelopment Agency, 392 So. 2d at 881-882.

The Court went on to note that the contributions to the trust fund were merely *measured* by the amount of the ad valorem tax increment, and could be repaid from any source, not solely ad valorem taxes. Id. at 898. The Court relied on Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978), to show that the mere *use* of ad valorem revenues to pay debt service, as opposed to an *express pledge* of such revenues, did not violate the constitutional prohibition on pledging ad valorem tax revenues without an approving referendum. Miami Beach Redevelopment Agency, 392 So.2d at 898.

In Tucker, Brevard County wished to substitute ad valorem revenues from a Municipal Services Taxing Unit for the non-ad valorem revenues pledged to pay solid waste bonds. The issue for the Court in Tucker was whether the bondholders could compel the levy of ad valorem taxes to pay the debt service. This Court found that nothing prohibited the county from

paying the debt service with ad valorem revenues but that the bond covenants expressly precluded a bondholder from being able to compel the county to levy ad valorem taxes to pay the debt service. Tucker, 356 So. 2d at 254.

Following this reasoning, and considering the nature of the monies flowing into the trust fund, the Court in Miami Beach Redevelopment Agency found, "Tucker v. Underdown supports the argument that there is nothing in the constitution to prevent a county or city from using ad valorem tax revenues where they are required to compute and set aside a prescribed amount, when available, for a discreet purpose." Miami Beach Redevelopment Agency, 392 So. 2d at 898. Moreover, addressing the ability of bondholders to compel the levying of ad valorem taxes, the Court went on to find,

> What is critical to the constitutionality of the bonds is that, after the sale of bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation.
>
> Under the statute authorizing this bond financing the governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum

> equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year.

Id. at 899. Because the amount of money to be deposited in the trust fund was only measured by the increment of ad valorem taxes, and not secured by the taxes themselves, the pledge did not obligate the levy of ad valorem taxes.

The distinction between pledging an amount defined by the tax increment and pledging revenues that could be ad valorem taxes was explained by Justice McDonald in his dissenting opinion in State v. School Board of Sarasota County, 561 So. 2d 549, 553 (Fla. 1990) (McDonald, J. Dissenting). Justice McDonald compared the financing at issue in that case with the tax increment financing approved in Miami Beach Redevelopment Agency, noting,

> It is true that in *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla. 1980), we approved a bond supported in part by ad valorem taxes. I hasten to point out, however, that the extent of that pledge was the *tax increment* created by the development. These bonds, on the other hand, come from existing ad valorem tax sources, and the schools do not increase the tax base.

School Board of Sarasota County, 561 So. 2d 554 (McDonald, J. Dissenting) (italics in original).

This Court has approved tax increment financing authorized by a county and a municipality using their statutory powers of self government and acting through ordinances instead of a legislative act. In Penn v. Florida Defense Finance and Accounting Service Center Authority, 623 So. 2d 459 (Fla. 1993), this Court upheld the validity of bonds issued by a non-CRA entity created only by ordinance and secured

> by lease payments from the city and county, which in turn are secured by tax increment revenues measured in part by future increases in ad valorem tax receipts. Any shortfall will be made whole by non-ad valorem revenues, but the bondholders' lien attaches only to monies actually deposited in the trust funds.

Penn, 623 So. 2d at 461. This Court found that the financing mechanism "indistinguishable from that approved in State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980)." Penn 623 So. 2d at 462.

This Court's well established precedent shows that tax increment financing does not pledge ad valorem revenues and does not require a referendum to be approved.

CONCLUSION

Florida Counties enjoy the home rule power to implement bond financings authorized only by ordinance and do not need legislative authorization. This power extends to tax increment financing, since there is no express or implied preemption to the state for that kind of financing, nor is there any general law that prohibits a county from using a tax increment to secure bonds.

The Community Redevelopment Act does not limit tax increment financing only to Community Redevelopment Agencies. The provisions of that Act authorizing the issuance of bonds are supplemental to the powers already enjoyed by counties and municipalities to issue debt, including debt secured by tax increment financing.

Tax increment financing itself is only a measure of an amount of money calculated by the difference between a current level of ad valorem taxation and a future level. Tax increment financing is not a pledge of the underlying ad valorem taxes nor does it confer upon a bondholder the right to compel a county or other entity to levy ad valorem taxes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail to:

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this ____13th___ day of November, 2006.

_/s/_ David G. Tucker
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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief is presented in Times New Roman font, 14 point type, a font that is proportionately spaced as required by the Florida Rules of Appellate Procedure.

/s/ David G. Tucker
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