**IN THE FLORIDA SUPREME COURT**
**CASE NO. SC06-1894**

Bond Validation Appeal From a Final Judgment
of the Circuit Court of the First Judicial Circuit,
in and for Escambia County, Florida

**DR. GREGORY L. STRAND,**

Appellant,

v.

**ESCAMBIA COUNTY, FLORIDA,**

**a political subdivision of the State of Florida,**

Appellee.

# ANSWER BRIEF OF APPELLEE

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## INTRODUCTION; REFERENCES TO THE PARTIES AND THE RECORD

On August 18, 2006, the trial court entered its Final Judgment (the "Validation Judgment") validating the issuance by Escambia County, Florida, of not exceeding $135,000,000 of its Southwest Escambia Improvement Revenue Bonds (the "Bonds") to be used to finance transportation and infrastructure improvements in the southwest portion of the unincorporated area of the County, particularly including the widening of certain roads to enhance access to such areas, thereby addressing transportation inadequacies that pose safety concerns in times of evacuation and impair economic growth in the area. Dr. Gregory L. Stand has appealed the Validation Judgment, alleging that the Bonds should not be issued without a referendum.

Appellee Escambia County, Florida, will be referred to as the "Appellee" or the "County."

Appellant Dr. Gregory L. Strand will be referred to as the "Appellant" or "Dr. Strand."

The Appendix submitted by the Appellant with his Initial Brief constitutes a portion of the Record in this case. References to that Appendix will be referred to as "Strand AP" followed by the tab exhibit number

followed by a page number. Attached to this Answer Brief is County's Appendix including additional matters presented in the case below. References to this Appendix will be cited as "County AP" followed by the tab number. A copy of the Validation Judgment is included in the County Appendix and will be referred to as "COUNTY AP Ex. 1".

## JURISDICTION

Pursuant to Fla. R. App. P. 9.030(a)(1)(B)(i), this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. On August 18, 2006, the Circuit Court of the First Judicial Circuit, in and for Escambia County, Florida, entered such a final order concerning the Bonds the County proposes to issue for transportation and infrastructure improvements in the Southwest portion of the unincorporated area of the County. Under § 75.01, Fla. Stat. (2005), a circuit court has "jurisdiction to determine the validation of bonds and all matters connected therewith." A suit for bond validation is a legislatively created cause of action which permits a public body in the State of Florida to obtain an adjudication as to the validity of debt it proposes to incur and the regularity of proceedings taken in connection therewith. *See* § 75.02, Fla. Stat. (2005). This Court has mandatory jurisdiction to hear appeals from final judgments entered in a proceeding for the validation of

bonds. Art. V., § 3(b)(2), Fla. Const.. Further, § 75.08, Fla. Stat. (2005) provides that "any party to the action whether plaintiff, defendant, intervenor or otherwise, dissatisfied with the final judgment, may appeal to the Supreme Court." The Appellant was an intervenor in the cause below and has timely filed his Notice of Appeal; hence this Court has jurisdiction to review the decision of the Circuit Court.

## STANDARD OF REVIEW

This Court's scope of review in bond validation cases is limited to the following issues: (1) whether the public body has the authority to issue bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issuance complies with the requirements of the law. *See Boschen v. City of Clearwater*, 777 So. 2d 958 (Fla. 2001)*; State v. Osceola County, 752 So. 2d 530* (Fla. 1999); *State v. Inland Protection Fin. Corp.*, 699 So. 2d 1352 (Fla. 1997); *Poe v. Hillsborough County*, 695 So. 2d 672 (Fla. 1997); *Northern Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992); *Taylor v. Lee County*, 498 So. 2d 424 (Fla. 1986). The Appellant has the burden of demonstrating that the record and evidence fail to support the trial court's conclusions. *Turner v. City of Clearwater*, 789 So. 2d 273, 276-277 (Fla. 2001); *Wohl v. State*, 480 So. 2d 639,641 (Fla. 1985).

## STATEMENT OF THE CASE

County has no objection to the "Statement of the Case and the Facts" included in Appellant's Initial Brief.[1] In addition to the information presented therein, however, the County adds the following information.

First, notice of the hearing below (the "Validation Hearing") was given as required by the provisions of § 75.06, Fla. Stat. (2005) by the publication of the Court's Amended Order to Show Cause for two consecutive weeks in a newspaper of general circulation within the County, with the first publication appearing at least twenty days prior to the date scheduled for the Validation Hearing. As established by the Affidavit of Publication presented at the Validation Hearing, the Amended Order to Show Cause was published on May 24, 2006 and May 31, 2006, 2006. (COUNTY AP Ex. 2; STRAND AP Ex. 2, p. 14)

Second, the County's Board of County Commissioners enacted Ordinance No. 2006-38 (the "TIF Ordinance") on May 4, 2006, following a

[1] Appellant notes at page three of his Initial Brief that both the Complaint for validation filed by the County and the Answer filed by the State Attorney bear document identification numbers containing the initials "MCSP," indicating that counsel for the County assisted in drafting both documents. In fact the document identification numbers contain the initials "MC***PS***." Despite Appellant's distress over the document identifier on the State Attorney's answer, Appellant apparently had no objection to the content of the document: his Motion to Intervene adopts by reference fourteen of the fifteen paragraphs in the State's Answer as his objections to the validity of the Bonds.

public hearing. Notice of the public hearing was published in a newspaper of general circulation in Escambia County on April 23, 2006, a date that was at least ten days prior to the date of the public hearing, as established by the Affidavit of Publication presented at the Validation Hearing. (COUNTY AP Ex. 3; STRAND AP Ex. 2, p. 17) Prior to that public hearing, on March 9, 2006, the Board of County Commissioners considered the plan of finance at a workshop meeting, which, like all meetings of the Board of County Commissioners, is required to be duly noticed and open to the public. (STRAND AP Ex. 2, p. 16).

Third, the TIF Ordinance authorizes the issuance of bonds to finance infrastructure improvements not only in that part of the unincorporated portion of Escambia County known as Perdido Key, but also in a larger portion of the southwest portion of the unincorporated portion of Escambia County described in the TIF Ordinance. (STRAND AP Ex. 3, Attachment A)

Fourth, on May 4, 2006 following the enactment of the TIF Ordinance, the County adopted its Resolution No. R2006-96 (the "Bond Resolution") authorizing the issuance of the Bonds to finance the Project, transportation and infrastructure improvements. (STRAND AP Ex. 4)

Fifth, at the Validation Hearing, Appellant made no offer of proof. In response to the Court's invitation to present evidence at the Validation Hearing, counsel for Appellant indicated that his arguments in opposition to the issuance of the Bonds were "primarily legal in nature" and requested an opportunity to brief the Court on his legal arguments. (STRAND AP Ex. 2, p. 33) The record below shows that counsel for Appellant was given such an opportunity (STRAND AP Ex. 13) well in advance of the date the Validation Judgment was entered.

## SUMMARY OF ARGUMENT

Appellant raises on appeal three arguments: one procedural issue regarding denial of his motion for a continuance; and two substantive issues, each of which are settled matters of Florida law. County submits that this Court should conclude, as did the trial court below, that these arguments are without merit. First, Appellant's claim of abuse of discretion in denying a continuance ignores Florida's well-documented statutory procedure for expedited treatment of bond validation proceedings. Second, as to Appellant's two substantive objections to validation of the Bonds, acceptance of such objections would overturn existing precedents upon which Florida law has relied for years. Appellant's first substantive

argument, that no competent substantial evidence supports the trial court's judgment, ignores the decisions of this Court that, *as a matter of law*, introduction into evidence of the bond resolution establishes a prima-facie case for validation. Appellant's other substantive argument, that the County is without authority to issue the Bonds except under the provisions of Chapter 163, Part III, Fla. Stat. (2005), would overturn this Court's seminal case interpreting the 1968 Constitution to allow counties to empower themselves to issue bonds by ordinance. This argument would also reverse an extended line of cases affirming that bonds are not subject to any referendum requirement if they do not pledge the ad valorem taxing power. Accordingly, none of Appellant's challenges to the trial court's judgment should prevail.

***The Continuance***. Appellant's claim that the trial court erred in denying his last-minute request for continuance of the validation hearing is supported only by his citation of decisions in ordinary litigation. Bond validation proceedings are to be given special priority by the courts of this State because the public interest is at stake. It is common knowledge that prevailing interest rates in the bond markets can substantially change in a short period of time. Appellant presented no clear and compelling reason why a continuance was necessary. Publication of the notice of the bond

validation hearing was published twice in a newspaper of general circulation in Escambia County, with the first publication appearing thirty-seven days prior to the validation hearing – seventeen days more notice than the statute requires. Appellant's assertion in his Motion for Continuance that his counsel "first learned of the bond validation hearing on Tuesday, June 27, 2007" (STRAND AP Ex. 10, p. 2) three days prior to the hearing does not rise to the required level of a "clear and compelling" reason for delay. The record contains no evidence to show that the Appellant was prejudiced by the means of publication prescribed in Chapter 75, Fla. Stat. (2005), for notice of a bond validation hearing, or by the trial court's denial of his motion for continuance. In addition to the ample notice required by statute in a bond validation case, Appellant was given the opportunity to present his legal arguments concerning the validity of the Bonds following the hearing and prior to the entry of the Validation Judgment.

***Competent Substantial Evidence***. Appellant's first substantive argument contends that the trial court's judgment was not supported by competent substantial evidence. However, in light of the standard of review for this Court in bond validation proceedings, Appellant can point to no element of that review that is not addressed by competent substantial evidence in the record. Moreover, introduction of the TIF Ordinance and the

Bond Resolution establishes a sufficient basis, even without further evidence or testimony, to support a validation judgment. Every matter subject to review by this Court is specifically addressed in the TIF Ordinance and the Bond Resolution. In addition, the record shows that the County presented testimony of witnesses supporting factual matters.

***Legal Authority.*** Finally, Appellant argues that the County does not have the power to issue the Bonds either because the Bonds would somehow pledge the taxing power of the County or because the County did not follow the tax-increment provisions for redevelopment of slum and blighted areas. However, nothing in the authority cited by Appellant would prohibit the County from using tax-increment financing for purposes other than redevelopment of blighted areas. Tax-increment financing for other purposes has been expressly approved by this Court. And despite Appellant's assertion that the proposed Bonds pledge the taxing power and thus require approval by referendum, this Court has expressly found both (i) that tax-increment financing does not constitute an improper pledge of the taxing power; and (ii) that bonds secured by a covenant to budget and appropriate do not require approval by referendum.

***Conclusion***. Appellant's arguments fail to show any error in the judgment of the lower court validating the Bonds and therefore this Court should affirm the Validation Judgment.

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## ARGUMENT

### 1. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S MOTION FOR CONTINUANCE.

Appellant's reliance on authorities outside the bond validation context to support his claim that it was error for the lower court to fail to grant his motion for a continuance is misplaced. In divorce cases, such as the ones cited by Appellant, extensive published notice of the hearing is not required and there is no public interest in expediency. These authorities do not pertain. This Court has already clearly expressed the guidelines for continuance of a bond validation hearing, stating that a continuance should not be granted unless a clear and compelling reason is shown:

> The law and the rules of this Court are designed to expedite the disposition of proceedings for the validation of bonds. This is required by the very nature of the proceedings themselves and the fact that the public interest is involved in each case. While the statute empowers the trial judge to grant adjournments of the hearing provided for in the rule nisi, *none should be granted in the absence of a clear and compelling reason*. All interested parties have been afforded adequate notice and sufficient time to prepare their case for presentation on the return day and those who desire to do so should be present at such time and place and ready to proceed. The law and rules contemplate such expediency and the courts should, as the learned trial judge did here, require compliance.

*State v. Florida State Turnpike Authority*, 134 So. 2d 12, 15 (Fla. 1961). (Emphasis added; footnote omitted.)

Similarly, in *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503 (Fla. 1966), this Court was confronted with a situation almost identical to the present case. In refusing to reverse the trial court's decision to deny a last-minute motion for continuance, the Court stated:

> At this hearing … the respondents in effect sought a continuance in order that they might have time thereafter to gather evidence and submit the same at a later hearing. However, there was a duly published notice in which a particular date was set for the validation hearing. The respondents intervenors were thereby notified as provided by law to be ready to present their objections to the validation including their testimony or other evidence of any. The court offered respondents opportunity to present their evidence but they made no effort then to submit any nor made any proffer whatever. …The question of granting a continuance in the case was …[within the discretion of the circuit court].
>
> It is the intent of the law that validations be expedited at the earliest time reasonably possible. Nothing in the record of this case leads us to conclude the circuit court abused its discretion, … but properly proceeded after the initial hearing to enter the decree of validation.

*Id.*, at 504-505.

In the present case, the notice of the bond validation hearing was first published in the principal Pensacola newspaper, on May 24, 2006, and again on May 31, 2006. (COUNTY AP Ex. 2; STRAND AP Ex. 2, p. 14) These notices gave Appellant, as an intervenor, over seventeen more days notice of the hearing than was required by § 75.09, Fla. Stat. (2005). In addition, notice was published prior to the May 4, 2006 public hearing at which the

TIF Ordinance was considered and adopted (COUNTY AP Ex. 3; STRAND AP Ex. 2, p. 17). Prior to that public hearing, on March 9, 2006, the Board of County Commissioners considered the plan of finance at a workshop meeting, which, like all meetings of the Board of County Commissioners, was required to be duly noticed and open to the public. (STRAND AP Ex. 2, p. 16) Appellant asserts that he did not find out about the validation hearing until a few days before the scheduled date; however, it is clear that this was not the fault of the County. Further, the record shows that Appellant advised the trial court that he desired the continuance in order to prepare legal arguments. Appellant was given the opportunity to present and brief his legal arguments prior to entry of the Validation Judgment and therefore was not prejudiced by the trial court's decision to deny his motion for a continuance. Appellant has failed to show a "clear and compelling" reason that would have justified a continuance of the validation hearing. Accordingly, on the basis of *Turnpike Authority* and *Rianhard*, *supra*, the trial court's denial of a request for continuance in the present case was well within its discretion and provides no basis for this Court to overturn the Validation Judgment.

**2. THE CIRCUIT COURT'S FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.**

Appellant's arguments on this question are two-fold: the first having to do with the use by the trial court of a form of final judgment prepared by

Appellee's counsel, and the second questioning the existence of substantial competent evidence for the Validation Judgment. The record below refutes each of these challenges.

Appellant cites a divorce case, *Perlow v. Berg-Perlow,* 875 So. 2d 383, 390 (Fla. 2004) as support for his contention that the Validation Judgment must be reversed because "the Judgment reads essentially **verbatim** to the proposed Final Judgment" submitted by the County's counsel. In *Perlow*, the trial court's judgment was reversed because the wife's counsel was permitted to submit a form of judgment adopted by the trial judge, while the husband's counsel (1) was not given opportunity to object to the wife's form of judgment and (2) was not given opportunity to submit his own form of judgment. The *Perlow* decision also emphasized that the trial court signed the wife's form of judgment within two hours after the closing arguments (*Id*, at 386), and therefore raised the *appearance* that the trial judge could not have had time to thoughtfully consider the issues before it:

> the trial judge did not permit the husband an opportunity to submit his own proposed final judgment or to object to the wife's proposed final judgment. Furthermore, because the final judgment (twenty-five pages in length with six additional pages of financial exhibits incorporated by reference) was submitted by the wife's counsel and adopted verbatim without any additions, changes or deletions so quickly thereafter (i.e., with *two hours* of its submission) without the trial judge having

> indicated on the record any findings of fact or conclusions of law, there was an appearance that the trial judge did not independently make factual findings and legal conclusions, i.e, an *appearance of impropriety* …" (emphasis added)

*Id.*, at 389.

There are no comparable circumstances in the present case. During the validation hearing, Appellant's counsel was furnished with a copy of the County's proposed form of judgment. (STRAND AP Ex. 2, p. 46) After closing arguments at the hearing, the trial court gave the parties five days to submit additional arguments and supporting memoranda. In its submission, Appellant's counsel included his own form of final judgment in addition to his argument (STRAND AP Ex. 13), and presumably had read, researched and objected to any provision in the County's form of judgment. After the Appellant submitted his additional argument and his own form of judgment, another forty-four days elapsed before the trial court entered the Validation Judgment. Thus the present case, unlike *Perlow*, in no way gave an appearance of impropriety for the court not having sufficiently considered the judgment. On the contrary, the trial court took over six weeks (as compared to two hours in *Perlow*) to consider the issues before entering the Validation Judgment. It should be noted that the *Perlow* court specifically approved the common practice of having each party prepare and submit proposed findings and conclusions. *Id.*

It should also be noted that in *Hillier v. City of Plantation*, 935 So. 2d 105, 106 (Fla. 4th DCA 2006), the District Court applied the *Perlow* case to the facts before it and specifically found that it is not error for the trial court to adopt verbatim the proposed order of one party if the other party is given opportunity to review and object to the proposed order. In this case, Appellant's counsel was given opportunity to review and object to the proposed judgment submitted by the County, and the entry of the Validation Judgment by the trial court in substantially the form proposed by the County was not error.

As to Appellant's argument that there was no substantial competent evidence to support the trial court's Validation Judgment, the County would simply point out this Court's longstanding position that the introduction of the Bond Resolution alone at the validation hearing is sufficient to support validation. For example, in *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503 (Fla. 1966) this Court stated:

> We think the introduction of the supporting resolution in evidence is all that was necessary to justify validation. In *State of Florida v. Manatee County Port Authority*, Fla. App. 171 So. 2d 169, we approved as sufficient evidence to justify validation of revenue certificates similar to those in this case only the introduction of the supporting resolution covering that issue.

*Id.*, at 505.

The Rianhard decision is dispositive of Appellant's challenge based upon insufficient competent evidence, because the Bond Resolution as well as the TIF Ordinance were introduced, without objection at the validation hearing. Nevertheless, in his effort to show a lack of substantial competent evidence for the validation, Appellant points to specific cases under Chapter 163, Part III, Fla. Stat. (2005) (the "Redevelopment Act") where evidentiary matters were in dispute. The cases relied upon by Appellant are inapposite here, not only because Appellant did not dispute any evidentiary matters in the case below[2], but also because the County did not merely introduce the Bond Resolution as its only evidence at the validation hearing.

On page 17 of his Initial Brief, Appellant claims:

> Although legislative determinations are entitled to deference, such deference does not negate the requirement that such determinations be supported by competent substantial evidence. See *Panama City Beach Cmty.* (sic) *Redevelopment Agency v. State*, 831 So. 2d 662, 667 (Fla. 2002).

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[2] Appellee would point out that in *Rianhard*, all of the questions presented by either counsel related to questions of law, not questions of fact. Rianhard, at 504. Similarly, the record below demonstrates that Appellant made no effort to present any evidence of a dispute of factual matters. After the County presented its case to the trial court at the validation hearing, Appellant was asked by the trial judge whether he wished to present any evidence. Appellant's counsel stated, "No sir … our arguments are primarily legal in nature and we would somehow like to brief the Court." (STRAND AP Ex. 2, p. 33) Thereafter, Appellant was given 5 days to brief the Court and did, in fact, timely file a post-hearing brief. (STRAND AP Ex. 13)

> In the instant case, the record is devoid of any direct testimony of other documentary evidence to support the Circuit Court's findings regarding the alleged legislative determinations.

Such assertion by Appellant could not be more incorrect. In the present case, as the Bond Resolution and TIF Ordinance were being introduced, the County's Director of Administrative Services, Jean Kassab, testified that she was responsible for developing the financing plan, including the recommendation that the County authorize the issuance of the Bonds. (STRAND AP Ex. 2, p. 15) Ms. Kassab explained that the public purpose to be served by the project being financed with the Bonds was to widen various transportation corridors to improve economic development and alleviate traffic congestion. (STRAND AP Ex. 2, p. 15) She further testified that, prior to adoption of the Bond Resolution and the Tax-Increment Ordinance, the Board of County Commissioners held a workshop meeting where she presented the project and explained the financing plan, including the tax increment plan. She then recommended the project and the tax increment financing to the Board of County Commissioners. (STRAND AP Ex. 2, p. 16) On cross examination by the State Attorney, Ms. Kassab testified that it was anticipated that the tax increment would only apply to capture increased revenues within the benefited area, including Perdido Key Drive, the new

bridge, Sorrento Road to Gulf Beach to Blue Angel Parkway, to pay for the four-lane widening project. (STRAND AP Ex. 2, p. 22).

Even though the Bond Resolution and Tax Increment Ordinance alone are sufficient to support the trial court's Validation Judgment, the record here further shows that the findings of the Board of County Commissioners were made only after a workshop meeting was conducted to consider the traffic and economic development needs of the tax increment district (STRAND AP Ex. 2, p. 16), and only after the County's Director of Administrative Services had explained the project, the financing mechanism and the tax increment plan, and affirmatively recommended that the County Commission adopt the TIF Ordinance and Bond Resolution. Accordingly, there was more than sufficient competent and substantial evidence to support the findings of the Board of County Commissioners in the Tax Increment Ordinance and Bond Resolution, and the findings of the trial court below in validating the Bonds.

Addressing the matter raised by Appellant in Part II of his Initial Brief, concerning the requirement for evidence to support the findings of the County Commission, Appellee would point out that the very case relied upon by Appellant for such point, the *Panama City Beach Community Redevelopment Agency* case, *supra*, recognizes that legislative findings of

the County Commission are to be given deference. Under any circumstances, it was Appellant's burden to produce some evidence to overcome the presumption of correctness of the legislative findings. Appellant presented no evidence (nor proffer of evidence nor request to present evidence), did not testify on the subject, and did not cross-examine the County's witnesses who provided the additional support for the legislative findings.

Appellant also argues that the sufficiency of the evidence is contrary to the requirements for redevelopment districts under the Redevelopment Act. Appellee will address that question in Part III of this Answer Brief as part of its showing that said statute is inapplicable to the present case.

Appellant's brief fails to demonstrate any basis for overturning the Validation Judgment due to lack of competent substantial evidence to support the findings. In fact, the record affirmatively demonstrates that the County's evidence was more than sufficient to support the findings, and that Appellant produced no contrary evidence and made no attempt at the hearing to challenge such findings.

### 3. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE COUNTY HAD THE LEGAL AUTHORITY TO ISSUE THE BONDS.

This Section 3 will address the following arguments contained in Section III of Appellant's Initial Brief: (A) the Bonds are invalid because the County has not followed the procedures for creation of a community development district under the Redevelopment Act; (B) the decision in *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1981), to the effect that tax-increment financing does not pledge the taxing power of the issuing entity, is inapplicable here because the Bonds are not for redevelopment but instead will finance road and transportation improvements, (C) the authority of *Penn v. Florida Defense Finance and Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993) ("*Penn*") is distinguishable from the present case because in *Penn*, the bond issuing entity did not have taxing power; (D) the Bonds are not authorized because the judgment below stated that the County was permitted to use ad valorem revenues to repay the Bonds; and (E) the back-up commitment to repay the Bonds from non ad valorem sources (the "Covenant to Budget and Appropriate") amounts to an indirect pledge of the County's taxing power, which has not been approved by referendum.

### (A). The County Is Not Required To Comply with the Community Redevelopment Act In Order To Issue Tax Increment Bonds.

Appellant complains that the County has not complied with the state statutory scheme for tax increment financing for redevelopment of slum and blighted areas. This argument ignores the fact that the Bonds are not being issued for redevelopment, and therefore the statutory requirements suggested by Appellant are irrelevant. The financing plan contemplated by the County's TIF Ordinance is similar in structure to the financing method authorized in the Redevelopment Act. Both methods contemplate that bond-financed improvements will result in increased property values, and that the additional ad valorem taxes which result from the increased tax assessments will offset the costs of the bond financing. The County's TIF Ordinance and the Redevelopment Act both provide that deposits equal to the increased ad valorem taxes will be paid into a local trust fund, to be pledged for repayment of bonds to be used to finance improvements within a specific area. But that is where the similarity ends.

The CRA Act contemplates the creation of a redevelopment district, based upon slum and blight criteria and procedures. These criteria and procedures are not pertinent to the Southwest Escambia Improvement District created under the TIF Ordinance, because the Bonds are not issued

for redevelopment purposes. The County has chosen to exercise its power to acquire right-of-way, build and widen roads and thereby protect the public health, safety and welfare and promote economic development. The more important distinction, however, is that the Redevelopment Act allows a Community Redevelopment Agency to redirect the ad valorem taxes *of other governmental taxing units* into the Redevelopment Trust Fund without their permission or consent. *See* § 163.387(2)(a), Fla. Stat. (2005). Here, Escambia County is not exercising any redevelopment powers under the Redevelopment Act, and *is not diverting any revenues of other taxing authorities* into the County's Trust Fund.[3] Because the County is not using the privileges granted under the Redevelopment Act, the requirements of the Redevelopment Act are not applicable to the tax-increment method of finance employed for repayment of the Bonds herein.

The seminal case interpreting County financing powers under the 1968 Constitution is *State v. Orange County*, 281 So. 2d 310, 311 (Fla. 1973). In that case, this Court expressly recognized that Florida counties

[3] The Southwest Escambia Improvement District created by the TIF Ordinance includes only unincorporated areas of the County. In addition, the plain language of the TIF Ordinance requires only the County to deposit revenues into the trust fund in an amount equal to the tax increment. All of the moneys to be deposited to the trust fund are to come from County revenues.

may empower themselves to implement financing plans by ordinance alone, so long as the ordinance is not inconsistent with general or special law:

> Section 1(f) of Article VIII authorizes Orange County, a non-charter county, pursuant to enabling statues to enact a county ordinance (in lieu of securing a special act to that effect) authorizing such revenue bond issue. F.S. Section 125.01(1), (c), (r), (t), F.S.A., empowers noncharter counties in several self-government respects and clearly authorizes adoption of the bond ordinance herein. Thus, there is no preclusion; instead, there is ample authority for the bond ordinance. Since F.S Section 125.01(1)(r) F.S.A. delegated to Orange County the specific power to issue bonds and revenue certificates, it had the power to adopt its implementing ordinance in this instance.

*Id.* at 311.

The Tax Increment Ordinance validated by the trial court in the present case does not conflict with the Redevelopment Act. § 163.387(2)(a) of the Redevelopment Act grants powers for redevelopment of blighted areas, and authorizes redevelopment agencies to redirect tax revenues from other taxing authorities into a redevelopment trust fund. The enumeration of powers in the Redevelopment Act contains no preclusion against using a tax-increment method to finance other programs or projects. Neither does it reserve tax-increment financing exclusively for community redevelopment. This Court has recognized that the Redevelopment Act is a supplemental method of finance. *State v. City of Pensacola*, 379 So. 2d 922 (Fla. 1981). At page 23 of his Initial Brief, Appellant asserts the invalidity of the Bonds based on the

contention that § 163.355, Fla. Stat. (2005) prohibits a county from exercising "the community redevelopment authority conferred by this part" until the area to be redeveloped is found to be slum or blighted. The Appellee has no quarrel with Appellant's interpretation of § 163.355, Fla. Stat. (2005). However, since the County does not propose to exercise the powers granted under § 163.355, Fla. Stat. (2005), that prohibition simply does not apply to the County's exercise of powers to issue the Bonds.

The County does not deny that one or more of the indicia indicating a "blighted area" within the meaning of the Redevelopment Act could be present within the Southwest Escambia Improvement District. Nor does the County deny that, upon establishing the Redevelopment Act criteria, it could have decided to undertake the establishment of a community redevelopment district pursuant to the provisions of the Redevelopment Act. However, it did not do so, but instead determined to exercise its home rule powers to finance traditional infrastructure improvements in the unincorporated area of the County. According to the undisputed findings set forth in the County's Bond Resolution and the testimony presented at the validation hearing (STRAND AP Ex. 2, p. 15; STRAND AP Ex. 4, p. A-1), the improvements to be financed with the Bonds are traditional county road and infrastructure

projects. Counties have general powers under Chapter 125, Fla. Stat., which provides, among other things:

> 125.01 Powers and duties.-
>
> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:
>
> . . .
>
> (m) Provide and regulate arterial, toll, and other roads, bridges, tunnels, and related facilities.
>
> . . .
>
> (r) … Levy and collect taxes … for county purposes, …borrow and expend money; and issue bonds, revenue certificates, and other obligations of indebtedness.
>
> . . .
>
> (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.

These powers under Chapter 125, Fla. Stat. (2005) are sufficient, in and of themselves, to enable the County to implement the tax-increment program described in the Bond Resolution and the TIF Ordinance.

The fact that the Legislature provided a special means of tax-increment financing in the Redevelopment Act for one purpose (redevelopment, using the tax revenues of multiple local taxing authorities) *does not* mean that tax-increment financing cannot be used for different purposes (such as road improvement and economic development, using only

the County's revenues) as described in the County's TIF Ordinance. (STRAND AP Ex. 3, p. 4) As noted above, the County has independent power, by statute and by ordinance to finance and build the kinds of projects contemplated by the TIF Ordinance and the Bond Resolution. Moreover, such projects are not "redevelopment" projects to a greater extent than any road improvement or economic development program.

The Redevelopment Act was created as an extraordinary means to redevelop slum and blighted areas. It was not intended to replace all other local government powers that had some incidental redevelopment consequences. The conditions in § 163.335, Fla. Stat. (2005), that must be met to enable the County to exercise Redevelopment Act powers in no way repeal the general powers granted by statute or ordinance to the County, particularly when the County is neither seeking to finance a project that is exclusively "redevelopment" nor using the tax revenues of other taxing entities.

Appellant's assertion that the County is without authority to employ a method similar to the method employed in the Redevelopment Act is much like the argument that was rejected by the Florida Supreme Court in *State v. City of Pensacola*, *supra*. There, the City of Pensacola adopted its own ordinance creating a method for financing mortgages for homeowners in the

urban redevelopment area, which ordinance did not comply with provisions for certain bond financing methods set forth in state law. In upholding the validation of City bonds issued under its ordinance, the Supreme Court stated:

> The state claims the city is expressly preempted from the proposed [financing] by the Florida Housing Finance Authority law . . . and by the Community Redevelopment Act of 1969, as amended, Part II, Chapter 163, Florida Statutes (1979). However, as respondent points out, neither of these acts expressly prohibits municipalities from issuing revenue bonds for the purpose of financing housing or for redeveloping areas within their boundaries. Instead, they merely authorize the creation of housing finance authorities and *community redevelopment agencies whose powers to issue bonds are supplemental to those of the counties and municipalities*.

*City of Pensacola* at 924 (Emphasis added.)

The *Pensacola* case clearly establishes that a city or county may provide financing redevelopment or housing programs pursuant to a revenue method different from specific financing methodology in general law. In the above-quoted language of the *Pensacola* case, this Court expressly stated that redevelopment powers under the Redevelopment Act are "supplemental to those of the counties and municipalities." Such language completely disposes of Appellant's claim that the Bonds and the TIF Ordinance herein were required to conform to the Redevelopment Act.

This principle of the *Pensacola* case was further confirmed, specifically as to tax-increment financing methods, in *Penn v. Florida Defense Finance and Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993). There, the financing mechanism for the proposed bonds was described as follows:

> the bonds will be secured by lease payments from the City and the County, which in turn were secured by tax increment revenues measured in part by future increase in ad valorem tax receipts. Any shortfall will be made whole by non-ad valorem revenues, but the bondholders' lien attaches only to moneys actually deposited in the trust funds.

*Id.*, at 461.

The project to be financed in *Penn* was not for community redevelopment, and neither the project nor the ordinances creating the tax increment trust funds followed the criteria and procedures of the Redevelopment Act. Nevertheless, this Court rejected the challenge to the tax-increment financing mechanism and affirmed the validation, stating:

> We find that the financing mechanism at issue here is indistinguishable from that approved in *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980).

*Id.*, at 461-462.

The three-point financing mechanism utilized in *Miami Beach, supra*, and carefully described by the Supreme Court in the *Penn* case, *supra*, is identical to the three-point financing mechanism here being challenged by

Appellant. Under the County's TIF Ordinance, County revenues in amounts measured by future increase in ad valorem tax receipts are deposited to the trust fund. (STRAND AP Ex. 3, p. 6) Under the TIF Ordinance, the bondholders' lien attaches only to moneys actually deposited in the trust fund. (STRAND AP Ex. 3, p. 6) And finally, any shortfall will be made whole by the County's covenant to budget and appropriate from legally available non-ad valorem revenues. (STRAND AP Ex. 4, p. 35)

### (B). Bonds Secured By Tax Increment Financing Do Not Pledge the Taxing Power And Are Not Required To Be Approved By Referendum.

In *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1981) tax-increment bonds to be issued under the Redevelopment Act were challenged as an illegal pledge of the ad valorem taxing power without referendum approval. § 163.387(5), Fla. Stat. (2005) provides that:

> Revenue bonds issued under the provisions of this part shall not be deemed to constitute a debt, liability, or obligation of the public body or the state or any political subdivision thereof, or a pledge of the faith and credit of the public body or the state or any political subdivision thereof, but shall be payable solely from the revenues provided therefor. *All such revenue bonds shall contain on the face thereof a statement to the effect that the agency shall not be obligated to pay the same or the interest thereon except from the revenues of the community redevelopment agency held for that purpose and that neither the faith and credit nor the taxing power of the governing body*

> *or of the state or of any political subdivision thereof is pledged to the payment of the principal of, or the interest on, such bonds.*

(Emphasis added.) Even though the tax increment revenues deposited into the trust fund and pledged to secure the *Miami Beach* bonds were derived from and measured by ad valorem taxes, the Supreme Court in *Miami Beach* relied on the emphasized statutory language to conclude that the bonds did not pledge the taxing power:

> . . . 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 discrete purpose. … *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 … to compel by judicial action the levy of ad valorem taxation*.

(Emphasis added.) *State v. Miami Beach Redevelopment District, supra*, at 898.

In the present case, Section 301 of the County's Bond Resolution conforms to the statutory language approved in the *Miami Beach* case, and specifically provides that:

> No holder or holders of any Bonds issued hereunder shall ever have the right to compel the exercise of the ad valorem taxing power of the Issuer, the State or any political subdivision thereof, or taxation in any form of any real or personal property therein, or the application of any funds of the Issuer, the State or any political subdivision thereof, to pay the Bonds or the

> interest thereon or the making of any sinking fund or reserve payments provided for herein other than the Pledged Funds as provided in this Resolution.

(STRAND AP Ex. 4, p. 23)

In addition, Section 4(5) of the County's TIF Ordinance includes the following language, which tracks the limitation required under *Miami Beach*:

> (5) Revenue Bonds issued under the provisions of this part shall not be deemed to constitute a debt, liability, or obligation of the County or the State or any political subdivision thereof, or a pledge of the faith and credit of the County or the state or any political subdivision thereof, but shall be payable solely from the revenues provided therefor. *All such revenue Bonds shall contain on the face thereof a statement to the effect that the County shall not be obligated to pay the same or the interest thereon except from the revenues of the County held for that purpose and the neither the faith and credit nor the taxing power of the County or of the state or of any political subdivision thereof is pledged to the payment of the principal of, or the interest on, such bonds.*

(Emphasis added for comparison to *Miami Beach, supra*.) (STRAND AP Ex. 3, p. 6)

Therefore, under the *Miami Beach* analysis, the County's tax-increment Bonds do not pledge the taxing power of the County, because the bondholders have no right, if the trust fund were insufficient to meet the bond obligations, to compel by judicial action the levy of ad valorem

taxation. This is the exact standard identified in *Miami Beach* as the element that is "critical to the constitutionality of the bonds. *Miami Beach*, *supra*, at 898.

*Miami Beach* stands for the principle that the constitutional prohibition against pledging the taxing power is not violated by pledging incremental ad valorem revenues deposited into a trust fund to repay the bonds, provided the bondholder's lien does not arise until the moneys are deposited into the trust fund. *Miami Beach* establishes the principle that the constitutional prohibition against pledging the taxing power is not violated even when ad valorem taxes are required to be paid into a trust fund to repay the bonds, provided the bondholder's lien does not arise until the moneys are deposited into the trust fund.

**(C) Whether the taxing power is vested directly with the bond issuer, or indirectly, by contract with or statutory duty of, the taxing authorities does not affect the analysis of whether the taxing power is pledged.**

Appellant's brief attempts to distinguish *Penn, as well as Miami Beach, supra*, from the present case on the theory that in those cases, the bond issuer had no ad valorem taxing power. But it is clear that the decision in *Miami Beach* did not rely on such a distinction. This Court in *Miami Beach* looked through the Redevelopment Agency to the taxing

authorities themselves to determine whether the taxing power was pledged, and found that the mandatory contributions from the taxing authorities were not a pledge of the taxing power because the bondholder's lien did not attach until the contributions were deposited into the trust fund. As the Court noted:

> That the statutory duty [of the taxing authorities] to make the annual contributions [of the tax increments] would become a contractual duty, part of the obligation of the bonds, does not mean, however, that the bonds are 'payable from ad valorem taxes' in the constitutional sense of the term….What is critical to the constitutionality of the Bonds is that the bondholders have no right, if the trust fund were insufficient to meet the bond obligations … to compel the levy of ad valorem taxation.

*Id*., at 898.

The *Miami Beach* decision analyzed the tax increment plan based upon the fact that taxing powers of the city and county were part of the Bond obligation. The Court never relied on the fact that the Redevelopment Agency had no taxing powers. There would have been no reason for the Court to address the prohibition against pledging the ad valorem taxing power of Article VII, §12, Fla. Const. if the Court believed that the lack of taxing power by the Redevelopment Agency ended the analysis. The *Miami Beach* Court did not approve the bonds because the Agency had no taxing powers. Rather, the decision expressly recognized that the right to receive tax increments from both the City and the County were part of the contract

with the bondholders. Instead, the Court's decision was based upon the fact that the bondholders had no right to *compel* the exercise of the taxing power.

Similarly, this Court in the *Penn* case implicitly recognized that the issuing bond agency (the DFAS Agency) having power to compel application of ad valorem tax-increment, pursuant to the leases with the City and County, secured by tax increments, was equivalent to having ad valorem taxing power. Otherwise, the challenges to the tax-pledge and referendum issues could never have arisen.

The proscription against pledging the taxing power without referendum of the voters is contained in Article VII, § 12, Fla. Const. The DFAS Agency in *Penn* did not have taxing power; however, in *Penn* the intervenor challenged the underlying contract between DFAS and Escambia County (which contract was, in turn, pledged to repayment of the DFAS Bonds) on the ground that *the lease* pledged tax-increment revenues of Escambia County in violation of Article VII, § 12. It was for this reason that the Florida Supreme Court's opinion in Penn specifically refers to Article VII, § 12, Fla. Const. (*Penn, supra*, at 461, and footnote 2). The Florida Supreme Court rejected the Article VII, § 12 challenge, finding that "the financing mechanism at issue here is indistinguishable from that approved in *State v. Miami Beach Redevelopment Agency*." *Penn, supra*, at 461-462.

In both *Miami Beach* and *Penn*, the Court directly addressed the questions of whether bonds secured by tax increment financing pledged the taxing power and required a referendum, and did not rely on any concept that the issuer had no direct taxing power. Instead, those decisions were based squarely on the fact that, notwithstanding the character of the revenues being deposited to the trust fund (i.e. whether or not those revenues were derived from ad valorem taxes), the bondholders could not compel the city or county to levy ad valorem taxes if the tax-increment was insufficient, because no lien attached until the moneys were deposited in the Trust Fund. *Miami Beach, supra* at 898.

### (D). The County May Use Any Legally Available Revenue To Pay Debt Service On The Bonds.

Appellant argues that the Validation Judgment of the trial court below improperly permits the County to use ad valorem property tax receipts to pay debt service. Presumably, Appellant is referring to item 12 in the Validation Judgment, which states:

> 12. The Plaintiff is duly authorized by the Tax Increment Ordinance in accordance with the Constitution and laws of the State of Florida to make the required payments and deposits to the Trust Fund from all available revenues of the Plaintiff including ad valorem property tax receipts, and to do and accomplish all actions authorized and contemplated by the Tax Increment Ordinance.

(COUNTY AP Ex. 1, p. 5)

In addition, Section 305 of the Bond Resolution states:

> Subject to the provisions of the State Constitution, nothing herein contained shall preclude the Issuer from using any legally available funds, in addition to the Pledged Funds herein provided, which may come into its possession, including but not limited to the proceeds of sale of the Bonds, contributions or grants, for the purpose of payment of principal of and interest on the Bonds, or the payment of Amortization Installments, if any, or the purchase or redemption of such Bonds in accordance with the provisions of this Resolution.

(STRAND AP Ex. 4, p. 36)

There is a clear distinction between pledging the ad valorem revenues, and permitting ad valorem revenues to be used to pay debt service. This Court has frequently ruled that that the actual source of the annual payments is not limited to the sources pledged for the repayment of the Bonds. As noted in *DeSha v. City of Waldo*, 444 So. 2d 16, 18 (Fla. 1984):

> The mere possibility that the City may some time in the future choose to expend general revenue to meet its bond obligations does not render the bonds 'payable from' *ad valorem* taxation. See *Tucker v. Underdown*, 356 So. 2d 251 (Fla. 1978); *Town of Medley v. State*.

Accordingly, Appellant's objection to the Bonds on the basis that the Validation Judgment and the Bond Resolution contemplate that the County

may, if it chooses, apply ad valorem revenues to fund deposits to the trust fund created under the TIF Ordinance, is not supported by law.

### (E). The County's Covenant To Budget and Appropriate Funds To Repay The Bonds From Non Ad Valorem Sources Is Not An Improper Pledge Of Its Taxing Power.

Finally, Appellant asserts that the covenant in Section 304(m) of the Bond Resolution (STRAND AP Ex. 4, p. 35), which requires the County to budget and appropriate Non Ad Valorem Revenues as necessary to assure that there are sufficient moneys to repay the Bonds, constitutes an indirect pledge of the taxing power of the County. However, this assertion is also contrary to the settled law of this State.

The undisputed testimony at the validation hearing showed that it is expected that the Tax Increment Revenues will be sufficient to repay the Bonds (STRAND AP Ex. 2, p. 17-19). Accordingly, the County's covenant to budget and appropriate will likely never become operative. However, even if it became necessary for the holders of the Bonds to enforce that covenant, this Court has found in similar cases that there would be no improper pledge of the County's taxing power on account of such a covenant.

In *Murphy v. City of Port St. Lucie, Florida*, 666 So. 2d 879 (Fla. 1995), the City of Port St. Lucie proposed to issue bonds to be paid from

special assessments imposed for utility improvements (the "Pledged Revenues"). The bond resolution also included a covenant (virtually identical to the County's covenant to budget and appropriate in connection with the Bonds in this case) requiring the City of Port St. Lucie "to budget and appropriate "Non Ad Valorem Revenues … as may be necessary to supplement the Pledged Revenues to the extent necessary to pay the debt service requirement on the bonds." *Port St. Lucie, supra,* at 881. The appellant in *Port St. Lucie* asserted that this covenant amounted to an indirect pledge of the ad valorem taxing power. This Court rejected that contention and affirmed the lower court's judgment validating the Port St. Lucie bonds, notwithstanding the inclusion of the covenant to budget and appropriate, stating:

> there is no provision in this resolution for the City to continue services for the purpose of generating income to pay the Bonds. Thus, because any potential impact on ad valorem revenues is incidental, [the bond resolution] does not violate Article VII, Section 12, of the Florida Constitution.

*Id.,* at 881.

In this case, the County's covenant to budget and appropriate in Section 304(m) of the Bond Resolution is identical to the covenant approved in *Port St. Lucie*. In addition, as in *Port St. Lucie*, there is no provision in the County's Bond Resolution to continue services for the purpose of

generating income to pay the Bonds. On the contrary, Section 304(m)(1) of the County's Bond Resolution expressly provides that "(n)otwithstanding the foregoing covenant of the Issuer, the Issuer does not covenant to maintain any services or programs, now provided or maintained by the Issuer, which generate Non-Ad Valorem Revenues." (STRAND AP Ex. 4, p. 35-36) Further, Section 304(m)(2) of the Bond Resolution provides that the obligation to repay the Bonds based on the covenant to budget and appropriate is expressly subject "to the payment of services and programs which are for essential public purposes affecting the health, welfare and safety of the inhabitants of the Issuer or which are legally mandated by applicable law." (STRAND AP Ex. 4, p. 35) Accordingly, any impact of enforcement of the County's covenant to budget and appropriate non ad valorem revenues to pay the Bonds would have an incidental potential impact on ad valorem revenues within the meaning of *Port St. Lucie*, and under *Port St. Lucie*, the covenant does not violate Article VII, § 12, Fla. Const.

None of the five arguments raised in Part III of Appellant's Initial Brief show any reason why this Court should overturn the Validation Judgment. First, non-compliance with the Redevelopment Act is irrelevant, because the County is not relying on the Redevelopment Act for its authority

to issue the Bonds. Second, the use of tax-increment revenues does not constitute an unlawful pledge of the County's taxing power, for the same reason that was identified by this Court in the *Miami Beach* case, *supra*: the bondholder's lien does not attach until the moneys are deposited into the trust fund, and the bondholder has no right to compel the County's ad valorem taxing power to pay the Bonds. Third, the present financing plan challenged by Appellant is substantively the same as this Court already approved in *Penn, supra*: the ad valorem tax-increment was pledged to secure the bonds, to finance a project that was not slum or blight pursuant to a tax-increment financing program established by ordinance and not pursuant to the Redevelopment Act. Fourth, the Validation Judgment did not authorize an illegal *pledge* of the ad valorem taxes, but simply noted that the County could *choose* to use the ad valorem taxes to pay debt service. Fifth, and finally, the commitment in the County's bond resolution to budget and appropriate amounts from non-ad valorem sources if necessary to make up shortfalls in tax-increments to pay debt service on the Bonds complies exactly with the language already approved by this Court in the *Port St. Lucie*, case, *supra.*

## CONCLUSION

The challenges raised by Appellant in his Initial Brief show no basis to reverse the judgment of the trial court. The denial of Appellant's motion for continuance was not an abuse of discretion, particularly since this Court has stated that such continuances in validation cases should not normally be granted. The Validation Judgment was supported by substantial and competent evidence, both in the findings of the legislative body as well as in the testimony presented at the validation hearing. The Circuit Court properly found more than adequate legal authority for the issuance of the Bonds, both under the TIF Ordinance and Chapter 125, Fla. Stat. (2005), and correctly concluded that the Bonds are not required to be approved by referendum.

For the reasons set forth in this Answer Brief, the County respectfully requests that this Court affirm the trial court's Final Judgment validating the Bonds and the proceedings in connection therewith.

Respectfully submitted,

By:_____

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. Mail to John Molchan, Esquire, Assistant State Attorney, Post Office Box 12726, Pensacola, Florida 32591, David A. Theriaque, Esquire, Theriaque Vorbeck & Spain, 433 North Magnolia Drive, Tallahassee, Florida 32308, and Kerry A. Schultz, Esquire, Bordelon & Schultz Law Firm, P.L., 2721 Gulf Breeze Parkway, Gulf Breeze, Florida 32563 this 8th day of November, 2006.

Respectfully submitted,

By:_____
Patricia D. Lott

## CERTIFICATION

The undersigned does hereby certify that this Answer Brief used 14 point Times New Roman type and does comply with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

By:_____
Patricia D. Lott