

IN THE SUPREME COURT OF FLORIDA

DR. GREGORY L. STRAND,

Appellant,

v.

CASE NO. SC06-1894

L.T. Case No. 2006-CA-881

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

Appellee.

INITIAL BRIEF OF
APPELLANT DR. GREGORY L. STRAND

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PREFACE

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

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

References to the Appendix submitted by the Appellant with this Initial Brief, as required by Florida Rule of Appellate Procedure 9.110(i), will be to the Exhibit and, where appropriate, the page number. For example, a reference to page seven of Exhibit 1 of the Appendix will be denoted as follows: “App., Ex. 1 at 7.”

STATEMENT OF THE CASE AND FACTS

This case involves an appeal from a Final Judgment of the First Judicial Circuit Court validating revenue bonds to be issued by Escambia County in an amount not to exceed \$135,000,000.00, and funded through the utilization of tax increment financing. (App., Ex. 14). The subject revenue bonds, however, were not subject to a referendum as required by Article VII, Section 12 of the Florida Constitution, nor were they proposed in accordance with the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*, which authorizes the use of tax increment financing for the redevelopment of “blighted” or “slum” areas without a referendum. Thus, this Court should reverse the \$135,000,000.00 bond issuance.

A. Factual Background

On or about May 4, 2006, the County adopted Ordinance 2006-38, which authorizes tax increment financing to fund certain capital and infrastructure improvements on Perdido Key, a barrier island/peninsula located in Southwest Escambia County (“TIF Ordinance”).¹ (App., Ex. 3). The TIF Ordinance purports

¹ Tax increment financing is a method of financing authorized by Florida’s “Community Redevelopment Act of 1969,” Chapter 163, Part III, *Florida Statutes*, to redevelop “blighted” or “slum” areas, subject to the requirements therein. See §§ 163.385-.387, Fla. Stat. (2005). Tax increment financing is based on the premise that a portion of the increased ad valorem taxes generated as a

to: (1) establish the Southwest Escambia Improvement District; (2) establish the Southwest Escambia Improvement Trust Fund; and (3) authorize tax increment financing to fund the Southwest Escambia Improvement Trust Fund. (*Id.*). The purported purpose of the TIF Ordinance is to establish a financing mechanism to fund infrastructure improvements on Perdido Key. In conjunction with the adoption of the TIF Ordinance, the County adopted Resolution No. R2006-96, authorizing the County to issue bonds not exceeding \$135,000,000.00 for the Southwest Escambia Improvement District (“Bond Resolution”). (App., Ex. 4).

On May 16, 2006, the County filed a “Complaint for Validation” with the First Judicial Circuit Court, pursuant to Chapter 75, *Florida Statutes*, seeking validation of the bond issuance. (App., Ex. 5). In filing its Complaint for Validation, the County also submitted a proposed Final Judgment validating the revenue bonds. (App., Ex. 6). On May 19, 2006, the Circuit Court issued an “Amended Order to Show Cause” setting the matter for hearing on June 30, 2006, at 8:00 a.m. (CST). (App., Ex. 7).

On June 22, 2006, the State Attorney filed its Answer to the County’s Complaint for Validation. (App., Ex. 8). The State Attorney’s Answer was

result of improvements to such property should be available to pay for the improvements. *See generally* David E. Cardwell and Harold R. Bucholtz, *Tax-Exempt Redevelopment Financing in Florida*, 20 Stet. L. Rev. 667, 667-80 (1991).

apparently prepared by the County's bond counsel, as reflected by the document identification number on the face of the State Attorney's Answer.² (*Id.*).

On June 29, 2006, Dr. Strand filed a "Motion to Intervene as a Full Party Defendant" ("Motion to Intervene") pursuant to Section 75.07, *Florida Statutes*.³ (App., Ex. 9). In so doing, Dr. Strand adopted by reference a portion of the State Attorney's Answer as grounds for invalidating the proposed bond issue. (*Id.* at ¶ 5). Dr. Strand further asserted that the financing scheme purportedly authorized by the TIF Ordinance and the Bond Resolution constituted an indirect pledging of ad valorem tax revenue without a referendum of the electorate, in violation of Article VII, Section 12 of the Florida Constitution. (*Id.* at ¶ 6).

In addition to filing his Motion to Intervene, Dr. Strand filed a separate "Motion for a Thirty (30) Day Continuance of Final Hearing" ("Motion for Continuance") on June 29, 2006. (App., Ex. 10). Dr. Strand's Motion for Continuance stated in pertinent part:

² The County's Complaint and the State Attorney's Answer contain the same document identification number in each document's footer. Most notably, the initials "MCSP" are denoted on both documents, which presumably stand for "Miller, Canfield, Paddock and Stone," *i.e.*, the County's bond counsel. (*Compare* App. Ex. 5 and Ex. 8).

³ Section 75.07, *Florida Statutes*, provides, in part, that "[a]ny property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint at or before the time set for hearing."

3. The undersigned counsel first learned of the bond validation hearing in this matter on Tuesday, June 27, 2006. The undersigned counsel promptly informed Intervenor Dr. Gregory L. Strand (“Dr. Strand”) of such proceeding on Wednesday, June 28, 2006. Upon learning such information, Dr. Strand immediately authorized the undersigned counsel on June 28, 2006, to file a motion to intervene and represent his interests on his behalf in this proceeding.

* * *

5. Due to the brief time in which the undersigned counsel has to prepare for the June 30 final hearing, counsel will be unable to properly investigate, prepare for, and assert all of Dr. Strand’s objections to the bond issue, Ordinance No. 2006-38, and Ordinance No. R2006-96, including factual issues of notice, and legal issues such as whether the County has the legal authority to adopt such a bond, which are at issue in this proceeding.

6. Dr. Strand submits that a thirty (30) day continuance of the June 30 final hearing will not prejudice any party in this proceeding and will further judicial economy by ensuring that all arguments regarding the 135 million dollar bond validation at issue may be properly presented to the Court. . . .

(*Id.* at ¶¶ 3, 5-6). The County filed an objection to Dr. Strand’s Motion for Continuance on June 30, 2006. (App., Ex. 11).

B. Bond Validation Hearing

On Friday, June 30, 2006, the Circuit Court conducted a hearing on the County’s Complaint for Validation. (App., Ex. 2). At the beginning of the

hearing, the Circuit Court granted Dr. Strand's Motion to Intervene, noting that "the statute says it shall be permitted, so I'll permit the intervention." (*Id.* at 8). The Circuit Court, however, refused to grant Dr. Strand's Motion for Continuance. (*Id.* at 4-9).

During the bond validation hearing, the County presented two (2) witnesses, Jean Kassab, Director of Administrative Services for Escambia County, and Alex Bugallo, an advisor with a financial consulting firm retained by Escambia County. (*Id.* at 13). Ms. Kassab offered testimony regarding the TIF Ordinance and the Bond Resolution, as well as the improvements anticipated to be funded by the revenue bonds. (*Id.* at 14-23). Mr. Bugallo offered testimony regarding the sale and repayment of the revenue bonds, and the anticipated rating of the revenue bonds. (*Id.* at 24-28).

Thereafter, Dr. Strand briefly testified to establish his legal standing to intervene in the bond validation proceeding pursuant to Section 75.07, *Florida Statutes*. (*Id.* at 31). In so doing, Dr. Strand testified that he is a property owner and taxpayer within Escambia County. (*Id.*).

At the conclusion of the June 30 hearing, the Circuit Court allotted each of the parties five (5) minutes to briefly outline their respective positions regarding the legality of the proposed revenue bonds. (*Id.* at 43). Following the brief oral

argument of counsel for the County and Dr. Strand, the Circuit Court indicated that it would provide the parties until Wednesday, July 5, 2006, *i.e.*, one (1) business day after the hearing and the holiday weekend, to submit any written argument and proposed findings. (*Id.* at 44). In so doing, the Circuit Court advised the parties that it intended to rule by Friday, July 7, 2006. (*Id.*)

On July 5, 2006, the County and Dr. Strand each filed post-hearing memoranda of law. (*See* App., Ex. 12 and Ex. 13). The State Attorney, however, did not submit any post-hearing memorandum.

C. Final Judgment Validating Bond Issuance

On August 18, 2006, forty-nine (49) days after the June 30 hearing, the Circuit Court entered a Final Judgment validating the bond issuance. (App., Ex. 1). The Circuit Court's August 18 Final Judgment reads verbatim to the proposed Final Judgment submitted by the County's bond counsel with its Complaint for Validation, except for Paragraphs 35 and 36. (*Compare* App., Ex. 1 and Ex. 6). Paragraphs 35 and 36, which discuss Dr. Strand's Motion to Intervene and Motion for Continuance, read verbatim to requested modifications set forth in the County's "Post-Hearing Memorandum." (App., Ex. 12 at 9-10).

In validating the bond issuance, the Circuit Court concluded that the County was not required to comply with the requirements of the Community

Redevelopment Act, Chapter 163, Part III, *Florida Statutes*, to utilize tax increment financing for the revenue bonds. (App., Ex. 1 at ¶ 13). In addition, the Circuit Court concluded that the revenue bonds did not need to be approved by referendum pursuant to Article VII, Section 12 of the Florida Constitution. (*Id.* at ¶¶ 16, 20).

On September 15, 2006, Dr. Strand timely filed a Notice of Appeal for review in this Court. (App., Ex. 14).

SUMMARY OF THE ARGUMENT

Dr. Strand respectfully submits that the Circuit Court erred in validating the \$135,000,000.00 bond issuance. In particular, Dr. Strand asserts that: (1) the Circuit Court abused its discretion in denying Dr. Strand's request for a continuance of the bond validation hearing; (2) the Circuit Court's findings are not supported by competent substantial evidence in the record; and (3) the Circuit Court erred in concluding that the County had the authority to issue the bonds.

First, the record demonstrates that the Circuit Court's refusal to grant Dr. Strand's request for a continuance substantially prejudiced Dr. Strand. Indeed, by refusing to grant a brief continuance of the bond validation hearing, the Circuit Court deprived Dr. Strand of his right to present evidence regarding the numerous factual issues raised by the County, as well as the opportunity to conduct meaningful cross-examination of the County's witnesses during the hearing. Further, there is no evidence in the record to suggest that the County would have suffered any prejudice had the Circuit Court granted Dr. Strand's request for a continuance.

Second, the Circuit Court in the instant case adopted verbatim the proposed Final Judgment submitted by the County prior to the bond validation hearing and Dr. Strand's intervention. As a result, the Final Judgment contains findings that

are not supported by competent substantial evidence in the record before the Circuit Court, as required by law. In addition, the Circuit Court's wholesale adoption of the proposed Final Judgment submitted by the County prior to the bond validation hearing reflects that the Circuit Court did not perform an independent analysis of the facts, issues, and law in this matter.

Third, the Circuit Court erred in concluding that the County had the authority to issue the proposed revenue bonds without a referendum pursuant to Article VII, Section 12 of the Florida Constitution, or compliance with the requirements of the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*. Pursuant to Article VII, Section 12 of the Florida Constitution, a referendum is required to issue bonds that (a) mature more than twelve (12) months after issuance; and (b) are payable from ad valorem taxation. It is undisputed that the revenue bonds at issue in this proceeding (a) mature more than twelve (12) months after issuance; and (b) are payable, in part, from ad valorem taxation. Although the County purportedly disclaims its ad valorem taxing powers as security for the bond issue, the Final Judgment allows for the repayment and service of the proposed revenue bonds from all available revenues, including ad valorem property tax receipts. Further, while the County seeks to utilize the tax increment financing mechanism authorized by the Community Redevelopment

Act, it is undisputed that the County has not complied with the statutory requirements set forth therein, including, but not limited to, the requirement that the County make a finding, supported by data and analysis, that the area to be redeveloped, *i.e.*, Perdido Key, is a “slum” or “blighted” area.

Accordingly, this Court should reverse the Circuit Court’s August 18 Final Judgment validating the \$135,000,000.00 bond issuance.

BASIS OF JURISDICTION

This Court has jurisdiction to hear this appeal pursuant to Article V, Section 3(b)(2) of the Florida Constitution, Section 75.08, *Florida Statutes* (2005), and Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i).

STANDARD OF REVIEW

In a bond validation proceeding, this Court has stated that “courts should: (1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law.” *State v. City of Port Orange*, 650 So. 2d 1, 2 (Fla. 1994). This Court reviews the trial court’s findings of fact in a bond validation proceeding for competent substantial evidence. *See City of Gainesville v. State*, 863 So. 2d 138, 142 (Fla. 2003). The Court reviews the trial court’s conclusions of law de novo. *Id.*

ARGUMENT

I.

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S REQUEST FOR A CONTINUANCE

As previously discussed, Dr. Strand filed a motion with the Circuit Court requesting a thirty (30) day continuance of the bond validation hearing scheduled for June 30, 2006. (App., Ex. 10). In so doing, Dr. Strand advised the Circuit Court that he and his counsel had first learned of the bond validation hearing only a couple of days before the hearing, and, in light thereof, Dr. Strand's counsel would be unable to properly investigate, prepare for, and assert all of Dr. Strand's objections to the proposed bond issuance. (*Id.*). Notwithstanding such facts, the Circuit Court refused to grant Dr. Strand's request for a continuance. (App., Ex. 2). The Circuit Court's refusal to grant a continuance was an abuse of discretion.

Although a trial court is endowed with broad discretion in deciding whether to grant or deny a motion for continuance, the exercise of such discretion is not absolute. Florida courts have long recognized that "[s]pecial circumstances . . . may require a continuance where there has not been sufficient time to complete discovery and prepare for trial and where the continuance causes no substantial prejudice or injustice to the opposing party." *Carpenter v. Carpenter*, 451 So. 2d

914, 916 (Fla. 1st DCA 1984). Factors to be considered in determining whether a trial court abused its discretion in denying a motion for continuance include:

[1] whether the denial of the continuance creates an injustice for the movant; [2] whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and [3] whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.

Fleming v. Fleming, 710 So. 2d 601, 603 (Fla. 4th DCA 1998).

As noted above, the Circuit Court's refusal to grant Dr. Strand's request for a brief continuance precluded Dr. Strand's counsel from being able to properly investigate, prepare for, and assert all of Dr. Strand's objections to the proposed bond issuance. Moreover, by failing to grant a brief continuance, the Circuit Court deprived Dr. Strand of his right to present evidence regarding the numerous factual issues raised by the County, as well as the opportunity to conduct meaningful cross-examination of the County's witnesses. Thus, the record demonstrates that the Circuit Court's refusal to grant a continuance created an injustice for Dr. Strand. *See Carpenter*, 451 So. 2d at 916; *see also Lipford v. Harris*, 212 So. 2d 766, 768 (Fla. 1968) (reiterating that "a validation decree once it becomes final puts at rest all questions which were raised in the validation as well as all questions which could have been raised"); § 75.09, Fla. Stat. (2005) (setting forth conclusive effect of a final judgment validating a bond issuance).

The record further demonstrates that Dr. Strand's request for a continuance was not the result of dilatory practices. To the contrary, Dr. Strand's counsel first learned of the June 30 bond validation hearing on June 27. (App., Ex. 10 at ¶ 3). Upon learning of the bond validation hearing, counsel notified Dr. Strand on June 28 of such proceeding, and Dr. Strand immediately authorized counsel to file a motion to intervene and represent his interests during the bond validation proceeding. (*Id.*, App., Ex. 2 at 5). In so doing, counsel promptly requested a continuance on behalf of Dr. Strand to allow counsel sufficient time to investigate, prepare for, and represent Dr. Strand's interests during the proceeding. *Cf. Peiman v. Peiman*, 829 So. 2d 307, 309-10 (Fla. 5th DCA 2002) (holding trial court abused its discretion in denying request for continuance filed on eve of final hearing where appellant had been attempting to retain counsel); *Kamhi v. Waterview Towers Condo. Ass'n, Inc.*, 793 So. 2d 1033, 1037 (Fla. 4th DCA 2001) (reversing denial of motion for three-month continuance to obtain new counsel where request was not an attempt to unduly delay or prejudice appellee's case).

Lastly, there is no evidence in the record to demonstrate that the County would have suffered any prejudice had the Circuit Court granted Dr. Strand's request for a thirty (30) day continuance. Indeed, the Circuit Court did not even

enter its Final Judgment validating the proposed bond issuance until August 18, 2006, which was forty-nine (49) days after the June 30 hearing.

In sum, the Circuit Court abused its discretion in refusing to grant Dr. Strand's request for a continuance. Accordingly, this Court should reverse the Circuit Court's Final Judgment and remand for further proceedings during which Dr. Strand will be afforded a full opportunity to present evidence regarding the numerous factual issues raised by the County, as well as the opportunity to conduct meaningful cross-examination of the County's witnesses.

II.

THE CIRCUIT COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

It is well settled that a trial court's factual findings in a bond validation proceeding must be supported by competent substantial evidence. *See City of Gainesville v. State*, 863 So. 2d 138, 142 (Fla. 2003). Competent substantial evidence is that which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). A review of the record in the instant case establishes that the Circuit Court's factual findings are not supported by competent substantial evidence.

As an initial matter, it must be emphasized that the Circuit Court's Final Judgment reads essentially verbatim to the proposed Final Judgment submitted by the County's bond counsel prior to the bond validation hearing and Dr. Strand's intervention.⁴ (*Compare* App., Ex. 1 and Ex. 6). This Court has previously criticized the wholesale adoption by trial courts of proposed final judgments submitted by one party, stating:

[Proposed judgments] cannot substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge. When the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding is fair to neither the parties involved in a particular case nor our judicial system.

Perlow v. Berg-Perlow, 875 So. 2d 383, 390 (Fla. 2004).

Although *Perlow* involved a divorce proceeding, this Court's pronouncement therein is equally applicable to the instant case, where the Circuit Court adopted verbatim the proposed Final Judgment submitted by the County's

⁴ As noted in the Statement of Facts, Paragraphs 35 and 36 of the Final Judgment, which discuss Dr. Strand's Motion to Intervene and Motion for Continuance, read verbatim to requested modifications set forth in the County's "Post-Hearing Memorandum." (App., Ex. 12 at 9-10).

bond counsel prior to the bond validation hearing. Indeed, the fact that the County submitted the proposed Final Judgment prior to the bond validation hearing refutes any suggestion that the proposed Final Judgment was premised upon findings and conclusions made by the Circuit Court on the record.

Nonetheless, even assuming the Circuit Court's wholesale adoption of the County's proposed Final Judgment as its own was proper in this case, the Circuit Court's Final Judgment contains numerous factual findings which are not supported by competent substantial evidence in the record. For example, the Final Judgment contains specific findings regarding legislative determinations allegedly made by the County regarding Perdido Key and the Southwest Escambia Improvement District. (App., Ex. 1 at ¶¶ 9-10). Although legislative determinations are entitled to deference, such deference does not negate the requirement that such determinations be supported by competent substantial evidence in the record. *See Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 667 (Fla. 2002).

In the instant case, the record is devoid of any direct testimony or other documentary evidence to support the Circuit Court's findings regarding the alleged legislative determinations. *Compare City of Winter Springs v. State*, 776 So. 2d 255, 258-61 (Fla. 2001) (detailing the specific evidence introduced during the bond

validation hearing, consisting of reports and expert testimony, supporting legislative determinations). Further, the mere fact that the TIF Ordinance, which contains a recital of such legislative determinations, was introduced during the bond validation hearing does not constitute *per se* competent substantial evidence to support such findings. *Cf. City Beach Cmty. Redevelopment Agency*, 831 So. 2d at 669 (noting that “the City Council cannot simply label an area ‘blighted’ and make it so”).

In addition, the Final Judgment contains specific factual findings regarding the “sufficient nexus” between the properties within the Southwest Escambia Improvement District and the alleged benefits of the projects to be financed by the proposed revenue bonds. (App., Ex. 1 at ¶ 14). The Final Judgment also contains factual findings regarding the “necessity” of the public improvements proposed to be financed by the revenue bonds. (*Id.* at ¶ 22). As with the legislative determinations discussed above, however, the record is devoid of any direct testimony or other documentary evidence to support these additional findings.

In sum, the Circuit Court’s verbatim adoption of the proposed Final Judgment submitted by the County prior to the bond validation hearing and Dr. Strand’s intervention reflects that the Circuit Court did not perform an independent analysis of the facts, issues, and law in this matter. Moreover, a review of the

record demonstrates that the Final Judgment contains findings which are not supported by competent substantial evidence. Accordingly, this Court should reverse the Circuit Court's Final Judgment validating the \$135,000,000.00 bond issuance.

III.

THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE COUNTY HAD THE AUTHORITY TO ISSUE THE BONDS

In the Final Judgment, the Circuit Court erred in concluding that the County had the authority to issue the proposed revenue bonds without a referendum as required by Article VII, Section 12 of the Florida Constitution, or compliance with the requirements of the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*. Accordingly, this Court should reverse the Circuit Court's Final Judgment validating the \$135,000,000.00 bond issuance.

Although Florida counties generally enjoy broad powers pursuant to the 1968 revisions to the Florida Constitution and Chapter 125, *Florida Statutes*, it is axiomatic that counties may not act in a manner inconsistent with general or special law. *See, e.g., Fillingim v. State*, 446 So. 2d 1099, 1102 (Fla. 1st DCA 1984). With respect to the issuance of bonds, Article VII, Section 12 of the Florida Constitution provides :

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 a vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or

(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

Id. Thus, pursuant to Article VII, Section 12 of the Florida Constitution, a referendum is required to issue bonds that (a) mature more than twelve (12) months after issuance; and (b) are payable from ad valorem taxation. It is undisputed that the revenue bonds at issue in this proceeding (a) mature more than twelve (12) months after issuance; and (b) are payable, in part, from ad valorem taxation.

During the bond validation proceeding, the County contended that the proposed revenue bonds did not require a referendum because, although payable, in part, from ad valorem taxation, the use of a tax increment financing mechanism, in other contexts, has been previously found not to require such a referendum. As authority for this proposition, the County relied upon *State v. Miami Beach*

Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), and *Penn v. Florida Defense Finance and Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993). (App., Ex. 2 at 36-38). Citing *Miami Beach Redevelopment Agency* and *Penn*, the Circuit Court concluded that the County had the authority to issue the proposed revenue bonds without a referendum as required by Article VII, Section 12 of the Florida Constitution, or compliance with the requirements of the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*. (App., Ex. 1 at ¶¶ 13, 16, 20). The Circuit Court’s reliance upon *Miami Beach Redevelopment Agency* and *Penn*, however, was misplaced as such cases are distinguishable.

Miami Beach Redevelopment Agency involved a proposed tax increment financing scheme as authorized by the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*. See *Miami Beach Redevelopment Agency*, 392 So. 2d at 878. Pursuant to the Community Redevelopment Act, a local government may, as a community redevelopment strategy for “slum” or “blighted” areas, establish a redevelopment trust fund which is funded by tax increment revenues, without a referendum of the electorate. See §§ 163.385-.387, Fla. Stat. (2005). In order to exercise the authority conferred by the Community Redevelopment Act, the local government must, among other things, make a finding, supported by data

and analysis, that the property to be redeveloped is a “slum” or “blighted” area. *See* § 163.355, Fla. Stat. (2005).

The instant case, however, does not involve a tax increment financing scheme proposed in accordance with the Community Redevelopment Act. Indeed, it is undisputed that the County has not complied with the requirements set forth in the Community Redevelopment Act, including the requirement that it make a finding, supported by data and analysis, that the area to be redeveloped, *i.e.*, Perdido Key, is a “slum” or “blighted” area. Thus, *Miami Beach Redevelopment Agency* is inapposite.

Likewise, *Penn v. Florida Defense Finance and Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993), is distinguishable from the instant case, and does not authorize the proposed revenue bonds. In *Penn*, a *pro se* petitioner challenged a bond issue authorized by the Florida Defense Finance and Accounting Center Authority (“Authority”). Although Escambia County and the City of Pensacola had established trust funds and adopted ordinances designed to support the bond issue, the bonds were to be issued solely in the name of the Authority, which this Court expressly noted had “no taxing powers.” *See id.* at 460. Hence, unlike the County in the instant case, the bond issuer in *Penn*, *i.e.*, the Authority,

could ***not*** compel ad valorem taxation, under any circumstances, in order to meet its bond obligations.

Moreover, in *Penn*, the ad valorem tax receipts were only a valuation tool to determine the amount of revenue necessary to deposit to the fund, not a means by which to secure the bond issue. *See id.* at 461. By contrast, although the County purportedly disclaims its ad valorem taxing powers as security for the bond issue, the Final Judgment in the instant case allows for the repayment and service of the proposed revenue bonds from

all available revenues of the Plaintiff [County] ***including ad valorem property tax receipts.***

(App., Ex. 1 at ¶ 12) (emphasis supplied). Thus, the County in this instance is attempting to do indirectly what it may not do directly without a referendum. *See County of Volusia v. State*, 417 So. 2d 968, 972 (Fla. 1982).

Lastly, the issue of whether a local government may utilize the tax increment financing mechanism authorized by the Community Redevelopment Act without complying with the statutory requirements therein was not at issue in *Miami Beach Redevelopment Agency*, nor was it raised before this Court in *Penn*. Significantly, Section 163.355, *Florida Statutes*, states:

No county . . . shall exercise the community redevelopment authority conferred by this part until after the governing body has adopted a resolution,

supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria described in s. 163.340(7) or (8). The resolution must state that:

(1) One or more slum or blighted areas . . . exist in such county or municipality; and

(2) The rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas . . . is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality.

(Emphasis supplied).

As noted previously, it is undisputed that the County has not complied with the requirements set forth in the Community Redevelopment Act, including, but not limited to, the express requirement that the County make a finding, supported by data and analysis, that the area to be redeveloped, *i.e.*, Perdido Key, is a “slum” or “blighted” area. To allow the County to utilize the tax increment financing mechanism set forth in the Community Redevelopment Act, without having to comply with the statutory requirements therein, runs afoul of Section 163.355, *Florida Statutes*, and the Legislature’s intent in adopting the Community Redevelopment Act. Simply put, the County cannot “have its cake and eat it too,” *i.e.*, utilize the tax increment finance mechanism authorized by the Community

Redevelopment Act to redevelop an area which the County has not determined, based upon data and analysis, to be a slum or blighted area.

In sum, the Circuit Court erred in concluding that the County had the authority to issue the proposed revenue bonds without a referendum as required by Article VII, Section 12 of the Florida Constitution, or compliance with the requirements of the Community Redevelopment Act, Chapter 163, Part III, *Florida Statutes*. Accordingly, this Court should reverse the Circuit Court's Final Judgment validating the \$135,000,000.00 bond issuance.

CONCLUSION

In sum, for the reasons set for above, the Circuit Court erred in validating the \$135,000,000.00 bond issuance. Accordingly, this Court must reverse the Circuit Court's Final Judgment entered on August 18, 2006.

RESPECTFULLY SUBMITTED this ____ day of October 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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