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.
_____/

REPLY BRIEF OF APPELLANT DR. GREGORY L. STRAND

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I.

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

In its Answer Brief, the County contends that the Circuit Court properly denied Dr. Strand's Motion for Continuance because bond validation proceedings are to be given priority by Circuit Courts, and Dr. Strand failed to provide a "clear and compelling reason" for a continuance. The County further contends that Dr. Strand was not prejudiced by the Circuit Court's refusal to grant a continuance. The County's contentions are unavailing.

"It is fundamental that the constitutional guarantee of due process, ***which extends into every proceeding***, requires that the opportunity to be heard be full and fair, not merely colorable or illusive." *Pelle v. Diners Club,* 287 So. 2d 737, 738 (Fla. 3d DCA 1974) (citing *Ryan's Furniture Exch., Inc. v. McNair*, 162 So. 483 (Fla. 1935)) (emphasis supplied). Thus, while Section 75.07, *Florida Statutes*, provides that a Circuit Court should "render a final judgment with the least possible delay" in a bond validation proceeding, such provision does not and cannot negate or otherwise deprive a party of his or her right to due process.

Further, the record refutes the County's suggestion that Dr. Strand failed to provide a "clear and compelling reason" for the requested continuance. As discussed in the Initial Brief, Dr. Strand advised the Circuit Court that he and his counsel had first learned of the bond validation hearing only ***three (3) 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 – both legal *and* factual.[1] Given the conclusive effect afforded a final judgment validating a bond issuance, it is hard to imagine a more compelling reason warranting a brief continuance than that existing in the instant case, *i.e.*, inadequate time to investigate, prepare for, and assert all objections to the proposed bond issuance.[2]

Moreover, the County's suggestion that Dr. Strand was not prejudiced by the Circuit Court's refusal to grant a continuance is without merit. By failing to grant a 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

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[1] The County incorrectly states in its Answer Brief that Dr. Strand's Motion for Continuance was filed to prepare only "legal arguments." (Answer Brief at 13; *see* App., Ex. 10 at ¶ 5, Ex. 13 at 2 n.1).

[2] In its Answer Brief, the County relies upon *State v. Florida State Turnpike Authority*, 134 So. 2d 12 (Fla. 1961), and *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503 (Fla. 1966), to support its argument. Neither *Florida State Turnpike Authority* nor *Rianhard*, however, involved a situation where a party first learned of the validation proceeding only three (3) days before the hearing and promptly sought a continuance, as in the instant case. *See Rianhard*, 186 So. 2d at 504 (after presenting legal argument at bond hearing, party, in effect, sought a continuance to allow time to gather evidence to present at a later hearing); *Florida State Turnpike Auth.*, 134 So. 2d at 14 (party who had previously moved to dismiss bond validation complaint subsequently moved for a continuance of validation hearing alleging counsel had an engagement out of state). Thus, such cases are factually distinguishable.

opportunity to conduct meaningful cross-examination of the County's witnesses. Notably, the County now improperly seeks to use the lack of such "factual evidence" and "cross-examination" on appeal to rebut Dr. Strand's argument that the Circuit Court's findings are not supported by competent substantial evidence. (*See* Answer Brief at 20). Accordingly, for the reasons stated above and in the Initial Brief, the Circuit Court abused its discretion in refusing to grant Dr. Strand's Motion for Continuance.

II.

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

The County contends that 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 does not warrant reversal under *Perlow v. Berg-Perlow*, 875 So. 2d 383 (Fla. 2004), because Dr. Strand was afforded an opportunity to object to the proposed Final Judgment and the Circuit Court did not immediately enter the proposed Final Judgment. The County's argument is unpersuasive.

The record reflects that the Circuit Court provided the parties until Wednesday, July 5, 2006, *i.e.*, one (1) business day after the hearing on June 30, 2006, and the holiday weekend, to submit any written argument and proposed findings, and that the Circuit Court planned to rule by Friday, July 7, 2006. (App.,

Ex. 2 at 44). The short time period in which to submit any written argument, coupled with the Circuit Court's refusal to grant a continuance, belies any suggestion that Dr. Strand was provided a meaningful opportunity to object to the proposed Final Judgment.[3] Further, the fact that the Circuit Court did not immediately enter the proposed Final Judgment is not dispositive under *Perlow*, as the County claims.[4] Rather, the critical factor is whether the Circuit Court delegated its decision-making authority. Here, the proposed Final Judgment was submitted ***prior*** to the bond validation hearing and the presentation of any evidence, thereby refuting any suggestion that the proposed Final Judgment was premised upon findings and conclusions made by the Circuit Court on the record.

The County's contention that the factual findings in the Final Judgment are supported by competent substantial evidence is also without merit. First, the mere introduction of the TIF Ordinance and the Bond Resolution does not constitute *per se* competent substantial evidence to support the County's legislative

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[3] In his Memorandum of Law submitted on July 5, 2006, Dr. Strand renewed his objection to the time frames provided by the Circuit Court, stating that the July 5 deadline provided an insufficient amount of time to adequately address the issues in this matter. (*See* App., Ex. 13 at 2 n.1).

[4] As an aside, the Circuit Court intended to rule well before August 18, 2006, and thought it had done so. In early August, however, the Judicial Assistant informed the undersigned counsel's office that the Final Judgment had been misplaced and never filed with the Clerk, and, thus, a new Final Judgment would need to be entered.

determinations. Indeed, if that were the case, there would never be a situation where legislative findings could be found lacking by this Court. Moreover, this Court's most recent pronouncements make clear that, while legislative determinations are entitled to deference, they still must be supported by competent substantial evidence in the record, which they are not in the instant case. *See Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662, 667-69 (Fla. 2002); *City of Winter Springs v. State*, 776 So. 2d 255, 258-61 (Fla. 2001).

Despite the County's claims in its Answer Brief, Ms. Kassab did not offer any direct testimony sufficient to support the legislative determinations allegedly made by the County, which are discussed in Paragraphs 9 and 10 of the Final Judgment, concerning the alleged inadequacy of roads and bridges; the alleged shortage of high-paying jobs; the alleged lack of employment opportunities; and the alleged need to preserve the tax base, etc. (App., Ex. 2 at 14-24). Nor did Ms. Kassab offer any direct testimony sufficient to support the Circuit Court's factual findings regarding the "necessity" of the public improvements or the "nexus" between the public improvements and the Southwest Escambia Improvement District.[5] (*Id*.; App., Ex. 1 at ¶¶ 14, 22); *compare Panama City Beach Cmty.*

[5] In its Answer Brief, the County alleges several times that the Board of County Commissioners held a "workshop meeting" to discuss the proposed bond issuance and the alleged need for the anticipated public improvements. (*See* Answer Brief at 13, 18). Notably, however, the record is devoid of any *substantive* evidence regarding the "workshop meeting," *i.e.*, transcript, hearing tape, exhibits,

Redevelopment Agency, 831 So. 2d at 667-69 (detailing the evidence in the record, including evidence from the adoption hearing before the city, supporting legislative determinations); *City of Winter Springs*, 776 So. 2d at 258-61 (detailing the specific evidence introduced during the bond validation hearing, consisting of reports and expert testimony, supporting legislative determinations).

Lastly, the County's suggestion that the Court should reject Dr. Strand's argument because he failed to produce factual evidence below to refute the alleged legislative determinations is not well taken. (*See* Answer Brief at 17 n.2, 20). Dr. Strand's inability to produce such evidence was a direct result of the Circuit Court's refusal to grant a continuance. Accordingly, for the reasons stated above and in the Initial Brief, this Court should reverse the Final Judgment.

III.

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

The crux of the third issue to be decided by this Court is whether a local government may utilize the tax increment financing mechanism prescribed in the Community Redevelopment Act of 1969, Chapter 163, Part III, *Florida Statutes*, ***without*** complying with the statutory requirements therein.[6] In their briefs, the

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reports, or studies related thereto.

[6] It is undisputed that the County has not complied with the requirements set forth in the Community Redevelopment Act in the instant case.

County and Amicus Curiae Florida Association of Counties ("FAC") argue that a local government need not comply with the Community Redevelopment Act in order to utilize the tax increment financing mechanism set forth therein, relying upon the home rule powers conferred by Section 125.01, *Florida Statutes*. The County's and the FAC's arguments are without merit and should be rejected by this Court.

A. The County Relied Upon The Community Redevelopment Act As Authority For The Bonds

As an initial matter, the County's contention that it is not relying upon the Community Redevelopment Act for its authority to issue the bonds, as well as its contention that the bonds are not being issued for redevelopment purposes, is contrary to the record. (*See* Answer Brief at 22-23). In its "Objection to Motion for Continuance" filed below, the County asserted that "[t]his method of financing is expressly approved in Chapter 163.385 [sic], Florida Statutes . . . ."[7] (App., Ex. 11 at 2). Moreover, the Final Judgment, which was prepared by the County, states in pertinent part:

> Pursuant to the authority of Chapters 125 ***and*** 163, Florida Statutes (2005), . . . the Plantiff did, on May 4, 2006, duly enact Ordinance No. 2006-38 (the "Tax Increment Ordinance"), authorizing the creation of the Southwest Escambia Improvement District (the "Trust

[7] The correct citation is Section 163.387, *Florida Statutes*, not "Chapter 163.385," as demonstrated by the statutory language quoted in the County's "Objection to Motion for Continuance." (App., Ex. 11 at 2).

> Fund"), establishing the Southwest Escambia Improvement Trust Fund (the "Trust Fund").

(App., Ex. 1 at ¶ 7) (emphasis supplied). Thus, the record demonstrates that the County relied upon the Community Redevelopment Act as authority for the legality of the proposed bonds.

The County's contention that the proposed bonds are not being issued for redevelopment purposes under the Community Redevelopment Act is similarly unavailing. Indeed, the "Findings and Declaration of Necessity" in the TIF Ordinance essentially mimic the "Findings and declarations of necessity" enumerated by the Legislature in Section 163.335, *Florida Statutes*. (*Compare* App., Ex. 3 at § 1 *with* § 163.335(1), (3)-(6), Fla. Stat. (2005)). Further, one of the "blight" criteria under Section 163.340(8), *Florida Statutes*, is "inadequate . . . roadways, bridges, or public transportation facilities." Notably, the County claims that the bonds are necessary, in part, to address "inadequate roadways, bridges, or public transportation facilities" which "pose safety concerns . . . and impair economic growth in the area." (App., Ex. 3 at § 1; Answer Brief at 1). Likewise, Sections 4(4) and (5) of the TIF Ordinance and Section 301 of the Bond Resolution, upon which the County relies in claiming that a referendum was not needed on the bonds, read essentially verbatim to Sections 163.387(4), (5), *Florida Statutes*. (*See* App., Ex. 3 at 6; Ex. 4 at 23). Simply put, while the County attempts to portray its actions otherwise, the record demonstrates that the County

was relying upon, and attempting to benefit from, the provisions of the Community Redevelopment Act, without complying with all of the provisions therein.

B. The County Does Not Have The Authority To Utilize The Tax Increment Financing Mechanism Prescribed In The Community Redevelopment Act Without Complying With The Statutory Requirements Therein

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. With respect to bonds, Section 125.01(r), *Florida Statutes*, provides that a county may "issue bonds . . . and other obligations of indebtedness, which power shall be exercised in such manner, and ***subject to such limitations, as may be provided by general law***." (Emphasis supplied).

Tax increment financing, as proposed by the County in the instant case, is specifically addressed *only* in the Community Redevelopment Act, namely Section 163.387 thereof. Significantly, Section 163.355, *Florida Statutes*, states:

> ***No county or municipality 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). . . .

(Emphasis supplied). Thus, Section 163.355, *Florida Statutes*, makes clear that in order to utilize the tax increment financing mechanism prescribed in Section

163.387, *Florida Statutes*, a local government must comply with the requirements of the Community Redevelopment Act. *See Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla. 1989) ("[P]reemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject."). Indeed, when the Legislature has sought to authorize the use of tax increment financing as prescribed in Section 163.387, *Florida Statutes*, outside of the confines of the Community Redevelopment Act, the Legislature has expressly stated as much. *See, e.g.*, § 163.2520, Fla. Stat. (2005) ("A local government with an adopted urban infill and redevelopment plan or plan employed in lieu thereof may issue revenue bonds under s. 163.385 and employ tax increment financing under s. 163.387 for the purpose of financing the implementation of the plan.").

Moreover, the legislative history surrounding the implementation of tax increment financing in Florida refutes the County's and the FAC's contention that counties may utilize their home rule powers to forgo complying with the requirements of the Community Redevelopment Act. As noted by the FAC in its brief, the Legislature amended Chapter 125, *Florida Statutes*, in 1971 to broaden the powers of counties to govern themselves through home rule.[8] Significantly, ***five (5) years later***, the Legislature in 1976 proposed an amendment to the 1968

[8] *See* Ch. 71-14, § 1, Laws of Fla.; *see also* Ch. 73-129, § 1, Laws of Fla. (adopting the Municipal Home Rule Powers Act), *codified at* § 166.021, Fla. Stat. (2005).

Florida Constitution to specifically authorize tax increment financing in Florida, through the creation of Section 16, Article VII of the Florida Constitution. *See* Committee Substitute for House Joint Resolution No. 3982 (June 10, 1976).[9]

Florida voters, however, rejected the proposed constitutional amendment to authorize tax increment financing at the 1976 general election. Consequently, in 1977, the Legislature amended the Community Redevelopment Act to authorize tax increment financing through the creation of Section 163.387, *Florida Statutes*. *See* Ch. 77-391, § 1, Laws of Fla. The failed 1976 constitutional amendment and subsequent amendment to the Community Redevelopment Act to authorize tax increment financing refute the County's and the FAC's contention that a local government may, pursuant to its home rule powers, utilize tax increment financing as prescribed in Section 163.387, *Florida Statutes*, without complying with the requirements of the Community Redevelopment Act.[10]

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[9] Records at the Florida State Archives reflect that numerous municipal and county governments urged the Legislature to propose a constitutional amendment that would authorize tax increment financing for redevelopment, relying on existing legislation in California. *See* Series 19, Carton 315, Florida State Archives.

[10] Despite the County's and the FAC's suggestions otherwise, 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 *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980), nor was the issue raised before this Court in *Penn v. Florida Defense Finance and Accounting Service Center Authority*, 623 So. 2d 459 (Fla. 1993). Likewise, tax increment financing was not

Public policy considerations also strongly weigh in favor of this Court holding that a local government must comply with the Community Redevelopment Act in order to utilize the tax increment financing mechanism prescribed in Section 163.387, *Florida Statutes*. If the tax increment financing mechanism prescribed in the Community Redevelopment Act is merely supplemental to a local government's home rule powers, as the County and the FAC contend, it begs the question, why would a local government ever go through the steps imposed in the Community Redevelopment Act. Rather, a local government could evade having to comply with the procedural requirements of the Community Redevelopment Act by simply proclaiming that it is acting pursuant to its home rule powers, even though what it proposes may be modeled after and seek to accomplish that which is prescribed in the Community Redevelopment Act. Further, a local government could simply disregard the substantive requirements and limitations imposed upon tax increment financing by the Community Redevelopment Act.[11]

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at issue in *State v. City of Pensacola*, 397 So. 2d 922 (Fla. 1981). Thus, the County's and the FAC's reliance upon such cases is misplaced.

[11] The FAC's "home rule" position in this case is somewhat surprising since the FAC has voiced concerns regarding inequities to counties associated with tax increment financing. *See* Legislative Committee on Intergovernmental Relations, *Local Government Concerns Regarding Community Redevelopment in Florida* (Jan. 2005), available online at http://www.floridalcir.gov/reports.html. Indeed, due in part to the FAC's concerns, the Florida Legislature amended Chapter 163, Part III, *Florida Statutes*, in 2006 to impose additional requirements on tax increment financing. *See* Ch. 2006-307, § 6, Laws of Fla.

Finally, as demonstrated by the legislative history discussed above, tax increment financing in Florida is intended to serve as a tool to facilitate redevelopment of "blighted" or "slum" areas, which otherwise might not take place, by financing such redevelopment through the increased property tax revenue generated by the redeveloped land. Allowing tax increment financing to be utilized under the guise of home rule will undoubtedly lead to the misuse of tax increment financing for projects traditionally undertaken by general governments, rather than redevelopment projects needed to revitalize an area. Further, such misuse of tax increment financing will serve to improperly divert ad valorem revenues otherwise available for governmental services for a substantial length of time, *i.e.*, thirty-five (35) years in the instant case.

Accordingly, for the reasons stated above and in the Initial Brief, the Court should reverse the Final Judgment.

CONCLUSION

In sum, for the reasons set forth above and in the Initial Brief, the Circuit Court erred by 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 December 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail and Telefacsimile to **Patricia Lott, Esquire**, Miller, Canfield, Paddock and Stone, P.L.C., 25 West Cedar Street, Suite 500, Pensacola, Florida 32502; **Richard I. Lott, Esquire**, Lott & Associates, P.L., 362 Gulf Breeze Parkway, Suite 288, Gulf Breeze, Florida 32561; **John Molchan, Esquire**, Assistant State Attorney, Post Office Box 12726, Pensacola, Florida 32591, and **David G. Tucker, Esquire**, Nabors, Giblin & Nickerson, P.A., 1500 Mahan Drive, Suite 200, Tallahassee, Florida 32308, this _____ day of December 2006.

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CERTIFICATE OF COMPLIANCE

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

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