IN THE SUPREME COURT OF FLORIDA

CITY OF PARKER, and
CITY OF PARKER COMMUNITY
REDEVELOPMENT AGENCY,

Appellants,
Cross-Appellees,

vs.

Case No. SC07-1400
L.T. Case No: 07-000889-CA

STATE OF FLORIDA, et al,

Appellees,
Cross-Appellees,

And

BAY COUNTY,

Appellee,
Cross-Appellant.

AMENDED REPLY BRIEF OF BAY COUNTY TO AMENDED ANSWER BRIEF ON CROSS APPEAL BY CITY OF PARKER AND CITY OF PARKER COMMUNITY REDEVELOPMENT AGENCY

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SUMMARY OF ARGUMENT.

After the filing of the County's Initial Brief, this Court issued Strand v. Escambia County, 32 Fla. L. Weekly, S550 (Fla. September 6, 2007, revised September 28, 2007), which fully supports the County's claim that the bonds that are the subject of this case are not constitutional. There is no "bright-line" principle to the contrary. No case law supports this contention. Ad valorem tax revenues are the measure of the amount of the TIF payment and constitute the source of the TIF payment. Because these TIF bonds have not been authorized by the voters, they violate Article VII, Section 12, Fla. Const.

The trial court misapplied the criteria governing the finding of blight set forth in Section 163.340(8), Fla. Stat. (2006). The City's consultants used the criteria in the second prong of the statutory analysis to support the first prong that a "*substantial number of deteriorated, or deteriorating structures. . . are leading to economic distress*". Id. It was legal error for the Court to rely on this approach. The trial court also confused the two Parts of Chapter 163, Fla. Stat. (2006). The CRA Plan at issue in this case does not "*conform*" to the City's Comprehensive Plan.

For these additional reasons, this Court should not validate the bonds.

REPLY TO FIRST CROSS APPEAL ARGUMENT: WHETHER TAX INCREMENT FINANCING UNDER THE REDEVELOPMENT ACT IS CONSTITUTIONAL AND DOES NOT REQUIRE A REFERENDUM.

The City submits that the "primary remaining issue is whether to . . . subject all tax increment financing bonds . . . to the referendum requirement. . ." The County's Answer Brief was written after the publication of this Court's revised opinion in Strand, which held that bonds, including TIF bonds, "issued" prior to the date of that opinion are valid. Therefore, the City overstates the issue on appeal.

The City cites no case law to support its so-called "bright-line principle". It should be noted that most of this Court's jurisprudence on the subject involves pure revenue bonds, not tax increment financing. Other cases that touch on the referendum issue were issued prior to the 1968 amendments to the Florida Constitution. For example, Seaboard Air Line Railroad Co. v. Peters, 43 So.2d 448 (Fla. 1949), was based on the 1930 Florida Constitution and case law interpreting that version of the Constitution. Another line of cases is Tapers v. Pichard, 169 So. 39 (Fla. 1936) and its progeny. Many of these older cases were specifically receded from by this Court, after the 1968 Constitution was adopted, in State v. Dade County, 234 So. 2d 651 (Fla. 1970), which held:

> The present Constitution is clearly more restrictive and expresses the will of the people that financial arrangements of the type formerly upheld in the Tapers v. Pichard line of cases be no longer permitted.

The City engages in a "sky is falling" type of argument. It claims Strand could prevent local governments from ever using ad valorem revenues to "off–set" budget shortfalls or pay for emergencies after hurricanes. This hyperbole misses the point. The Constitution prohibits the issuance of "*bonds. . . payable from ad valorem taxation*". It does not control a particular, isolated spending decision. The City's inclusion of evidence from the Division of Bond Finance that there are $1.5 billion in TIF bonds should not dissuade this Court. Yes, the use of TIF has grown since State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980). However, TIF bonds issued prior to Strand were conclusively held to be valid in Strand. The question now is whether to allow this financing scheme to continue.

The City claims that Strand guts the Redevelopment Act, while admitting the Act "does not contemplate the approval by electors". (Amended Answer brief at footnote 16.) If Strand stands, local governments may still engage in community redevelopment activities. They will just have to either take the bonds to the voters, or find another way to fund redevelopment projects.[1]

[1] One alternative to TIF is a redevelopment capital program (RCP), which uses non ad valorem funds deposited into a separate account for redevelopment projects, and has been suggested as an alternative to TIF. These have been authorized in Broward County. See, Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, 81 Fla. Bar J. 66 (July 2007).

The City argues that the 1968 Constitutional Revision Commission did not intend to fundamentally change the 1930 Constitution, but merely to "clarify" that the referendum requirement was limited to general obligation bonds. First of all, this clarification is not even mentioned in the Constitution. Section 12 is not limited to "general obligation bonds", but extends to all "*bonds*". Also, it should be noted that Professor Sandy D'Alemberte's comment on Section 12 does not support this allegation. Actually, the comment is consistent with this Court's construction in Strand and does not support the City. It states in part as follows:

> This section [section 12] was taken, with editorial amendments, from the Constitutional Revision Commission recommendation. It provides that local governmental units may issue bonds or other obligations funded by ad valorem tax resources maturing later than 12 twelve months after issuance if they are to finance or refinance the cost of state capital projects authorized by law and if they are approved by a freeholder election. (Emphasis added)

The City cites a report by Craig L. Johnson, *Tax Increment Financing (TIF)*, National Ass'n of Realtors (Nov. 2002), for the proposition that most states allow TIF. Actually, the article supports the County's position and this Court's acknowledgement in Strand that TIF payments come from ad valorem taxes.[2] Frankly, for the City to continue to argue otherwise is disingenuous.

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[2] The author states: "TIF debt is secured primarily by the incremental tax revenues derived from property taxes levied within the tax increment district. . . . The incremental revenue does not represent a new tax, but rather a reallocation of a portion of the municipality's general property tax revenues. Municipalities issue

Even the Florida Redevelopment Association agrees with this proposition. See, Carole Westmoreland's article, *Community Redevelopment Agencies: What, When, and How*, which states:

> Tax increment financing is a unique financing tool available to cities and counties for redevelopment activities. It is used to leverage public funds to promote private sector activity in the targeted area. The dollar value of all real property in the Community Redevelopment Area is determined as of a fixed date, also known as the "frozen value." Taxing authorities, which contribute to the tax increment, continue to receive property tax revenues based on the frozen value. These frozen value revenues are available for general government purposes. However, any tax revenues from *increases in real property value*, referred to as "increment," are deposited into the Community Redevelopment Agency Trust Fund and dedicated to the redevelopment area.[3] (Emphasis added)

The Affordable Housing Study Commission report, *Funding Infrastructure to Support Affordable Housing*, (2002 report), also recognizes that tax increment financing revenues come from ad valorem taxes, stating:

> The tax increment is the incremental amount of additional taxes collected above the base line amount in ensuing years. This tax increment may then be used as a revenue stream to issue, for example, TIF bonds. . . The bonds are paid off by the increment in property taxes generated above the base year. [4] (Emphasis added)

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tax increment debt, in part, to circumvent constitutional and statutory debt limitations and voter approval requirements on tax-supported debt." (Emphasis added)

[3] www.dca.state.fl.us/FDCP/DCP/gmw/2006/2006presentations/westmoreland.pdf

[4] www.floridahousing.org/webdocs/ahsc/AnnualReports/2002Report

The Council of Development Finance Agencies, a national group, has no qualms admitting that TIF payments come from tax revenues. Its publication states:

> Tax increment financing (TIF) is a mechanism to capture the future tax benefits of real estate improvements to pay the present cost of those improvements. . . . TIF uses the increased property or sales taxes generated by new development to finance costs related to the development . . . Bondholders are repaid from the incremental tax revenues as further value is added to the development, primarily by private developer partners."[5] (Emphasis added)

The City ends the argument claiming that the Legislature has already "made the policy decisions about which taxing authorities should contribute to redevelopment" in the Redevelopment Act. The Legislature cannot authorize local governments to evade the constitutional imperative that bonds financed with ad valorem revenues must be approved by the voters. For these reasons this Court must uphold the trial court and not validate the bonds.

[5] CDFA, *Tax Increment Financing Primer: Understanding an Increasingly Widespread Tool*. http://www.cdfa.net

REPLY TO SECOND CROSS APPEAL ARGUMENT: WHETHER THE TRIAL COURT APPLIED THE CORRECT STANDARD FOR DETERMINING THE EXISTENCE OF BLIGHTED AREA CONDITIONS

The City shifts away from the County's focus on legal issues, which are reviewable de novo by this Court, by turning to the testimony of witnesses. The County admits that the trial court's findings of fact must be affirmed if based on competent substantial evidence. However, whether the court applied the correct law is for this Court to decide. See, Poe v. Hillsborough County, 695 So.2d 672 (Fla. 1997).

The City cites older cases for the proposition that council members' "own knowledge" are part of the record. The problem with this argument is that these cases predate the 2002 amendments to the Community Redevelopment Act.[6] These amendments now require that the finding of blight be based on "*government-maintained statistics or other studies"* and *"data and analysis"*. Sections 163.340(8), and 163.355 Fla. Stat. (2006).

The City essentially agrees with the County on page 31 of its brief, where it admits that the "second prong" of the blight analysis was used to support the first prong. The City has failed to explain away its consultant improperly "bootstrapping" the required analysis under the first prong with evidence supporting only the second prong. This is not a factual issue. It is a legal issue.

[6] Chapter 2002-294, Laws of Fla.

The statute creates two separate tests. The trial court and the City have inappropriately merged the two tests into one.

It does not matter whether the experts disagreed on what "*substantial*" means in terms of the first prong. The term is statutory. It is up to this Court to define it, not the experts. The County submits that by failing to count the "*structures*" the City cannot begin to show that a "*substantial*" number were "*deteriorated or deteriorating*". (TR. Page 127, 128) Id.

The City cites its own resolutions to support the finding of necessity and the existence of blight. Again, this ignores the statutory requirement that "*statistics or studies*" and "*data and analysis*" must exist to support the finding of blight resolution. Id. Mouthing the right words in a resolution is no longer sufficient.

The County agrees that the City has sufficient evidence to support the second prong of the blight analysis. Two of the nine listed criteria were shown to exist. However, the City mischaracterizes Dr. Fishkind's testimony on this point. He was not called to show the City acted "arbitrary", but rather to show that it failed to support the first prong of the blight analysis with "*statistics or studies"* or "*data and analysis*". Id.

Therefore this Court should find as an additional ground to invalidate the bonds that the trial court misapplied the law governing the finding of blight.

REPLY TO THIRD CROSS APPEAL ARGUMENT: WHETHER THE TRIAL COURT CORRECTLY DETERMINED THAT THE REDEVELOPMENT PLAN CONFORMS TO THE COMPREHENSIVE PLAN; WHETHER THE TRIAL COURT APPLIED THE CORRECT LAW AND WHETHER THE TRIAL COURT'S DETERMINATION MUST BE UPHELD

The CRA Plan "*shall conform*" to the City's Comprehensive Plan. Section 163.360(2)(a), Fla. Stat. (2006). The City claims that this is a "legislative determination". Actually it is a legal requirement of the Act, which may be reviewed on appeal de novo. Because the trial court confused the CRA Plan with "development orders", it failed to apply the correct law.

The City argues that it was the County's "plea" below that the CRA be "consistent" with the Comprehensive Plan. While the County is perhaps at fault for confusing the terms at trial when arguing they basically mean the same thing, it is incorrect to allege that this was its legal position. Clearly, the County alleged and its witnesses demonstrated that the CRA Plan did not "*conform*" to the comprehensive plan. In fact, the examples of the lack of conformity continue to go unrebutted, except for the City's unsupported, conclusory statements to the contrary.

The City states that there is no need to amend the City's comprehensive plan to support the CRA Plan. It cites Section 163.3177(7)(g), which provides that a "*general area redevelopment element*" is an option for local governments to include in their comprehensive plan. This ignores two things and a basic legal

issue. First, Section 163.3177(6)(a), Fla. Stat. (2006), requires that the Future Land Use Element be based upon "*surveys, studies, and data regarding. . . redevelopment, including the renewal of blighted areas*". Second, just because a local government is provided with the option to include a specific "*redevelopment element*" in its comprehensive plan cannot obviate the statutory mandate in Section 163.360(2), Fla. Stat. (2006), that the community redevelopment plan "*shall conform*" to the comprehensive plan. The legal conclusion to be drawn from this is that if the CRA plan does not "*conform*", it is invalid. The solution is to amend the Comprehensive Plan.

The Community Redevelopment Act and the Local Government Comprehensive Planning Act are contained within the same Chapter of the Florida Statutes. Chapter 163, Fla. Stat. (2006), governs two types of plans, comprehensive plans and community redevelopment area plans. These two parts of Chapter 163 should be read together to support the goals and intent of both. In the context community redevelopment planning, it is important that this activity have a firm basis in the local government's comprehensive plan. To require this connection supports the purpose of comprehensive planning. See, Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. 3rd DCA 1987)(local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. . . . [citations excluded]

The plan is likened to a constitution for all future development within the governmental boundary. [citation excluded].) (Emphasis added).

The City obscures the County's argument by focusing on the consistency mandate, which governs comprehensive plans. It claims Dixon v. City of Jacksonville, 774 So.2d 763 (Fla. 1st DCA 2000) is "misplaced". Admittedly, Dixon involved the consistency review of a development order. However, the case was cited to bolster the argument that the statutory requirement for the CRA Plan to "conform" to the Comprehensive Plan should be taken seriously as it is a legal, not a factual issue.

If municipalities understood that this concept of conformity between the CRA Plan and the comprehensive plan is just as important as the mandate of consistency for development orders with the comprehensive plan, it might encourage more attention at the local level on how the two plans interrelate. Recognizing this important interrelationship will inevitably help efforts to revitalize our communities.

The trial court did not correctly apply the requirements of Section 163.360(2), Fla. Stat. (2006). The CRA Plan does not "*conform*" to the Comprehensive Plan. This is an additional reason to invalidate the bonds that are the subject of this appeal.

CONCLUSION

The trial court misapplied the two prongs governing the finding of blight. There were no "*statistics or studies*", or "*data and analysis*" to support the legal conclusion that a "*substantial*" number of "*deteriorating structures*" were leading to "*economic distress*". The conclusion that the CRA Plan conformed to the Comprehensive Plan was error. The lower court also confused the terms "*consistency*" and "*conformity*". Because the Court applied the incorrect law, the bonds should not be validated.

This Court's opinion in Strand supports the County's argument that the bonds are not constitutional. The resolutions creating the CRA Plan, the ordinance creating the Trust Fund, the Interlocal Agreement, and the bond resolution, as well as Section 163.387, Fla. Stat. (2006), all authorize long term debt for which property taxes are both the measure and the source of financing. There was no referendum to authorize these tax increment financing bonds. Therefore, they violate Art. VII, Section 12, Florida Constitution.

This Court should find Section 163.387, Fla. Stat. (2007), unconstitutional, uphold the Final Judgment on the additional grounds set forth in the cross-appeal, and remand with instruction that the trial court invalidate the ordinances and resolutions that are the subject of this case.

Respectfully submitted this ___ day of November 2007.

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