IN THE FLORIDA SUPREME COURT
CASE NO. SC07-1400

CITY OF PARKER, and
CITY OF PARKER COMMUNITY REDEVELOPMENT AGENCY,
Appellants, Cross-Appellees,
vs.

STATE OF FLORIDA, ETC., ET AL.
Appellees, Cross-Appellants.

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

BOND VALIDATION PROCEEDING

This case is an appeal under Florida Rule Appellate Procedure 9.030(a)(1)(B)(i) from a Final Judgment of the Fourteenth Judicial Circuit of the State of Florida, in and for Bay County, Florida

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APPELLANTS/CROSS-APPELLEES' AMENDED REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PRELIMINARY STATEMENT

The Appellant/Cross-Appellee, the City of Parker, Florida, will be referred to as the "City," and the Appellant/Cross-Appellee, City of Parker Community Redevelopment Agency, will be referred to as the "Agency." Collectively, the City and Agency may be referred to as Appellants or Cross-Appellees. The Appellee/Cross-Appellant, Bay County, Florida, will be referred to as the "County." The Appellee, State of Florida, will be referred to as the "State."

References to the Initial Brief will be cited by the symbol "IB" followed by the page number (IB; page#). References to the Answer Brief will be cited by the symbol "AB" followed by the page number (AB; page#).

References to the Appendix submitted with Appellants' Initial Brief will be cited as "AI," followed by the tab number, followed by the page or paragraph number (AI-tab#; page#). References to the Appendix submitted with Appellee/Cross-Appellant's Answer Brief/Initial Brief on Cross-Appeal will be cited by the symbol "AII," followed by the tab number, followed by the page or paragraph number (AII-tab#; page#). References to the Appendix submitted with Appellants/Cross-Appellees' Reply Brief and Answer Brief on Cross-Appeal will be cited as "AIII," followed by the tab number, followed by the page or paragraph number (AIII-tab#; page#). References to items attached as exhibits to items in the

Appendices will include the exhibit letter and the page or paragraph number if necessary.

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

The County has cross-appealed the Final Judgment of the trial court dated June 25, 2007 denying, in part, a complaint seeking validation of not to exceed $40,995,891 City of Parker, Florida Capital Improvement Revenue Bonds (the "Bonds")[1] finding that because the City does not itself levy ad valorem taxes it may not utilize the tax increment financing method authorized in section 163, part III, Florida Statutes (2006) ("Redevelopment Act" or "Act") to fund community redevelopment. (AI-tab 1; 16). The Final Judgment did, however, rule in favor of the City and Agency on all other factual and legal issues. (AI-tab 1; 3-11). This appeal followed. (AI-tab 24). The County cross-appealed, challenging certain findings of the trial court in favor of the City and the Agency. (AII-tab 1). Much of the support for the findings in favor of the City and the Agency was set out in the Initial Brief in anticipation of the cross-appeal. (IB; 2-11). They will not be repeated; however, the following supplemental statement is provided for the Court's consideration.

[1]The Bonds are not secured solely by redevelopment trust fund revenues, but are also secured on a primary pledge basis by such assessments as may be provided for and such other legally available revenues as may be consented to. (AI-tab 16). The Bonds may or may not be paid by redevelopment trust fund revenues.

There is a plethora of evidence to show that there was competent substantial evidence before the City Council of the City of Parker ("City Council") when it made its decisions in this matter. As set out in Appellants' Initial Brief, the City retained a consulting team to conduct interviews, to consider and assemble factual information concerning the existence of blighted area conditions, to examine the indicia of blighted area conditions identified within the study area defined therein, and to provide a study which tabulates and documents such findings. (AI-tab 5; 3). The consulting team additionally conducted a series of well attended public meetings. (AI-tab 2; 176). The City and Agency were provided a written report of the findings and conclusions in the City of Parker Findings of Necessity Report for a Community Redevelopment Area, dated November 30, 2006 (the "Findings of Necessity Study"). (AI-tab 5). The Findings of Necessity Study evidenced that "blighted area" conditions as defined within the meaning of section 163.340(8), Florida Statutes (2006), existed within the study area. (AI-tab 5; 53). On December 18, 2006, the City Council considered public comment and the results of the Findings of Necessity Study, and adopted Resolution No. 06-254. (AI-tab 6).

The trial court had before it not only the same study that was before the City Council, but also the depositions of Thomas Kohler and Ginger Corless, AICP, two experts whom the City relied upon. (AI-tab 18); (AI-tab 18; 106). The trial court allowed Ms. Corless to testify as an expert in both community redevelopment and

planning matters. (AI-tab 2; 167). Mr. Kohler was also qualified as an expert in both areas. (AI-tab 18).

At trial, Ms. Corless provided expert opinion testimony that there were a substantial number of deteriorated or deteriorating structures in the Parker Community Redevelopment Area ("Redevelopment Area" or "Area") which lead to economic distress and to safety concerns or safety as it related to property or persons. (AI-tab 2; 178-79).[2] The record supports this finding. (AI-tab 1; 6-10). Ms. Corless further testified that the blighted conditions are sprinkled throughout the north and south parcels which comprise the entirety of the Area. (AI-tab 2; 180-81).[3] Ms. Corless opined that the Redevelopment Plan conformed to the City's Comprehensive Plan. (AI-tab 2; 182).

[2]Ms. Corless stated that there were several factors with regard to the condition of the buildings and structures, including the lack of pedestrian amenities, sidewalks, crosswalks, building conditions related to living conditions in the mobile homes, vacant buildings and crime issues through vandalism. (AI-tab 2; 179). She was aware of a limitation on replacing mobile homes in the Area, specifically that there are a substantial number of deteriorating mobile homes in the Longpoint Area which currently provide affordable housing but cannot be replaced, causing the loss of much needed affordable housing units. (AI-tab 2; 180).

[3]Ms. Corless testified that there was an error in Findings of Necessity Study. (AI-tab 2; 195-97). The statement that the buildings and structures except a few are largely in acceptable physical condition was in the report by error, carried over from another report by mistake. (AI-tab 2; 195-97, 208-09). Her blight study clearly provides evidence to the contrary. (AI-tab 2; 208-10).

The trial court had in evidence Thomas Kohler's deposition. (AI-tab 2; 20-21). Mr. Kohler testified that as an expert in planning, he assisted in preparing a portion of the Findings of Necessity Study, specifically the section titled Real Estate Development and Investment Activity. He further testified that the Findings of Necessity Study and the City of Parker Community Redevelopment Plan (the "Redevelopment Plan" or "Plan") are consistent with each other.[4] (AI-tab 18; 49-50).

Dr. Henry Fishkind, the County's primary witness,[5] made his own decision as to what the term "substantial" means and concluded that it should mean twenty five (25%) and not ten percent (10%) of the tax parcels in the Area. (AI-tab 2; 127-28). Dr. Fishkind is not a traffic engineer or traffic expert, not an expert in transportation planning, not a planner, not an expert in subdivision design, not an expert in crime or fire, not an expert in local or state development codes or building codes. (AI-tab 2; 144-45). Dr. Fishkind conceded that if the City Council

[4]While Mr. Kohler made no separate or independent written determination whether the Area contained the requisite criteria for blight (AI-tab 18; 23), he did testify that he had visited the Area and was familiar with the conclusions in the Findings of Necessity Study as to the existence of blight and agreed with them. (AI-tab 18; 49). The conditions Mr. Kohler reviewed are on pages 53-56 of the Findings of Necessity Study. (AI-tab 18; 49). He rendered a professional opinion that those conclusions were valid. (AI-tab 18; 49).

[5]Dr. Fishkind's testimony was impeached by the inconsistency between his trial testimony and his deposition testimony as to the subject of how many times, either in court or in deposition, he had given testimony on the subject of a finding of necessity for a community redevelopment agency. (AI-tab 2; 114-15).

came to the conclusion that there were unsanitary and unsafe conditions in the Area, he was not in a position to disagree. (AI-tab 2; 145-46).[6] He further testified that plan implementation would improve conditions in the City (AI-tab 2; 145), and that consolidation of both developed and undeveloped parcels would make property in the City more marketable. (AI-tab 2; 146).[7]

After the entry of all evidence and testimony, the trial court "with counsel for the parties, conducted a view, driving along the alleys, side streets, and main roads within the entire community redevelopment area of the City." (AI-tab 1; 3). *See Hammond v. Carlyon*, 96 So. 2d 219 (Fla. 1957) (stating in dicta that in a nonjury hearing, a view may be "'for the purpose of explaining and clarifying evidence and facts brought out at the trial' but . . . 'cannot be employed as basis for a judgment.'").

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[6]Dr. Fishkind did not critique the legislative determinations of the City Council because he conceded that, as he said, it was not his "place to second guess the City." (AI-tab 2; 144).

[7]On cross examination, Dr. Fishkind acknowledged that the Findings of Necessity Study stated that there were present a substantial number of deteriorating or deteriorated structures; that the housing stock had reached a critical state of dilapidation, particularly mobile homes; that a number of these units had declined to the point where any form of rehabilitation or maintenance would not be feasible; that within the study area were segments of roadway that literally have craters where the pavement has collapsed; that there exists localized flooding; that the stormwater, wastewater and potable water infrastructure needs significant upgrading and that without these upgrades the Area may experience system failure. (AI-tab 2; 148-51).

In addition, much of the County's purported Statement of Case and Facts is unduly argumentative. This Court should disregard same as unauthorized and impermissible. *See Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829, 830 (Fla. 1st DCA 1989) (brief stricken for improper legal argument in statement of the case and facts).

SUMMARY OF THE ARGUMENT

The City and Agency appeal the single basis for the trial court's denial of the bond validation. The trial court reasoned that, because the City does not levy ad valorem taxes, it may not utilize tax increment financing to fund community redevelopment. (AI-tab 1; 16). This reasoning is erroneous, because the Redevelopment Act cannot be construed to require a municipality or county to impose an ad valorem tax in order to employ the statutory funding mechanisms for community redevelopment. Accordingly, the trial court's reading of the Redevelopment Act is incorrect and should be reversed.

On cross-appeal, the County advances three issues. First, the County questions the constitutionality of tax increment financing without referendum approval. The Court should reject this challenge based on the bright-line principle that a referendum is not required unless bondholders have the power to compel, directly or indirectly, the levy of an ad valorem tax. *See State v. Miami Beach Redevelopment Agency,* 392 So. 2d 875 (Fla. 1980) (hereinafter referred to as

"*Miami Beach*"), *called into question by Strand v. Escambia County*, 32 Fla. L. Weekly S550 (Fla. Sept. 6, 2007, revised Sept. 28, 2007). The Court should not abandon this bright-line principle without first undertaking its traditional *stare decisis* analysis. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003). This analysis does not support abandoning *Miami Beach*, because the precedent presents no error in legal thinking to be corrected, there have been no drastic factual changes, and the bright-line principle has not proved unworkable. Rather, communities throughout the state have placed heavy reliance upon *Miami Beach* in issuing debt to address the ills of slum and blighted area conditions.

This Court should not rewrite the referendum requirement clause "payable from ad valorem taxation" to mean "derived from ad valorem tax revenue." *Miami Beach* remains good law, requiring a referendum in a redevelopment scenario only where bondholders have the power to compel, directly or indirectly, the entity with taxing powers to levy an ad valorem tax. It is constitutional to pledge tax increment revenues to bondholders without a referendum in accordance with the Redevelopment Act, which includes many procedural and substantive safeguards. Outside the context of the Redevelopment Act, courts should carefully scrutinize the use of tax increment financing for compliance with safeguards inherent in

statutory community redevelopment financings, to ensure that they do not violate the referendum requirement.

The second and third issues raised in the cross-appeal ask this Court to substitute its judgment for that of the trial court on factual issues where competent substantial evidence is present. The City correctly developed and articulated its determination of blighted area conditions and the trial court's application of the law in that regard is correct. As well, the trial court's factual and legal determination that the City's redevelopment plan conforms to the comprehensive plan for the development of the City as a whole is correct and should be left undisturbed. Accordingly, this Court should uphold these findings.

This Court should validate the Bonds and all matters associated therewith under the long-standing authority of *Miami Beach* and the Redevelopment Act.

STANDARD OF REVIEW

The scope of review in a validation proceeding under chapter 75, Florida Statutes (2006), is: (1) whether the public body has the authority to issue the bonds, (2) whether the purpose of the obligation is legal, and (3) whether the bond issuance complies with the requirements of law. *State v. Osceola County*, 752 So. 2d 530, 533 (Fla. 1999); *Poe v. Hillsborough County*, 695 So. 2d 672, 675 (Fla. 1997); *Taylor v. Lee County*, 498 So. 2d 424, 425 (Fla. 1986).

The standard of review for the trial court's findings of fact is a review for competent substantial evidence and for its conclusions of law, the review is de novo. *City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003); *City of Boca Raton v. State*, 595 So. 2d 25, 31 (Fla. 1992) *Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662, 665 (Fla. 2002). As recognized by this Court in *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976), only the trial court[8] is empowered to weigh the evidence and draw inference therefrom, "[i]t is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it."

ARGUMENT

REPLY TO ANSWER BRIEF

I. THE REDEVELOPMENT ACT DOES NOT REQUIRE THE CITY TO IMPOSE AN AD VALOREM TAX AS A CONDITION TO THE FUNDING OF COMMUNITY REDEVELOPMENT

The Redevelopment Act provides counties and municipalities a general law vehicle to accomplish community redevelopment. The Act contains requirements that an initiating government must follow. However, contrary to the trial court's findings and the County's argument, the levy of an ad valorem tax is not required.

The Initial Brief responded to the County's arguments from the hearing, which are almost identical to those contained in the Answer Brief. Because the

[8]The findings of fact in *Shaw*, as is the case here, were made by a trial judge in a non-jury trial. *Id*.

conclusion reached by the trial court was one of law, the County can not simply rely on the same arguments used below, but must also respond to those raised by the City and Agency. To that end, it is difficult to reply as the arguments have not changed or developed in any significant way[9] other than inclusion of a tag phrase: "Parker must TAX before it may TIF." (AB; 18). Although catchy, it has no basis in the law, as the County concedes. (AB; 15).

The County was not responsive to the Initial Brief; it simply followed what was done by the trial court by re-arguing that certain sections from the Redevelopment Act ***support*** the trial court's finding. (AB; 18, 20, 22, 24). The fault in the trial court's finding and the County's argument, however, is that there is no ***basis*** for the finding. A careful reading of the Answer Brief shows that the County again mistakes the obligations placed upon a taxing authority for restrictions on a municipality's power to implement community redevelopment under the Act. (AB; 21-22). Furthermore, the County does not respond to the City and Agency's main point, specifically that counties and municipalities alone are given the power to effectuate community redevelopment under the Act. Simply put, any county or municipality may utilize the powers under the Act. By contrast,

[9]The County did not include in the Answer Brief any discussion of section 163.353, Florida Statutes (2006); as Appellants pointed out in the Initial Brief, this section has a clear history that does not support the County's argument. (IB; 28-29). The County additionally did not include section 163.335(1), Florida Statutes (2006) in its Answer Brief.

the role of taxing authorities is to fund community redevelopment if and to the extent they impose taxes.

There is no ***basis*** for the trial court's finding and therefore nothing for the County's arguments to ***support***. The County claims as support, however, two sections of the Act taken out of context. In section 163.335(5), Florida Statutes (2006), one of the Act's findings and declaration of necessity is detailed. The City and Agency do not deny that this section discusses obligations of taxing authorities that do implement taxes, but do deny that the legislative intent contained therein should be interpreted to place additional substantive requirements upon the City.[10] (AB; 18-19). The County also alleges section 163.387, Florida Statutes (2006), supports the trial court's conclusion. (AB; 20-21). To the contrary, that section places obligations upon taxing authorities that impose taxes to fund the community redevelopment trust fund. It does not provide a substantive basis in the Act to require the City to levy a tax and should not be read to place otherwise nonexistent obligations on the City.[11]

The County completely mischaracterizes the City and Agency's position as stated in the Initial Brief. (AB; 21-22). The Initial Brief did not draw a distinction

[10] In the Initial Brief, the City and Agency detailed why this statute does not provide a basis for this argument. (IB; 27-28).

[11] Again, the City and Agency discussed this section in detail in the Initial Brief. (IB; 29-31).

between a public body and a taxing authority, but rather between (1) powers given to counties and municipalities and (2) obligations placed upon taxing authorities. The County's misunderstanding is illustrated by this incongruous statement: "One way to read the definitions consistent with the trial judge's Final Judgment is to recognize that there may be '*taxing authorities*' that are not '*public bodies*' and do not have the power to create CRAs or impose Tax Increment Financing." (AB; 22). The County's reading should be rejected because "taxing authorities" do not have the power to implement community redevelopment — that power is given exclusively to "counties" and "municipalities." The only roles played by a public body are those specifically defined by the Act, none of which are relevant to this issue. *See, e.g.*, § 163.365, Fla. Stat. (2006).

A. The Legislature Has Made the Policy Decision to Allow Cities That Do Not Levy an Ad Valorem Tax to Create a Community Redevelopment Regime, and It Is Beyond the Power of the Court to Require the Contrary

Contrary to the County's unhelpful restatement and attempted resuscitation of the trial court's analysis, the Redevelopment Act neither by express terms nor by implication mandates the levy of a tax in order to create a community redevelopment regime and realize the resulting benefit to all affected local governments. The trial court erroneously followed the County's lead on this one issue, a path the Appellants urge this Court not to take. This is a decision of statutory interpretation and, as the County admits, there is no precedent or case law

dealing with this narrow issue. (AB; 15, 18). As a decision of law, this Court has the power to disagree with the trial court and interpret the Redevelopment Act as it was written, not as the County wishes it were written.

The Redevelopment Act is a tool that only counties and municipalities may use to effect redevelopment[12] in their communities. It is through the use of the community redevelopment regime employed by the City that areas such as that in the City can receive an influx of money and flexible financing to facilitate otherwise impossible revitalization.

In its Answer Brief, the County seems to make five points between arguments in the facts, the summary of the argument, and in the argument. First, the County misplaces an enormous amount of weight on section 163.335, the Redevelopment Act's findings and declarations of necessity. (AB; 18-20). Second, the County ignores that portion of the definition of taxing authority that includes within that term, those taxing authorities that have the authority but do not levy an ad valorem tax. (AB; 22). Third, the County mischaracterizes the Appellants' well discussed point that the powers to initiate community redevelopment under the Act are given to "counties" and "municipalities," not

[12]It is imperative that this Court observe that redevelopment is different than development. Redevelopment requires flexibility because it occurs in a variety of different situations, from undeveloped timberland to a metropolitan downtown to a forgotten subdivision. *See, e.g.*, *Fulmore v. Charlotte County*, 928 So. 2d 1281, 1288 (Fla. 2d DCA 2006); *see also* § 163.340(9), Fla. Stat. (2006) (defining "community redevelopment").

"public bodies" or "taxing authorities." (AB; 21-22). Fourth, the County spins the millage parity provisions in an absurd way attempting to write into the Redevelopment Act a levy requirement. (AB; 22-25). And finally, the County argues that "[t]his isn't fair." (AB; 25). Fairness may have its place in a policy decision, but cannot be this Court's basis for interpreting the Redevelopment Act to require 'a tax before a TIF.'

B. Neither the Statements of Legislative Intent nor the Operative Provisions of the Redevelopment Act Support a Construction That the City Must Levy an Ad Valorem Tax to Create a Community Redevelopment Regime If It Meets the Grandfathering Provisions of the Act

The County weaves together portions of the Redevelopment Act to unconvincingly argue that the trial court was correct in adopting the County's argument in its decision. The County argues that the declaration of necessity contained in section 163.335(5) mandates the City to impose an ad valorem tax to utilize the community redevelopment regime. To the contrary, that statement of intent indicates the exact opposite. It focuses not on the tax levy but on the benefits of the completed redevelopment project. The statement of intent declares, in relevant part, that "*community redevelopment, when complete, will enhance such tax base and provide increased tax revenues to all affected taxing authorities, increasing their ability to accomplish their respective purposes . . . .*" § 163.335(5), Fla. Stat. (emphasis added). When the community redevelopment is complete, the tax base will be enhanced for ***all*** taxing authorities. The legislature

has made it abundantly clear that all taxing authorities will be the beneficiaries of the redevelopment effort both by enhancement of the tax base and by the elimination of blighted area conditions. Furthermore, it is clear that it is the completed redevelopment which achieves the purpose of the Act, not a tax levy during the process of completing the redevelopment.

In its argument, it is apparent that the County does not understand that the tax base is not the same as a tax levy. Whether or not a county, municipality, or taxing authority levies a tax in a particular year is immaterial both as to enhancement of the tax base and to achievement of the paramount public purposes underlying the Redevelopment Act (that is, addressing slum and blight).

Carried to its logical conclusion, the County's interpretation would mandate some sort of tax proportionality. Otherwise, and if the County is right, the City could levy a minimal tax, one quarter of a mill, for example, and be compliant. Clearly the legislature did not mandate such a requirement. To the contrary, tax proportionality is now mandated only for those taxing entities that did not comply with the window of opportunity to grandfather themselves in under the old statutory regime (as did the City in the instant case). *See* § 163.387(1)(b)1., Fla. Stat. (2006).

In its zeal to avoid the legislature's requirement to participate in addressing blighted area conditions of a selected part of the County within the City,[13] the County simply wants to deny and ignore the blighted area conditions. In doing so, the County reads into the statute a requirement that is simply not there, specifically, that each taxing authority must levy an ad valorem tax. The Act contains no such mandate of a tax levy. The legislature is cognizant of the statutes and the words in the statutes. It is not the province of the courts to amend statutes to include what is not included. If a taxing authority (such as the City or County) levies no ad valorem tax in a particular year its increment will be zero for that year. However, upon a taxing authority's levy of an ad valorem tax in any particular year, the contribution of increment is required. This is the direction and result of section 163.387(2)(a), Florida Statutes.[14]

[13]For example, the County's arguments as to why this Court should recede from *Miami Beach* do not even address the traditional *stare decisis* analysis in *North Florida Women's Health & Counseling Services Inc. v. State*, 866 So. 2d 612 (Fla. 2003). Rather, the County simply argues that this Court should abruptly move to the minority rule and engage in a policy debate concerning the advisability of the Legislature's mandate to shift revenues from one taxing authority to another to combat blight or slum conditions. This is ***not*** the same as construing the referendum requirement.

[14]This Court has declared in numerous decisions that making legislative policy is for the legislature, not the courts. *See, e.g., Poe v. Hillsborough County*, 695 So. 2d 672 (Fla. 1997).

ANSWER TO CROSS-APPEAL

II. TAX INCREMENT FINANCING UNDER THE REDEVELOPMENT ACT IS CONSTITUTIONAL AND DOES NOT REQUIRE A REFERENDUM

In this case, the City and the Agency relied in good faith on long-standing Florida precedent, which has now been called into question by *Strand v. Escambia County*.[15] The Court heard oral argument on rehearing in *Strand* on October 9, 2007, where many participants agreed on the prudence of deciding the remaining issues in the context of a dispute involving the Redevelopment Act. This case is one such dispute, as are two other pending cases involving Bay County and the Town of Cedar Grove, Case No. SC07-1572 (Core) and Case No. SC07-1574 (Brannonville). The primary remaining issue is whether to retract or modify *Strand*'s initial decision to recede from *Miami Beach* and to subject all tax increment financed bonds or tax increment financing ("TIF") to the referendum requirement of article VII, section 12, of the Florida Constitution.

The City and Agency advocate for continued adherence to the bright-line principle in Florida law that the referendum requirement is triggered only when bondholders have the power to compel, directly or indirectly, levy of an ad valorem tax. The Court historically has applied this principle to distinguish

[15]If the Court ultimately leaves the *Strand* referendum requirement intact, Appellants ask the Court, based upon principles of equity and judicial economy, to validate the Bonds in this case in all other respects, conditioned upon their approval in a later referendum.

between ***pledging the power of taxation***, which triggers the referendum requirement, and pledging the use of such tax revenues as may exist, which does not. In so doing, the Court has acted consistently with courts nationwide, which, while faced with some variation among constitutional phrasing, all tackle the identical issue in principle: when is an obligation a "debt" that triggers constitutional constraints? The paradigmatic example of a constitutional "debt" is a general obligation bond secured by the issuer's "faith and credit," that is, all available revenue-producing powers. From the grayer areas there has emerged a recurrent nationwide theme: the existence of a "debt" depends on whether the issuer or the bondholders bear the risk of failure.

Miami Beach was squarely in line with these principles. Thirty years ago, this Court was not alone in constitutionally characterizing TIF redevelopment bonds. The Court's thoughtful ruling honored the bright-line principle applied during the preceding decades and is consistent with subsequent decisions by the Court. With *Miami Beach*, the Court also placed Florida in the solid majority of jurisdictions concluding that TIF redevelopment bonds did not trigger constitutional constraints. The decision was correct, and should not be overruled. The Court can resolve *Strand* without doing so and without eviscerating the Redevelopment Act in the process. Even if *Miami Beach* were now viewed as

incorrect, the Court's traditional *stare decisis* analysis compels the conclusion that it should not be abandoned.

When initially deciding *Strand*, the Court did not have the full benefit of this history putting *Miami Beach* into context. Lack of complete historical perspective led to an erroneous "plain meaning" analysis of the referendum requirement's phrase, "payable from ad valorem taxation." Construing the word "taxation" to mean ***both*** the power of taxation ***and*** revenue derived from taxes simply does not fit with the principles previously applied by this Court, which to date have been in harmony generally with the law of public finance in the United States. *Strand*'s radical reinterpretation would have far-reaching negative consequences among local governments in Florida, well beyond the TIF redevelopment context. *Strand*'s approach would gut the principles underpinning many basic local government financial practices. For example, governments could no longer tap general revenue funds to off-set any temporary shortages in accounts devoted to servicing bond obligations, for fear that such revenues may have been ***derived from*** ad valorem taxes.[16] In choosing among competing interpretations of the

[16]A practical illustration of this point touches many local governments. Following the storm-wracked summers of 2004 and 2005, an unforeseen steep increase in property insurance costs has disrupted financial models of many bond-financed local projects in Florida. To cover temporary account shortages, governments have looked to general revenues — which are primarily derived from ad valorem taxes. Under *Strand*, doing so would be unconstitutional without a referendum.

word "taxation," the Court must allow for practical reality in the present, as well as honor the past.

1. The 1968 Revision to the Referendum Requirement Was Intended to Apply to Limited Tax Pledges, Which Are Not Used Under the Redevelopment Act

The 1968 Constitutional Revision Commission did not intend to fundamentally change the constitutional requirements that had been in place since 1930. In inserting the phrase "payable from ad valorem taxation" in the referendum requirement, the Constitutional Revision Commission intended to clarify that the requirement applied to limited general obligation bonds. Like holders of "full faith and credit" (or unlimited) general obligation bonds, holders of limited obligation bonds may sue to compel the issuer to levy taxes. Thus, under the bright-line principle, it is appropriate to view such bonds as constitutional "debt" and to apply the referendum requirement.

In Florida, TIF redevelopment bonds are revenue bonds and ***not*** limited general obligation bonds, and the referendum requirement does not apply to them.

Another practical problem is that the referendum requirement would render the Redevelopment Act practically impossible for a municipality to implement. The Redevelopment Act does not contemplate the approval by electors, nor does it provide a framework to initiate a referendum. A community redevelopment agency is not empowered to call a referendum. While the Legislature may authorize certain municipalities to call an extra-territorial referendum in specific situations, no such authority has been given to municipalities under the Redevelopment Act.

See §§ 163.385, .387, Fla. Stat. (2006). To illustrate this point, it is useful to compare the law of Michigan, where the redevelopment financing law provides:

> The municipality by majority vote of the members of its governing body may make a limited tax pledge to support the authority's tax increment bonds or, if authorized by the voters of the municipality, pledge its full faith and credit for the payment of the principal of and interest on the authority's tax increment bonds.

In re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186, 190 (Mich. 1988).[17] The first part of this law is an example of a limited general obligation bond (a "limited tax pledge to support the . . . bonds"). The Michigan law exempted such obligations from a referendum, which was required only when the government pledged its full faith and credit. In Florida, both options would be subject to the referendum requirement, probably since 1930 but without question following the 1968 constitutional revision. This result was the intent and practical effect of the new phrase "payable from ad valorem taxation." This interpretation better fits the historical record and makes far more sense than concluding that the drafters intended to cloak with constitutional constraints every dollar of revenue derived from ad valorem taxation.

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[17]In considering whether the law amounted to an unconstitutional lending of credit, *cf.* art. VII § 10, Fla. Const., the Supreme Court of Michigan considered whether the TIF bonds were more like general obligation bonds or revenue and special obligation bonds — that is, generically, whether the bonds were constitutional "debt." 422 N.W.2d at 198. The answer is obvious, since the bonds are backed by the taxing power; thus, Michigan reached a different conclusion than *Miami Beach*. *Id.* at 199-200. While the result differs, it logically follows from application of the same bright-line principle that guided *Miami Beach*.

By treating TIF bonds like revenue bonds rather than general obligation bonds, the Redevelopment Act is consistent with similar statutes in the majority of other states. A 2002 report examined the fifty states and the District of Columbia and found redevelopment TIF bonds authorized in all but four at the time. Those jurisdictions statutorily addressing both the issue of (1) whether the bonds were backed by full faith and credit and (2) whether the bonds were subject to constitutional "debt" limits were distributed in this manner:

		Subject to Debt Limit	
		Yes	No
Backed by Full Faith and Credit	Yes	4	10
	No	1	22 (including FL)

Craig L. Johnson, *Tax Increment Financing (TIF)* (National Ass'n of Realtors Nov. 2002). Like 86% of the jurisdictions (32 of 37), Florida does not view TIF redevelopment bonds as subject to constitutional debt limits. *See* § 163.385(2), Fla. Stat. (2006). Like 62% of the jurisdictions (23 of 37), Florida TIF redevelopment bonds are not backed by full faith and credit, that is, they are not general obligation bonds. *See* § 163.387(5), Fla. Stat. (2006). Interestingly, note that ten jurisdictions do back TIF bonds with full faith and credit but do not subject them to debt limits. By comparison, Florida now sits comfortably in the conservative and principled majority. As currently written, *Strand* would move

Florida to join the sole jurisdiction that subjects the bonds to debt limits even when not backed by full faith and credit.

2. Florida Local Governments Use TIF Bonds Reasonably and Consistently with Their Redevelopment Purposes

At the oral argument on rehearing of *Strand*, the Court sought information about how Florida governments use TIF bonds. That information is publicly available from the State Board of Administration, Division of Bond Finance, to which local governments must report concerning bond issues. *See* § 218.38, Fla. Stat. (2006). The publicly available information reveals that, between 1991 and October 10, 2007, Florida governments have issued 158 TIF bonds totaling approximately $1.5 billion. These agencies have financed redevelopment efforts in Florida in reliance on *Miami Beach*, and the Court must account for their interests in its traditional *stare decisis* analysis before abandoning that decision. Of the 34 TIF bond issues between September 2005 and September 2007, all were done by redevelopment agencies.[18]

It is readily apparent, then, that TIF bonds in Florida have not extended beyond their redevelopment origins and the Court need not act to curb rampant abuse. While some jurisdictions have taken a more lenient approach to the use of

[18]The Division of Bond Finance switched to a new database in 2005; as a result, accessing pre-2005 information takes more effort and time than was available to respond more fully to the Court's questions. To put the TIF figures into context, consider that for the past three years total annual bond financing has averaged $15.85 billion.

TIF bonds, Florida has actually restricted their use over the years.[19] A study of TIF debt issues from 1990 and 1995 found that California accounted for 58% of the number of issues and 80% of the dollar amount, while Florida accounted for 1.8% of the number of issues and 1.5% of the amount. Mehmet S. Tosun & Pavel Yakovlev, *Tax Increment Financing & Local Economic Development* 12-13 (W. Va. Univ. Oct. 2002). Today, the bulk of TIF debt continues to issue from California (about 93% of rated debt by par amount). *See* David G. Hitchcock, et al., *U.S. Tax Increment Bond Issuance Grows; Credit Quality Remains Stable* 5 (Standard & Poor's Feb. 23, 2006). While California remains the primary issuer, the financing technique is spreading elsewhere.

> Some of the growth nationwide in tax increment debt issuance may also be attributed to the growing desire to make development "pay for itself" – existing residents don't want to pay for the needed infrastructure of newcomers. This is what tax increment financing is designed to do: pay off bonds only with tax revenue from new assessed valuation within a given project area, although bond ratings are usually lower than they would be with a city GO [general obligation] debt issuance.

Id.

[19] *See* Alyssa Talanker, et al., *Straying From Good Intentions: How States Are* Weakening *Enterprise Zone and Tax Increment Financing Programs* 10 (Aug. 2003), *available at* http://www.cdfa.net.

TIF bond ratings are lower, and interest rates are higher, because they are not general obligation bonds: the bondholders bear the risk of project failure and related lack of growth in property valuations, with no power to compel, directly or indirectly, the issuer to levy ad valorem taxes. Use of TIF bonds is projected to grow, because they are a useful redevelopment tool and currently there is no perceived abuse of the tax increment process. *Id.* at 6.

3. Redevelopment TIF Bonds Do Not Unfairly Redistribute the Tax Burden

At the oral argument on rehearing of *Strand*, counsel expressed that Dr. Strand challenged Escambia County's bonds because he thought they were "unfair." In this case, too, the County seems to argue that the proposed bonds unfairly take dollars from the County, thereby increasing its burden to pay for County offices and government, while only the redevelopment district will benefit. (AB; 25). Apparently, the County believes it should focus exclusively on County government and its officers, and not on redevelopment, a position flatly inconsistent with Florida law. *See Kelson v. City of Pensacola*, 483 So. 2d 77, 78-79 (Fla. 1st DCA 1986) ("We are persuaded that the allocation of funds by the County to the CRA is for County purposes.").

These arguments also ignore the fact that areas outside of a redevelopment district are "denied" only those revenues that are generated by the redevelopment. *See,* e.g., *State vs. City of Daytona Beach*, 484 So. 2d 1214, 1215-16 (Fla. 1986)

("We note that the ad valorem tax base . . . is not reduced because the redevelopment creates an increase in tax revenues . . ., and the amount of [the] contribution will never exceed the amount of the increment."). Moreover, the Legislature already has made the policy decisions about which taxing authorities should contribute to redevelopment. *See* § 163.387(2)(c), Fla. Stat. (2006).

III. THE TRIAL COURT APPLIED THE CORRECT STANDARD FOR DETERMINING THE EXISTENCE OF BLIGHTED AREA CONDITIONS

As required by the Redevelopment Act, the City made a determination that blighted area conditions exist in the Redevelopment Area. The City and Agency do not dispute that the requirements contained in section 163.340(8), Florida Statutes (2006), were heightened in 2002 to require that the area contain (1) "a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property" and (2) two or more circumstances or conditions from a list of fourteen factors. § 163.340(8), Fla. Stat. (2006). It is this version of section 163.340(8) that the City utilized to determine that the Redevelopment Area was appropriate for community redevelopment. Likewise, it is based on this version of section 163.340(8) that the trial court held that the City Council had competent, substantial evidence to support its findings.[20] The County

[20]The County filed a declaratory action under chapter 86, Florida Statutes (2006), prior to the City and Agency filing the validation proceeding, each calling

has asked this Court to sit as the trier of fact, but that it reweigh only a portion of the evidence presented to the City Council and the trial court. This Court can not place itself in that position. The role of this Court is to uphold the trial court's findings unless not supported by ***any*** competent, substantial evidence. As detailed below, such a finding would be impossible for this Court to make.

A. The Trial Court Correctly Found that there was Competent Substantial Evidence to Support the City Council's Determination of Blighted Area Conditions

The City Council acted in a legislative capacity when it made its findings of the existence of blighted area conditions in the Redevelopment Area. *See JFR Inv. v. Delray Beach Cmty. Redev. Agency*, 652 So. 2d 1261, 1262 (Fla. 4th DCA 1995). These findings were rightfully presumed correct. In reviewing the County's challenge below, the trial court upheld them as supported by competent, substantial evidence in the record. *Panama City Beach Cmty. Redev. Agency v.*

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for a competing standard of review. (AI-tab 1; 2). The declaratory action was abated, but as the trial court stated in the Final Judgment,

> [I]n this instance, the Court was able to consider all the evidence presented within the scope of judicial review advanced by the parties for both Chapter 75 and Chapter 86 proceedings and determine that competent substantial evidence under either scope of review supported the City's determinations. Accordingly, in this matter, the Court was able to consider the merits of the issues raised in the County's declaratory action, both factual and legal, after all parties had a full opportunity to present evidence in support of their respective positions.

(AI-tab 1; 4-5).

State, 831 So. 2d 662, 667 (Fla. 2002) (hereinafter *Panama City Beach CRA*). Competent, substantial evidence is "such relevant evidence, as a reasonable mind would accept as adequate to support a conclusion." *Verizon Fla., Inc. v. Jabar*, 889 So. 2d 712, 714 n. 1 (Fla. 2004) (*citing DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957)). Even if reasonable persons could differ as to whether the facts supporting this legislative finding in fact do so, the findings of the City officials must be upheld. *See City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992); *City of Winter Springs v. State*, 776 So. 2d 255, 261 (Fla. 2001) ("a mere disagreement of experts . . . is legally inconsequential"); *Rosche v. City of Hollywood*, 55 So. 2d 909 (Fla. 1952). The trial court correctly applied this standard.

The relevant record is the one before the elected officials when they adopted the ordinances and resolutions creating the Redevelopment Agency, Redevelopment Area, and Redevelopment Plan. *Batmasian v. Boca Raton Cmty. Redev. Agency*, 580 So. 2d 199, 201 (Fla. 4th DCA 1991). Record evidence includes information presented to the city council members as well as their own knowledge. *Panama City Beach CRA*, 831 So. 2d at 669. A city may adopt a resolution finding blight with "a minimum of formality and evidence" because a city's elected officials are presumed to be "knowledgeable about the conditions in their city." *Miami Beach*, 392 So. 2d at 882; *see also Rianhard v. Port of Palm*

Beach Dist., 186 So. 2d 503 (Fla. 1966) ("introduction of supporting resolution in evidence is all that was necessary to justify validation").

The information and record before the City Council consisted of (1) the Findings of Necessity Study, (2) a presentation by Herbert Halback, Inc. ("HHI"), (3) citizen comments, and (4) each Council member's own knowledge of the Area. The County chose not to attend the noticed public hearings and provided competing evidence only at the validation hearing, specifically that of its expert Dr. Fishkind. (AI-tab 2; 107-62). The trial court took the competing testimony and record evidence into consideration and found that the decisions of the City were based on competent substantial evidence. (AI-tab 1; 10); (AI-tab 19; 6-10). The trial court took the extraordinary step to see the Redevelopment Area in person, not as a basis for judgment but to put the evidence in context. This Court must uphold this finding.

1. Competent Substantial Evidence Supports the First Prong Required to Find the Redevelopment Area Contained Blighted Area Conditions

For an area to contain blighted area conditions, it must contain "a substantial number of deteriorated or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property." §163.340(8), Fla. Stat. (2006). By inclusion of the term "structures," which has been broadly defined by the courts, this prong naturally encompasses characteristics of the Redevelopment Area — that support

the second prong. Inclusion of similar characteristics in the first and second prong of the blighted area definition does not cancel out the City Council's findings as County alleges but bolsters the substantial nature of the blighted area conditions throughout this area of the community. There are only a finite set of physical characteristics within the Area – it is their characterization in the first and second prong that differs. *Fulmore*, 928 So. 2d at 1288.[21]

The evidence supports the finding that the Redevelopment Area contains a substantial number of deteriorated or deteriorating structures. The trial court made a factual finding that this requirement was met solely based on competing testimony and documentary evidence as the Redevelopment Act does not define nor quantify this requirement.[22] The courts have assisted in defining the term "structures" to mean more than just buildings and encompass infrastructure and

[21]In *Fulmore*, the court dealt with an analogous argument when defining "structures" in the first prong to include infrastructure, specifically roads because roadways are included in the second prong of Section 163.340(8), "predominance of defective or inadequate . . . roadways." The landowners argued that "structures" was not meant to refer to roads. The court in *Fulmore* disagreed because the specified condition of "structures" is different from the specified condition of "roadways." In other words, "while roads and roadways are synonymous, a substantial number of deteriorated or deteriorating roads is a different concept than a predominance of defective or inadequate roadways." *Fulmore*, 928 So. 2d at 1288.

[22]Dr. Fishkind spent only three hours touring portions of the Redevelopment Area before making his conclusions. (A-tab 2; 143-44). By contrast, Ms. Corless and her team spent over one hundred man-hours in the field driving every street and back alley, in addition to time spent conducting the required analysis, public workshops and public meetings. (AI-tab 2; 173).

roads, to which the County agrees.[23] *Id*. (AB; 32). The courts have not, however, assisted in defining the term "substantial" and there is not agreement among the parties or the experts on how to quantify this requirement. *Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000) ("In the absence of a statutory definition, words of common usage are construed in their plain and ordinary sense . . . . [,which] can be ascertained by reference to a dictionary."). The term "substantial" is defined as "not illusory or considerable." Merriam-Webster Dictionary 490 (11th ed. 2005).

The County argues that because HHI concluded that the Redevelopment Area contained functional deterioration, the finding was somehow invalid. As Ms. Corless testified, her team looked at *both* physical and functional deterioration. (AI-tab 2; 199-210). The term functional deterioration was included in the Findings of Necessity Study, but as is readily evident from that study, many types of physical deterioration were discussed and illustrated. (AI-tab 5; 34-38).

The Findings of Necessity Study further found that the deteriorated or deteriorating structures were substantial in number. As Ms. Corless testified,

[23]The County agreed in argument (AI-tab 2; 220), but interestingly, Dr. Fishkind testified that he does not consider a roadway a structure. (AI-tab 2; 152). He further testified that "it's hard not to look at all [the streets, sidewalks, and signs] of them" so his analysis would have been the same if they were counted. (AI-tab 2; 153). This testimony directly contradicts his testimony that all structures must be counted in order to determine the substantial nature of deterioration. Further, his testimony was based on the number of parcels and not on the number of structures thereby illustrating the County's continued misunderstanding of this factor. (AI-tab 2; 127-28).

substantial could be "more so than not," which is more than fifty percent. (AI-tab 2; 198). The County provided contradictory testimony, illustrating that a different result could have been reached and that the requirement necessitates that every structure somehow be counted. (AI-tab 2; 127). This approach is practically impossible. The trial court did not find the City was required to count the structures to find substantial deterioration. (AI-tab 1; 6-8). As defined above, competent, substantial evidence recognizes that reasonable persons may differ in a conclusion but does not allow mere disagreement to overturn a finding under this standard. (AI-tab 1; 6-7, 9-10).

The County attempts to focus this Court solely on the Findings of Necessity Study and the competing expert testimony. The trial court did not ignore the additional support provided to the City Council and neither should this Court. (AI-tab 1; 8). For example, the Findings of Necessity Study lists government-maintained statistics, other sources and data references, and expressly indicates that the consultant team reviewed and relied upon them in preparing the report. These additional studies include the Historic Properties Survey, Crime and EMS Analysis, the City of Parker Utilities Determination, Real Estate Development and Investment Activity, Windshield Survey of the Study Area, numerous meetings with City officials, and the Code Enforcement Activity Synopsis. (AI-tab 5; 57). The City Council additionally held public hearings and despite multiple

opportunities, there was public comment but no contradictory evidence presented at the required public hearings before the City Council made its legislative determinations.[24] (AI-tab 7); (AI-tab 10). HHI made a presentation as to the existence of a substantial number of deteriorated or deteriorating structures during the public hearing process.[25] (AI-tab 7).

Finally, the findings are self-evident to the elected officials of the City, who are presumed by law to be knowledgeable about the conditions of their City. In this regard, the County fails to take into account this important evidence. The City Council is not limited to the evidence presented to them. *See Miami Beach*, 392 So. 2d at 882. As was pointed out in the Initial Brief, two members of the City Council were former City police chiefs (two of the three chiefs in the City's entire history) and therefore, had extraordinary knowledge of conditions endangering life and property highlighted in the Findings of Necessity Study. (IB; 6).

The second part of the first prong is also supported by competent, substantial evidence, specifically that the conditions described above lead "to economic

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[24]Despite receiving mailed notice on two different occasions of public hearings pursuant to section 163.346, Florida Statutes, and apparent consideration of the issues at hand by its counsel and expert economist "sometime in 2006," neither the County, its counsel nor its experts appeared at the hearings or offered any evidence to contradict the information presented to the City Council concerning the now challenged community redevelopment determinations. (AIII-tab 1; 18-19).

[25]HHI held public workshops that were well attended, educational and meant to solicit citizen input. (AI-tab 2; 175-77).

distress or endanger life or property." § 163.340(8), Fla. Stat. (2006). Although the Redevelopment Act requires only that such conditions are leading to ***either*** economic distress ***or*** endangerment of life or property, the study confirmed that both consequences were evident. Part of the consulting team, Real Estate Research Consultants ("RERC"), conducted an analysis of real estate development and investment activity in the Redevelopment Area and, as part of the Findings of Necessity Study, found that the growth in specified markets is lower than that in the surrounding communities including the County, specifically for assessed values, (AI-tab 5; 41), sales transactions, (AI-tab 5; 43), and rental rates, (AI-tab 5; 49).[26]

The County presented opposing testimony by Dr. Fishkind only at the subsequent validation hearing, where he testified that of the 1,016 parcels in the Redevelopment Area, "less than twenty-five properties" would be considered deteriorated, "which would be less than three percent of the total that was in the

[26]The Findings of Necessity Study also evidences concern over detection of petroleum in private wells (AI-tab 5; 53), a large groundwater contamination plume (AI-tab 5; 53), auto repair businesses in residential neighborhoods (AI-tab 5; 54), general property deterioration (AI-tab 5; 54), accidents involving pedestrians due to lack of pedestrian infrastructure, (AI-tab 5; 54), stormwater and wastewater deficiencies, (AI-tab 5; 54), potential water quality issues (AI-tab 5; 54), high crime rate (AI-tab 5; 55), incompatible land uses (AI-tab 5; 54), and infrastructure deficiencies (AI-tab 5; 54).

sample that I took." (AI-tab 2; 127-29).[27] After listening to this testimony and participating in a view, the trial court found that "the record amply demonstrated, and the view confirmed, deteriorated and deteriorating structures and buildings, *which are indicia of blighted area conditions, were prevalent throughout both the northern and southern portions of the redevelopment area*." (AI-tab 1; 9) (emphasis added). The trial court heard the testimony of Dr. Fishkind and, as stated in the final judgment, gave it the appropriate weight.

2. Competent Substantial Evidence Supports the Second Prong Required to Find the Redevelopment Area Contained Blighted Area Conditions

The Redevelopment Act next requires that two or more of the other fourteen factors listed in section 163.340(8) also support a determination of blighted area conditions. Through Resolution No. 06-254, the City Council made a legislative determination that this requirement was met. The Findings of Necessity Study specifically identified the presence of nine of these factors in the Redevelopment Area.

The County argues that the City Council wrongly used the physical characteristics that evidence the nine criteria from the second prong to find support for the first prong. The County simply attempts to rewrite the City Council's

[27]Dr. Fishkind did not look at all parcels or, by implication, all structures in the area. (AIII-tab 1; 37). Ms. Corless testified that she disagreed with this number. (AI-tab 2; 177-78). Further, there is nothing in the Act requiring a county or municipality to count the number of structures.

resolution, which the trial court found to be supported by competent, substantial evidence. The trial court stated:

> The evidence presented in this matter supports the correctly articulated City Council findings that (1) there were a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, were leading to economic distress or endanger life or property within the community redevelopment area, and (2) nine of the other fourteen factors in the statutory definition were supported by the evidence before the council members.

(AI-tab 1; 8).

The trial court already rejected this same argument after reviewing the entire record and all the testimony, finding to the contrary that competent, substantial evidence supported the City Council's finding that nine of the fourteen criteria were met. At the validation hearing, the County focused on the City's alleged "bootstrapping" and did not provide disproving evidence or testimony, again failing to prove lack of competent substantial evidence to support this finding. (AI-tab 2). Additionally, the County's own expert testified in his deposition that he would not dispute that the required two factors were met. (AIII-tab 1; 29, 44). The mere fact that some physical characteristics and evidence supports both the first and second prong does not negate the finding. *See Fulmore*, 928 So. 2d at 1288.[28]

[28] *See supra* note 21.

In summary, the Findings of Necessity Study provided the City Council with a comprehensive discussion of nine factors from section 163.340(8) that physical characteristics of the Area met. (AI-tab 5).[29] The trial court agreed that there was competent substantial evidence upon which the City made its legislative finding of the existence of blighted area conditions. (AI-tab 1; 6-10).[30] The County does not argue that this finding of fact was not supported by competent substantial analysis; only the legal analysis applied thereto was faulty. As discussed in detail above, in the Findings of Necessity Study, and in other record evidence (AI-tab 19; 5-18),

[29]Despite the County's unsuccessful attempt to confuse Ms. Corless, she testified extensively on the differences between what is taken into consideration to find the deterioration of site and other improvements factor under the second prong and evidence of deteriorated or deteriorating structures under the first prong. (AI-tab 2; 204-08).

[30]The trial court upheld the City's finding that the second prong was met, specifically that the following factors are present within the Area: predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities (AI-tab 5; 53), (AI-tab 19; 11-12); faulty lot layout in relation to size, adequacy, accessibility, or usefulness (AI-tab 5; 53), (AI-tab 19; 12); unsanitary or unsafe conditions (AI-tab 5; 53-54), (AI-tab 19; 13); deterioration of site or other improvements (AI-tab 5; 54), (AI-tab 19; 14-15); inadequate and outdated building density patterns (AI-tab 5; 54), (AI-tab 19; 15); incidence of crime in the area higher than in the remainder of the county or municipality (AI-tab 5; 55), (AI-tab 19; 16-17); fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality (AI-tab 5; 55), (AI-tab 19; 16-17); a greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality (AI-tab 5; 55), (AI-tab 19; 17); and governmentally owned property with adverse environmental conditions caused by a public or private entity (AI-tab 5; 55-56), (AI-tab 19; 18).

the City did not apply the legal standard in error, this Court should therefore uphold the trial court's finding. (AB; 27-34).

B. The Trial Court, not This Court, was Charged with Resolving Evidentiary Conflicts

The competent, substantial evidence contained within the Findings of Necessity Study, the HHI presentation, the citizen comments, and the City Council members' own knowledge supports the City Council's legislative determination that the Redevelopment Area contains "a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property." § 163.340(8), Fla. Stat. (2006).

The County hired an expert to later second guess the City's determination of blight. The County's expert, Dr. Fishkind, testified that he would have reached different conclusions than those reached by the City Council and its experts, Ms. Corless and Mr. Kohler. It is not necessary, however, to address whether Dr. Fishkind's testimony would have been sufficient to demonstrate that the City Council's determination was arbitrary. The trial court, as the trier of fact, either found his testimony not credible or insufficient to meet the County's high burden of showing that the legislative determination was arbitrary. In either case, resolving conflicts in the evidence and drawing inferences from the evidence was a matter for the trial court.

Further, the trial court had the benefit of a view. *See Dempsey-Vanderbilt Hotel, Inc. v. Huisman*, 15 So. 2d 903 (Fla. 1944). The trial court, without objection from either party, conducted a view of the Redevelopment Area after all parties closed their respective cases. As stated in the Final Judgment, "[a]fter the review of the evidence and conducting the view in this matter it has become obvious that, the Court cannot determine that the City Council's decision concerning blighted area conditions was patently erroneous, arbitrary, or capricious." (AI-tab 1; 8).

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT THE REDEVELOPMENT PLAN CONFORMS TO THE COMPREHENSIVE PLAN; THE TRIAL COURT APPLIED THE CORRECT LAW AND THE TRIAL COURT'S DETERMINATION MUST BE UPHELD

The County disputes the trial court's finding that the Redevelopment Plan conforms to the City of Parker Comprehensive Plan ("Comprehensive Plan") thus meeting the requirements of section 163.360(2)(a), Florida Statutes (2006). This finding of conformity was a legislative determination of three governmental entities: the Planning Commission of the City of Parker ("Planning Commission"), the Agency and the City Council, a fact which the County does not dispute. (AI-tab 8); (AI-tab 11); (AI-tab 12). The trial court was thoroughly briefed on this issue, heard testimony from two experts, weighed the experts' testimony and credibility, and found in favor of the City and Agency. The County attempts to persuade this Court to not only substitute its judgment for the trial court's on the

facts, but also to make new law requiring all local community redevelopment plans be adopted into the local comprehensive plan as a prerequisite for approval.

The lynchpin of the County's argument is a plea to require that the redevelopment plan must be "consistent" with the comprehensive plan. However, the term "consistent" is a term of art used in the Local Government Comprehensive Planning and Land Development Regulation Act ("Growth Management Act"), chapter 163, part II, Florida Statutes, which should not be imputed to the statutory requirement in the Redevelopment Act for "conformity." The County admittedly offers no statutory or case law support for this argument, and the trial court's findings should be upheld.

A. The Trial Court Correctly Determined that the Redevelopment Plan Conforms to the Comprehensive Plan.

A community redevelopment plan is required to *conform* with the comprehensive plan. § 163.360(2)(a), Fla. Stat. (2006). Section 163.360(4) dictates that the City's review of the redevelopment plan for conformity take into account the recommendations of the local planning agency. Section 163.360(7)(b) requires that, following a public hearing, a municipality "may approve the community redevelopment and the plan therefor [sic] if it finds that . . . [t]he community redevelopment plan *conforms* to the general plan of the county or municipality as a whole." The City and Agency followed all three statutory requirements, a fact that the County does not dispute. What the County does

argue, however, is that the trial court's holding that agreed with these findings was not supported by competent substantial evidence and that the trial court applied the wrong standard. We will answer each allegation in turn.

1. The Trial Court's Finding of Conformity is Supported by Competent, Substantial Evidence

The trial court's decision to hold that the Redevelopment Plan was in conformity with the Comprehensive Plan is a decision of fact which required the court to weigh evidence and witness credibility. Under the applicable standard of review, the burden is on the County to show a complete absence of competent substantial evidence, a burden the County did not meet.

In its Cross-Appeal, the County argues that the Redevelopment Plan does not conform to the City's Comprehensive Plan citing only the opinions of its expert, Elliott Kampert. However, the court also heard the expert testimony of Ms. Corless, the City's expert. (AI-tab 2; 182). Any conflict between the testimony of the two experts was within the purview of the trial court to reconcile.

Further, record evidence supported the trial court's finding that the Redevelopment Plan conforms to the Comprehensive Plan. The evidence before the trial court included a litany of existing Comprehensive Plan policies addressed by the Redevelopment Plan. (AI-tab 11; 40-47).

2. Applicable Law Does Not Require the Redevelopment Plan to Be Incorporated into the Comprehensive Plan

Despite overwhelming evidence that the Redevelopment Plan conforms to the City's Comprehensive Plan for development as a whole, the County maintains that the two are not in conformity because the Comprehensive Plan has not been amended to incorporate the Redevelopment Plan. However, neither the Growth Management Act nor the Community Redevelopment Act requires such incorporation. There is no case law or administrative order supporting such an interpretation of the Redevelopment Act.[31] Further, the plain language of the Growth Management Act makes adoption of the Redevelopment Plan within the Comprehensive Plan a local government option. The Growth Management Act lists the elements that *may be included* at the *option* of the local government. The statute states, in pertinent part:

> (7) The comprehensive plan *may include* the following additional elements, or portions or phases thereof:
>
> . . .
>
> (g) *A general area redevelopment element* consisting of plans and programs for the redevelopment of slums and blighted locations in the area and for community redevelopment, including housing sites, businesses and industrial sites, public building sites, recreational facilities, and other purposes authorized by law.

[31]The City has found only support to the contrary. *See Eloise Cmty. Redev. Agency v. Polk County*, 27 F.A.L.R. 3812, 3821 (AC 2005) (finding that a comprehensive plan amendment may not be held to be inconsistent with the jurisdiction's redevelopment plan where the redevelopment plan was never adopted as part of the local government's comprehensive plan).

§ 163.3177(7)(g), Fla. Stat. (2006) (emphasis added).

Finally, the Redevelopment Plan is an aspirational plan which hinges on the generation of sufficient revenues to accomplish the envisioned revitalization. The Redevelopment Plan itself recognizes that the incremental revenue identified may never be generated. (AI-tab 11; Ex A, 1). The Comprehensive Plan is a document of more force and effect, guiding all ordinances and development orders after its adoption. If the Legislature meant to give the Redevelopment Plan the same authority, it would have done so. Instead, the Legislature required conformity and made it optional as an element of the Comprehensive Plan. *See Eloise Cmty. Redev. Agency v.* Polk *County*, 27 F.A.L.R. 3812, 3821 (AC 2005).

3. The Redevelopment Plan Is Supported by Data and Analysis

Finally, the County argues that the Redevelopment Plan does not conform to the data and analysis which underpin the Comprehensive Plan. (AB; 35). The County's argument should be rejected because, first, the conformity requirement is to the Comprehensive Plan itself and, second, it is contrary to the evidence presented. While Mr. Kampert testified that the data and analysis briefly mentioned that there were few areas in need of redevelopment, the County glossed over the full data and analysis provision. The complete paragraph provides that:

> There are *few* areas within the City that show signs of deterioration and might be in need of redevelopment. The latest Census showed no substandard housing units within the City. During the next planning period, the City will monitor for areas that *may become in need of redevelopment in the future*. Redevelopment programs and funding

> should be explored *and a plan established to address the City's redevelopment needs* should they occur during the next planning period.

(AII-tab 5; 1-7) (emphasis added). The plain language of the City's Comprehensive Plan data and analysis recognizes the need to establish a redevelopment plan.

Additionally, to accept that argument would be contrary to the dynamic nature of comprehensive planning. The Growth Management Act provides that "[t]he planning program shall be a continuous and ongoing process." § 163.3191(1), Fla. Stat. (2006). To that end, the Act requires each local government to undertake an evaluation and appraisal of its comprehensive plan every seven (7) years. *Id*. The local government is required to amend its comprehensive plan based upon the evaluation and appraisal process to update its plan based upon new data collected and analysis performed. *See* § 163.3191(10), Fla. Stat. (2006). To argue that the City cannot implement a redevelopment plan in 2007 because data collected and analyzed in 1999 did not evidence areas in need of redevelopment is preposterous, in addition to being contrary to statute.

B. The Trial Court Applied the Correct Law

The County asserts that the trial court committed reversible error in holding that the Redevelopment Plan was not required to be "consistent" with, but rather conform to, the City's Comprehensive Plan. (AB; 36). The County cites to one section of the Growth Management Act utilizing the word "conformity" to support

its claim that the terms "consistency" and "conformity" are used interchangeably in the Act; thereby concluding that there is no difference between the terms. (AB; 36-37). However, the County's argument misses the point: it is the interpretation of the Redevelopment Act, not the Growth Management Act, which was, and is, at issue.

Contrary to the County's unsupported arguments, there is an important legal distinction between "conformity," required by the Redevelopment Act, and "consistency," required by the Growth Management Act. The Redevelopment Act utilizes the term "conformity," but does not define the term. As recognized by the Court in *Sieniarecki* "[i]n the absence of a statutory definition, words of common usage are construed in their plain and ordinary sense. If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary." 756 So. 2d at 75 (internal citations omitted). The term "conformity" is defined as harmony or agreement. Merriam-Webster Dictionary 104 (11th ed. 2005). Therefore, the Redevelopment Plan must agree or be in harmony with the City's Comprehensive Plan for development as a whole, rather than consistent with the Comprehensive Plan.

In contrast, the Growth Management Act requires local comprehensive plans to be consistent with the state comprehensive plan and the applicable regional

policy plan. *See* § 163.3177(9)(c), Fla. Stat. (2006). *For those purposes only*, the Legislature has defined "consistency" as follows:

> Therefore, *for the purpose of determining whether local comprehensive plans are consistent with the state comprehensive plan and the appropriate regional policy plan*, a local comprehensive plan shall be consistent with such plans if the local plan is "compatible with" and "furthers" such plans. The term "compatible with" means that the local plan is not in conflict with the state comprehensive plan or appropriate regional policy plan. The term 'furthers' means to take action in the direction of realizing goals or policies of the state or regional policy plan.

§ 163.3177(10)(a), Fla. Stat. (2006). The "consistency" requirement is particular to the Growth Management Act, and is not referenced in the Redevelopment Act. It is a well settled rule of statutory construction that the Legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended. *See Beshore v. Dept. of Fin. Servs.*, 928 So. 2d 411 (Fla. 1st DCA 2006); *State v. Cyphers*, 873 So. 2d 471 (Fla. 2d DCA 2004). In reviewing a redevelopment plan, the Legislature chose to use a different term, "conformity" rather than "consistency." *See* § 163.360(4), Fla. Stat. (2006). Therefore, the statutory definition of consistency, as well as case law construing that term, are inapplicable to the review of a redevelopment plan. The County's reliance upon *Dixon v. City of Jacksonville*, 774 So. 2d 763 (Fla. 1st DCA 2000) is misplaced.

The County dismisses as irrelevant the City's reminders that the Redevelopment Plan is not a development order which actually authorizes development. (AB; 38). To the contrary, there is an important legal distinction between a redevelopment plan and a development order. The Redevelopment Plan does not in itself authorize any development to take place within the designated redevelopment area.[32] A redevelopment plan is a *plan* for community redevelopment of the specific area defined and established as a redevelopment area. *See* § 163.340(11), Fla. Stat. (2006). Any and all development orders issued to *implement* the Redevelopment Plan must be consistent with the Comprehensive Plan. *See* § 163.3215(1), Fla. Stat. (2006). If, as in *Dixon*, one of those development orders is inconsistent with the Comprehensive Plan, it may be overturned under section 163.3215, Florida Statutes.

The County attempts to bolster its arguments by alleging that it has lost administrative remedies to challenge the Redevelopment Plan. (AB; 39). However, the Growth Management Act ensures points of entry for parties such as the County to challenge all new land development regulations under section 163.3213, Florida Statutes (2006), and all development orders under section

[32] "Development order" is defined as "any order granting, denying, or granting with conditions an application for development permit." § 163.3164(7), Fla. Stat. (2006). A "development permit" is defined as an official action of local government having the effect of permitting the development of land. *See* § 163.3164(8), Fla. Stat. (2006).

163.3215, Florida Statutes (2006). Adoption of a redevelopment plan does not abrogate the rights of "substantially affected persons" to challenge the local government redevelopment decisions implementing the redevelopment plan. The County's challenge is, therefore, simply premature.

CONCLUSION

The trial court denied the requested validation solely because the City does not levy ad valorem taxes. This fact is undisputed. It is the misplaced legal conclusion drawn from this fact that the City and Agency now appeal. The trial court's findings in favor of the City and Agency related to its blight and conformity findings are supported by competent substantial evidence; thus, this Court should affirm these findings. With regard to the referendum requirement, under the Court's bright-line principle no referendum is required where prospective bondholders lack the power to compel, directly or indirectly, an entity with taxing powers to levy ad valorem taxation. Tax increment financing under the Redevelopment Act is constitutional. The Court should reverse the ruling in *Strand.* To the extent the Court only limits *Strand*, the Court must ensure that its limiting principle does not inadvertently impact other long-standing areas of the law (like the distinction between revenue bonds and general obligation bonds). The limiting principle might be that, when a government pledges the tax increment for bonds, a referendum is required if the government body is at once the issuer,

the entity that levies the tax, and the entity that holds the trust fund. For the foregoing reasons, the portion of the Final Judgment refusing to validate the Bonds should be reversed, the remaining findings upheld and the Bonds and all matters associated therewith should be validated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and attached appendix has been furnished by United Parcel Service to **William A. Lewis**, Chief Assistant State Attorney, 421 Magnolia Avenue**,** Panama City, Florida 32401**, Terrell K. Arline**, Bay County Attorney, 810 W. 11th Street, Panama City, Florida 32401, **Douglas J. Sale and Kevin D. Obos,** Florida Redevelopment Association, Inc., Harrison Sale McCloy Thompson Duncan & Jackson, Chartered., 304 Magnolia Avenue, Panama City, Florida 32402, and **David E. Cardwell,** Florida Redevelopment Association, Inc. The Cardwell Law Firm, 7380 Sand Lake Road, Ste. 500, Orlando, Florida 32819, this ___ day of November 2007.

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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that the font size and style in the Appellants/Cross-Appellees' Amended Reply Brief and Answer Brief on Cross-Appeal is 14 Times New Roman in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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