IN THE SUPREME COURT OF FLORIDA

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

Appellants,
Cross-Appellees,

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

STATE OF FLORIDA, et al,

Appellees,
Cross-Appellees,

And

BAY COUNTY,

Appellee,
Cross-Appellant.

ANSWER BRIEF AND CROSS APPEAL BRIEF OF BAY COUNTY, FLORIDA

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PRELIMINARY STATEMENT

This is an appeal of a Final Judgment denying the validation of $40,995,891.00 in bonds by the City of Parker ("City") for a Community Redevelopment Area proposed to be issued pursuant to Chapter 163, Part III, Florida Statutes, the Community Redevelopment Act (the Act). Bay County ("County") intervened in the bond validation proceeding. The County claimed that the City's ordinances and resolutions, as well as certain provisions of the Act, which authorize the use of Tax Increment Financing, were unconstitutional and violated the referendum requirement set forth in Article VII, Section 12, of the Florida Constitution. The County also challenged the ability of the City to issue bonds financed by Tax Increment Financing (TIF) under the Act, because the City does not levy ad valorem taxes. The County claimed there was no evidence that the CRA Plan conformed to the City's Comprehensive Plan as required by Section 163.360(2)(a), Fla. Stat. (2006). Finally, the County alleged that the City misapplied the provisions governing the finding of blight set forth in Section 163.340(8), Fla. Stat. (2006).

On June 26, 2007, Judge Dedee S. Costello, entered a final judgment refusing to validate the bonds based on her conclusion that the City must levy an ad valorem tax on its own residents before it may enjoy the benefits of TIF under the Act. Parker appeals this ruling.

The trial judge relied on this Court's opinion in State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980), to reject Bay County's claim that tax increment financing was unconstitutional when not preceded by a vote of the electors. The trial judge concluded that the CRA Plan conformed to the Comprehensive Plan, and she accepted as sufficient the City's finding of "blight". Bay County cross-appeals these issues and respectfully asks this Court to recede from its 1980 decision in Miami Beach.

The Appendix submitted by the City with its Initial Brief contains most of the record below, including the transcript, ordinances, resolutions, etc. To reduce the size of the Court's file, Bay County will refer to the City's Appendix as "City App. " followed by the exhibit and page number. The Transcript contained in the City's Appendix will be referred to as (TR. Page x, line y). An Appendix has been filed with the County's brief to include items in the record that were not in the City's Appendix. This Appendix will be referred to as "County App." followed by the exhibit and page number.

There are two other cases involving similar issues pending in this Court. See, Bay County v. Town of Cedar Grove, Cedar Grove Community Redevelopment Agency, and State of Florida, SC07-1572 and SC07-1574.

STATEMENT OF JURISDICTION

The County agrees with the City's Statement of Jurisdiction. It would note that this Court also has jurisdiction to hear the County's cross appeal pursuant to 9.110(g), Fla. R. App. P. Bay County submits a copy of its Notice of Cross Appeal, filed August 1, 2007, (County App. Ex. 1), and a letter from the Clerk of the 14th Judicial Circuit to the Clerk of the Supreme Court dated August 9, 2007, transmitting the County's Notice of Cross Appeal. (County App. Ex. 2).

STATEMENT OF CASE AND FACTS.

The County initiated the litigation below by filing a Complaint for Declaratory and Injunctive Relief. (County App. Ex. 3). The trial court subsequently accepted this pleading as the County's defenses to the bond validation complaint. In its brief, the City mentions in passing that "the trial court allowed the County to further amend its answer upon motion". (Initial Brief at 10). In fact, upon becoming aware of the issues presented to this Court in the pending case Strand v. Escambia County, SC06-1894, and having reviewed on-line the oral arguments in that case, the undersigned moved to amend the County's complaint to raise the addition claim that the TIF scheme involved in this bond validation case violated Article VII, Section 12, Florida Constitution. The bonds issued by Parker are supported by ad valorem taxes and there was no referendum approving the bonds. (County App. Exhibit 4). The motion was granted. (City App. Ex. 27).

The County agrees with the City's chronological presentment of the various resolutions, ordinances and the interlocal agreement. While the documents speak for themselves, given the County's constitutional claim it is important to take a closer look at some of the pertinent provisions of these documents. The point of this exercise will be to demonstrate that the City set out to establish Tax Increment Financing (TIF) as a way to fund the redevelopment programs set forth in the CRA Plan through the issuance of bonds. More to the point, it can be seen from these documents that the TIF scheme essentially requires the County to transfer ad valorem revenues to the City to support the bonds. There is no dispute that there was not a referendum by the voters to approve the issuance of the CRA bonds.

Bay County will then examine the record and the transcript to demonstrate first, that the City does not levy ad valorem taxes; a point which is not in dispute. Second, to shore up the County's claim that the City misapplied the criteria for a finding of blight under Section 163.340(8), Fla. Stat. (2006). Third, to show that there was no competent substantial evidence to support the Court's conclusion that the CRA Plan conforms with the County's Comprehensive Plan as required by Section 163.360(2)(a), Fla. Stat. (2006).

Tax Increment Financing (TIF) without a referendum. The City of Parker Community Redevelopment Plan (CRA Plan), which was adopted by Resolution 06-01, claims that "*Among the most powerful tools associated with Part III,*

Section 163, F.S. (2006) is the availability of tax increment financing to support a wide range of redevelopment initiatives". (City App. Exhibit 11, page 31). The CRA Plan states that the "*estimated tax increment collected ranges from $40,328,023 to $86,939,97 at the end of 40 years, depending on the scenario*". (Id at 32).

As noted by Ordinance No. 06-312, which created the "Redevelopment Trust Fund", the "*Fund shall be used to finance "community redevelopment" within the Area [CRA Area] according to tax increment revenues attributed to the Area, which shall be appropriated by the Agency [CRA Agency]".* (City App. Ex. 13, page 3). Section 4 of this Ordinance states as follows:

> *Section 4. There shall be paid into the Fund each year by each of the "taxing authorities", as that term is defined in Section 163.340(24), Florida Statutes (2006) except for those special district exempted from such requirement, levying ad valorem taxes within the Community Redevelopment Area, a sum equal to ninety-five percent (95%) of the incremental increase in ad valorem taxes levied each year by that taxing authority, as calculated in accordance with Section 6 of this Ordinance and the Act, based on the base year established in Section 4 of this Ordinance (such annual sum being hereinafter referred to as the "tax increment").* (Id)

Notably, the Ordinance creating the CRA Trust refers to the "*assessment roll . . . prepared by the Property Appraiser of Bay County, Florida and certified pursuant to Section 193.122, Florida Statutes (2006)",* to determine the "*base year*" and the amount of the "*tax increment*" to be paid by the County to the City. (Id). This provision of the Ordinance mirrors the statutory authority for the City to

use Tax Increment Financing without a referendum contained in Section 163.387, Fla. Stat. (2006).

Finally, the CRA Trust Fund Ordinance, which is used to funnel the tax increment revenues to the bonds, states in part:

> *Section 7. All taxing authorities shall annually appropriate to and cause to be deposited in the Fund the tax increment determined pursuant to the Act and section 6 of this Ordinance at the beginning of each fiscal year thereby as provided by the Act.* (Id at 4)

Bay County is a "*taxing authority*" by definition, and must pay its "*tax increment*" into the Trust Fund. Notably, the Ordinance tracts the statutory obligation for Bay County to pay into the CRA Trust fund set forth in Section 163.387(2)(a), Fla. Stat. (2006).

The CRA Trust fund supports the bonds. Joint Resolution 07-256(City)/Resolution No. 07-02(Agency) obligates the City and the CRA Agency, which by the way is comprised of the City Council, to utilize the "f*unds in the Trust Fund for the payment of the principal, interest and redemption premiums, if any on the Bonds.*" (City App. Ex. 14, page 1). The Joint Resolution states that the CRA Agency "*transfers to the City amounts on deposit in the Trust Fund sufficient to pay the debt services on the Bonds as it becomes due"*. (Id)

The Interlocal Agreement between the City and the CRA Agency establishes the CRA Agency as the TIF enforcer with the City as its backup. The Interlocal Agreement recorded at OR BK 2899 Page 199, at Section 4, B, states as follows:

> *The Agency is presently entitled to receive tax increment revenues to be deposited in the Trust Fund and has taken all action required by law to entitle it to receive such revenues, and the Agency will diligently enforce the obligation of any 'Taxing Authority" (as defined in Section 163.340(24), Florida Statutes) to appropriate its proportionate share of the tax increment revenues and will not take, or consent to or adversely permit, any action which will impair or adversely affect the obligation of each such Taxing Authority to appropriate its proportionate share of such revenues, impair or adversely affect in any manner the deposit of such revenues in the Trust Fund, or the pledge of such revenues hereby unless otherwise consented to in writing by the City and the Bond Insurer or the Credit Bank, if applicable. The Agency and the City shall be unconditionally and irrevocably obligated so long as the Bonds are outstanding, and until the payment in full by the Agency of its obligations to the City, to take all lawful action necessary or required on its part such that each Taxing Authority shall appropriate its proportionate share of the tax increment revenues as now or later required by law, and to make or cause to be made any deposits of tax increment revenues or other funds required by this Interlocal Agreement and Ordinance No. 06-312.* (Emphasis added)

(City App. Ex. 15 at 4). Finally, the Bond Ordinance, No. 07-313 states the "*Pledged Funds,*" which are used to satisfy the bonds, "*shall mean, initially, the Redevelopment Trust Fund Revenues. . .*" (City App. Ex. 16, page 9).

Parker does not tax. It is undisputed that the City of Parker does not impose an ad valorem tax. For this reason, if the TIF scheme went forward, Bay County would entirely fund the CRA. Dr. Henry Fishkind testified as an expert in economics, including redevelopment areas and blight. (TR. at Page 111, line 20). He reviewed the various resolutions, ordinances, plans and documents provided by the City, visited the site, and did his own analysis. Dr. Fishkind testified:

> "If the bonds are validated and actually issued, the effect will be to cause a transfer of funding from the citizens of Bay County to fund roadway and other improvements in the City of Parker. I think that County residents will get relatively little benefit, most of it almost exclusively will flow to those residents given how localized it is. So basically, the effect is to transfer property taxes and revenues making those requirements somewhat higher in the County than what would otherwise be the case" (TR. at Page 141, lines 10-19).

Dr. Fishkind verified that the City of Parker does not have an ad valorem tax. (TR. at Page 141, line 24.) He admitted that all of the County's other general governmental expenses, that would have normally been funded in part from County ad valorem tax collected within the CRA, will be borne by the residents of the incorporated areas and the other municipalities. (TR. at 142, line 2).

Incorrect application of criteria for blight. As regards the City's application of the criteria for blight, the testimony of the City's expert, Ms. Ginger Corless and Dr. Fishkind are in accord; the City determined that there were "*a substantial number of deteriorated or deteriorating structures*" without apparently ever counting them. (TR. Page 127, line 21-Page 128 at 12) Nowhere in the testimony of Ms. Corless or the various reports did the City ever quantify the number of deteriorating structures.

Dr. Fishkind, on the other hand, visited the places the City identified as blighted areas and actually counted the structures. He testified that the few deteriorating structures he counted could not be considered, from an economic point of view, to meet the statutory threshold of "*substantial*". (TR. Page 127 line

21-25, 128-134) He noted there were 1,016 parcels in the CRA. He said the CRA Study did not quantify what percent of these parcels contained deteriorating structures. (TR. Page 128, line 10-12). Based on his analysis, the number of "*deteriorating structures*" was not "*substantial.*" (TR. Page 119, line 20)

Also, Dr. Fishkind reviewed the reports prepared by Ms. Corless and the City's other consultants and found nothing there to support the statutory requirement that a "*substantial number of deteriorated, or deteriorating structures. . . <u>are leading to economic distress</u>*". Section 163.340(8), Fla. Stat. (2006). In fact, he pointed out that the City's own study indicates exactly the opposite. The City's report shows that 18.1 percent of the property in the CRA actually appreciated in value vs. 16.1 percent citywide. (TR 136 page 1-23). The City offered as proof that this statutory criteria was met, the mere conclusion that there was "*economic distress.*"

<u>The CRA Plan does not conform to the Comprehensive Plan</u>. The CRA plan is supposed to "*Conform to the comprehensive plan*" of the City of Parker. Section 163.360(2)(a), Fla. Stat. (2006). Elliot Kampert, AICP was accepted as the County's expert in comprehensive planning. He reviewed the CRA Plan, the City's Comprehensive Plan, and a recent plan amendment the City was processing. (TR. 38, line 23-25). Mr. Kampert's review of the existing Comprehensive Plan showed that nothing in the Plan discussed the creation of the Community

Redevelopment Area. (TR Pages 58-59.) The Comprehensive Plan's capital improvement element did not mention of the 40 plus million dollars worth of improvements proposed by the CRA Plan. (TR. Pages 59-61). Nothing in the Future Land Use Element mentioned the CRA. In fact, the data and analysis for the Comprehensive Plan "concluded there was no blight". (TR. Page 65, line 3).

Mr. Kampert said that the Comprehensive Plan's Future Land Use Map did not identify the main street district, the commercial intensive district, or the historic district contemplated by the CRA Plan. (TR. Page 66, line 15-22.) Finally, Mr. Kampert focused on the Comprehensive Plan's coastal element, which contains policies regarding development in coastal areas. These policies say land uses along the shoreline should support public access and public recreational uses, not development. (TR. Page 76, line 15-21). The CRA Plan on the other hand calls for higher densities and intensities in this area. (TR. Page 77, line 14-25).

There was no counter to this testimony, only conclusory statements that the CRA Plan "*conformed to the Comprehensive Plan.*" The City offered no testimony to rebut Mr. Kampert's specific examples of how the CRA Plan did not conform to the Comprehensive Plan.

The City's response was to obfuscate the issue by claiming that the obligation for "*conformity*" does not mean the same thing as "*consistency*", which is the standard in the Growth Management Act, Chapter 163, Part II, Fla. Stat.

(2006). See, Section 163.3194, Fla. Stat. (2006). (TR. Page 94). The City also focused on the obvious fact that "development orders" in the CRA would have to be consistent with the Comprehensive Plan. (Id) (TR. Pages 92-93). These claims are true, but they do not alleviate the City from having to meet the legal requirement that the CRA Plan shall "*conform*" to the Comprehensive Plan. The City must engage in the comprehensive planning process before it proposes a $40 million dollar redevelopment scheme. Section 163.360(2)(a), Fla. Stat. (2006).

Finally, it should be noted that the City's legal argument, set forth in its "Memorandum of Law Conformity of the Redevelopment Plan with the City of Parker Comprehensive Plan", actually supports the County's position. (City App. Ex. 22). Parker's lawyers argue that the issue of whether the CRA Plan should conform to the Comprehensive Plan is "premature", because the CRA Plan "authorizes no specific redevelopment activity". (City App. Ex. 22 at 7). Again, this fails to address the legal requirement that the CRA Plan must "*conform*" to the Comprehensive Plan. (Id). The concepts are not mutually exclusive. The statute says nothing about development. It merely requires that the CRA Plan "*conform*" to the Comprehensive Plan.

The City's attorneys the raise the "timing" issue, stating in the memorandum of law, "The argument [Bay County's position] appears to be a timing issue

whereby the Intervenor would have the City amend its Comprehensive Plan prior to adopting the Redevelopment Plan". (Id at 8).

This is precisely the County's position. If the CRA Plan does not "*conform*" to the Comprehensive Plan, the CRA Plan cannot be adopted, because it does not comply with Section 163.360(2)(a), Fla. Stat. (2006). The City would have to amend its Comprehensive Plan to lay the predicate for the Community Redevelopment Plan. This is a result that flows from the plain reading of the statute. It also furthers the state's goal to manage growth, development, and redevelopment through the Comprehensive Plan. Section 163.3177(6)(a), Fla. Stat. (2006).

The bonds should not be validated, because the legal requirements supporting the bonds were not met.

STANDARD OF REVIEW.

Bay County basically agrees with the City's discussion of the standard of review, especially where it focuses on conclusions of law. The County would however, like to focus a bit more on the standard of review of findings of fact.

A major issue before this Court is the validity and weight to be given to the City's various legislative findings. The challenged ordinances contain broad legislative conclusions purporting to address a variety of matters. The County contends that many of these legislative findings, such as the finding of blight and

findings of conformity to the Comprehensive Plan, are arbitrary, clearly erroneous and not supported by competent evidence.

Florida courts follow the general rule that findings made by a legislative body are presumptively correct. Courts usually uphold legislative determinations unless they are clearly erroneous or arbitrary. See Panama City Beach Community Redevelopment Agency v. State of Florida, 831 So. 2d 662, 667 (Fla. 2002); Boschen v. City of Clearwater, 777 So. 2d 958 (Fla. 2001) and SMM Properties, Inc. v. City of North Lauderdale, 760 So. 2d 998, 1001 (Fla. 4th DCA 2000).

Although legislative findings carry a presumption of correctness, they are not automatically binding and unassailable. Courts are not required to blindly accept legislative findings, determinations and proclamations when they are shown to be clearly erroneous or nothing more than recitations or mere conclusions. See Moore v. Thompson, 126 So. 2d 543, 549-550 (Fla. 1961), and Stadnik v. Shell's City, Inc., 140 So. 2d 871, 874 (Fla. 1962). The Court in the Panama City Beach Community Redevelopment Agency decision recognized that a city council cannot simply label an area "blighted" and make it so. See, 831 So.2d at 669 citing to City of Jacksonville v. Moman, 290 So. 2d 105,107 (Fla. 1st DCA1974)(upholding trial court's finding that rejects Jacksonville City Council's designation of an area as a slum for purposes of eminent domain when City failed to carry burden of proving by competent and substantial evidence that subject property was needed

for the redevelopment of a slum area stating, "the city may designate an area as a slum, but such designation does not make it a slum.")

Florida courts, in a variety of situations, have invalidated statutes, codes or ordinances after judicial review determined the supporting legislative findings were arbitrary or erroneous. See, Donnelly v. Marion County, 851 So. 2d 256 (Fla. 5th DCA 2003)(invalidated a special assessment for enhanced emergency medical services while finding legislative body's determination of special benefit was not supported by evidence, stating the county commission could not by fiat make a special benefit to sustain a special assessment where there was no special benefit.); City of North Lauderdale v. SMM Properties, Inc., 825 So. 2d 343 (Fla. 2002)(upheld a lower court's finding that a legislative determination that an assessment for emergency medical services conferred special benefit was arbitrary and not supported by competent substantial evidence.); Stadnik, 140 So. 2d at 871 (upholding a lower court invalidation noting the legislative findings were not entitled to a presumption of correctness if they are mere recitations of conclusions or patently contrary to obvious facts.);and Moore, 126 So. 2d at 543 (invalidating a statute banning car sales on holidays, finding the statute arbitrary despite a recitation of legislative findings of fact in support of the legislation.)

The County contends that much of evidence provided by the City upon which the trial court relied to support the legal conclusions that there are blighted

areas and that the CRA Plan conforms to the Comprehensive Plan, are mere conclusions that are not supported by competent substantial evidence. Further, the City applied the wrong legal standard in determining the existence of blight and conformity to the Plan. Finally, the TIF scheme used here to support the bonds is not constitutional. Therefore, the subject ordinances and resolutions and bonds should not be validated, because they fail to comply with the requirements of law, i.e. the requirements set forth in Chapter 163, Part II, Fla. Stat. (2006), and Article VII, Section 12, Florida Constitution. See Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997).

SUMMARY OF ARGUMENT.

The City of Parker does not levy ad valorem taxes. It seeks to utilize the scheme of Tax Increment Financing (TIF), which will essentially shift a portion of the taxes collected by the County to the CRA, to fund the Community Redevelopment Plan. Money diverted from County coffers will be used to fund the bonds that are the subject of these proceedings. While there is no case law controlling this issue, the trial court correctly construed various provisions of the Community Redevelopment Act to require the City of Parker to levy ad valorem taxes on its residents before it may engage in Tax Increment Financing. For this reason the bonds should not be validated. Affirm the trial court on this issue.

Prior to the creation of a CRA, the City of Parker was obligated by Section 163.355, Fla. Stat. (2006), to make a finding that the criteria governing blight existed. Section 163.340(8), Fla. Stat. (2006), sets forth the criteria governing this analysis. There are two prongs of this analysis. First, the City must determine that "*there are 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 of endanger life or property*". (Id) Second, the City must find that two of the following 14 listed criteria exist. Section 163.340(8)(a-n), Fla. Stat. (2006).

A review of the evidence presented and the testimony of the City's expert witness show that the City and the trial court confused and misapplied the statutory provisions governing blight. In utilizing the 14 criteria listed in Section 163.340(8)(a-n) , Fla. Stat. (2006), to bootstrap the initial prong that a "*substantial number of deteriorating structures*" were leading to "*economic distress*", the trial court applied the incorrect standard for determining the existence of blight. The bonds should not be validated. The judgment must be reversed on this issue.

The City was obligated to create and adopt a Community Redevelopment Area Plan (CRA Plan). Section 163.360, Fla. Stat. (2006). This CRA Plan is required to "*conform*" to the City's Comprehensive Plan, which must be adopted pursuant to the guidelines of Chapter 163, Part II, Fla. Stat. (2006), the Growth

Management Act. Section 163.360(2)(a), Fla. Stat. (2006). This requirement is a condition precedent to the issuance of the bonds. The City and the trial court misapplied this statutory condition precedent by confusing the term "*consistent*" with the term "*conform*", and by applying an incorrect analysis of this simple statutory requirement. Moreover, the trial court's finding that the CRA Plan did conform to the Comprehensive Plan is not supported by competent substantial evidence, and is in fact contrary to the evidence and a plain reading of the Comprehensive Plan. For this reason the bonds should not be validated. Reverse the final judgment on this issue.

Finally, Bay County submits that this Court should recede from its decision in State of Florida, et. al, v. Miami Redevelopment Agency, etc., 392 So. 2d 875, (Fla. 1980), and conclude that the various ordinances, resolutions and schemes supporting the bonds with Tax Increment Financing, violate the requirement for a referendum set forth in Article VII, Section 12, of the Florida Constitution. There is no dispute that the City did not hold a referendum. The only conclusion that may be drawn from an honest review of the bond ordinance and resolutions, as well as Section 163.387, Fla. Stat. (2006), is that the TIF mechanism requires the County to pay an increment of ad valorem taxes to the City of Parker to support the CRA bonds, and this may occur without approval of the voters. The City has

attempted to do indirectly what the Constitution prohibits directly. For this reason the bonds should not be validated. Reverse the final judgment on this basis.

RESPONSE TO ARGUMENT: WHETHER THE COMMUNITY REDEVELOPMENT ACT AUTHORIZES THE CITY TO ISSUE BONDS SUPPORTED BY TAX INCREMENT FINANCING DESPITE THE FACT THAT THE CITY ITSELF DOES NOT LEVY AD VALOREM TAXES.

The trial court construed Chapter 163, Part III, Florida Statutes (2006), the Community Redevelopment Act (Act) to require a local government wishing to utilize tax increment financing to itself levy ad valorem taxes. There appears to be no case law governing this issue. That being said, reading all provisions of the Act together, and applying standard principals of statutory construction leads to the conclusion that Judge Costello was correct. Parker must TAX before it may TIF.

The findings and declaration of necessity set forth in Section 163.335(5), Fla. Stat. (2006), supports this conclusion. It states as follows:

> *(5) It is further found and declared that the preservation or enhancement of the tax base from which a taxing authority realizes tax revenues is essential to its existence and financial health; that the preservation and enhancement of such tax base is implicit in the purposes for which a taxing authority is established; that tax increment financing is an effective method of achieving such preservation and enhancement in areas in which such tax base is declining; that community redevelopment in such areas, when complete, will enhance such tax base and provide increased tax revenues to all affected taxing authorities, increasing their ability to accomplish their other respective purposes; and that the preservation and enhancement of the tax base in such areas through tax increment financing and the levying of taxes by such taxing authorities therefor and the appropriation of funds to a redevelopment trust fund bears a substantial relation to the purposes of such taxing authorities and is*

> *for their respective purposes and concerns. This subsection does not apply in any jurisdiction where the community redevelopment agency validated bonds as of April 30, 1984.* (Emphasis added).

Notably, this section requires that a "*taxing authority*" must "*realize tax revenues*". Parker is a "*taxing authority,*" but it does not "*realize tax revenues*"; it cannot, at least until the CRA TIF scheme is in place and the City begins to "*realize*" Bay County's tax revenues. Currently, all ad valorem taxes paid by residents of Parker and the CRA go to the other "*taxing authorities*", including Bay County. This section of the statute's intent mandates that the "*tax base*" of "*all affected taxing authorities*" must be "*enhanced*" by the CRA. This is one of the ultimate goals of TIF. If Parker does not levy taxes, how can its "*tax base*" be "*enhanced*"? Finally, the criteria for "*the levying of taxes by such taxing authorities therefore and the appropriation of such funds to a redevelopment trust fund*" simply cannot occur unless the municipality itself levies taxes.

Legislative intent is the polestar that guides the journey of statutory construction. See, McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998). The primary source for determining legislative intent is the language chosen by the Legislature to express its intent. See, Donato v. American Telephone and Telegraph Co., 767 So. 2d 1146 (Fla. 2000). Here the legislative intent is not hiding. It is expressed in Section 163.335, Fla. Stat. (2006), entitled "*Findings and declarations of necessity*". It is clear these introductory provisions of the Act

support the trial court's conclusion that Parker must levy taxes to engage in TIF. If Parker is allowed to evade taxation and still employ the financial scheme of TIF, the intent of the Legislature is ignored.[1] However one does not have to stop at this section of the Act. Other provisions support the trial judge's conclusion.

Section 163.387(1)(a), Fla. Stat. (2006), supports the claim that Parker must levy taxes in order to utilize TIF under the CRA statute. This provision states in part as follows:

> *The annual funding of the redevelopment trust fund shall be in an amount not less than that increment in the income, proceeds, revenues, and funds of each taxing authority derived from or held in connection with the undertaking and carrying out of community redevelopment under this part. Such increment shall be determined annually and shall be that amount equal to 95 percent of the difference between:*
>
> *1. The amount of ad valorem taxes levied each year by each taxing authority, exclusive of any amount from any debt service millage, on taxable real property contained within the geographic boundaries of a community redevelopment area; and*
>
> *The amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for each taxing authority, exclusive of any debt service millage, upon the total of the assessed value of the taxable real property in the community redevelopment area as shown upon the most recent assessment roll used in connection with the taxation of such property by each taxing authority prior to the effective date of the ordinance providing for the*

[1] The failure to raise municipal revenues through taxation could explain why an area is blighted in the first place. Perhaps if Parker had raised government revenue through taxation to fund essential infrastructure like sidewalks, roads, and drainage, it would not have had to rely on the CRA process.

funding of the trust fund. (Emphasis added)

This is the Tax Increment Financing (TIF) provision of the Act. Certainly Parker is a "*taxing authority*". How can Parker "*fund*" the Community Redevelopment Trust Fund without its own source of taxes? How can Parker meet its obligation to pay "*95% of the difference between . . .the amount of ad valorem taxes levied each year. . and [t]he amount of ad valorem taxes which would have been produced. . . "* if it does not collect taxes?

Section 163.387(2)(a), Florida Statutes (2006), requires "*each taxing authority*" to appropriate to the trust fund "*a sum that is not less than the increment. . . "*. How can Parker "*appropriate*" a "*sum*" of any "*increment*" if it does not collect ad valorem taxes? Is it rational to assume that the "*sum*" can be zero? On the contrary, in order to have a "*sum*" to "*appropriate*", the City of Parker must levy ad valorem taxes.

Parker attempts to avoid these various statutory provisions by parsing the Act into provisions; ones that govern "*taxing authorities*" and ones that govern "*a public body*". The illogic of this position is shown by the definitions themselves. Section 163.340(2), Fla. Stat. (2006), sets forth the definition of "*public body*" as:

> *…the state or any county, municipality, authority, special district as defined in Section 165.031(5), or other public body of the state, except a school district.*

A "*taxing authority*" is defined as:

> *. . . a public body that levies or is authorized to levy an ad valorem tax on real property in a community redevelopment area.*

Parker is both "*a public body*" and a "*taxing authority*", but this distinction is not the end of the story. The conclusion that a municipality must itself levy an ad valorem tax to utilize TIF is not denied by these definitions. Nor should it be. To properly interpret a statute, this Court should attempt to give meaning to all provisions. See, Holly v. Auld, 450 So. 2d 217 (Fla. 1984). 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. The point is, these definitions support the County, not Parker.

Another provision of the statute that supports the trial court's construction of the Act is Section 163.387(2)(c), Fla. Stat. (2006), which sets forth a list of certain "*public bodies or taxing authorities*" that are exempt from the obligation to pay into a CRA Trust Fund. Notably, "municipalities that do not levy ad valorem taxes" is not a listed exemption. Following Parker's logic it should be.

Then there is Section 163.387(1)(b)1, Florida Statutes, which includes provisions that only apply to CRAs created after June 7, 2007. The City cites this section of the Act to support its claim that the County and the trial court's construction of the Act is wrong. However, a close reading of this section actually

supports the conclusion that Parker must levy taxes to engage in tax increment financing. This section states in part as follows:

> *a. If a taxing authority imposes a millage rate that exceeds the millage rate imposed by the governing body that created the trust fund, the amount of tax increment to be contributed by the taxing authority imposing the higher millage rate shall be calculated using the millage rate imposed by the governing body that created the trust fund.*

This is the so called "millage parity" provision. Parker claims it explicitly recognizes that a municipality may avoid levying ad valorem taxes as long as it creates its CRA and employees the use of TIF financing before June 7, 2007. The City argues in footnote 5 of its initial brief that "Counties and municipalities that did not meet the recently imposed deadlines. . . must now levy ad valorem taxes to receive tax increment from taxing authorities". (Emphasis added)

Actually, it is more reasonable to interpret this provision to limit the County's obligation to pay millage into the Trust Fund, not as an indicator that municipalities may evade the obligation to levy ad valorem taxes altogether.[2]

[2] The County's interpretation is supported by the legislative history of the bill establishing these deadlines. See, House of Representatives Staff Analysis HB 1583 Community Redevelopment (3/7/06), which discusses the inclusion of these deadlines, stating in part as follows:
"The bill amends s. 163.387, F.S., to limit the amount of tax increment revenue owed by taxing authorities to any CRA created after July 1, 2006 . . . The amount of tax increment to be contributed by any taxing authority is limited as follows:
a. If a taxing authority imposes a millage rate that exceeds the millage rate imposed by the governing body that created the trust fund, the amount of tax increment to be contributed by the taxing authority is calculated using the millage rate imposed

One of the cardinal tenets of statutory construction cautions against adopting an interpretation that would lead to an unreasonable or absurd conclusion. See, Holly v. Auld, 450 So. 2d 217 (Fla. 1984). In response to Parker's illogical spin placed on the deadline provisions for CRAs established by the Legislature, it makes more sense to assume that the Legislature believed that municipalities creating CRAs would themselves contribute to the CRA Trust Fund. Under Section 163.387(2)(b)1,a, Fla. Stat. (2006), if a municipality was authorized by the Act not to impose any tax, its millage rate would be zero. Under the millage parity provision, other taxing authorities would thus pay nothing into the trust fund. Such a construction obviates the plain meaning of this section and is at odds with the whole purpose of the CRA statute. Why would the Legislature set up a process to create a CRA Trust Fund that had no income?

Apparently, there are no reported cases directly on point. Although the City of Panama City Beach does not levy ad valorem taxes, this issue does not appear to have been raised in the case validating those CRA bonds, nor has the City claimed that it was. See, Panama City Beach Community Redevelopment Agency, v. State of Florida, 831 So. 2d 662 (Fla. 2002). There is a brief discussion supporting the trial court's construction of the Act in State of Florida, et. al, v. Miami

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by the governing body that created the trust fund, provided that any taxing authority may voluntarily contribute amounts of tax increment at a higher rate for a period of time as specified by interlocal agreement between the taxing authority and the community redevelopment agency. Id at page 9. (Emphasis Added)

Redevelopment Agency, etc., 392 So. 2d 875, 882 (Fla. 1980), where the Court wrote:

> When a redevelopment trust fund has been established, all taxing authorities in the redevelopment area except school districts must annually appropriate the ad valorem tax increment to the trust fund. § 163.387(2). (Emphasis added).

Finally, there are the policy issues. For the City of Parker to choose not to tax its residents to pay for municipal services and infrastructure and then appropriate County ad valorem tax revenues through TIF, treats residents of the Parker CRA differently than the residents of the unincorporated areas and other municipalities. It discriminates between two sets of taxpayers; those in the CRA and those outside the CRA. More importantly, it imposes on all Bay Countians an increased obligation to fund the constitutional officers and county government. While admittedly residents of the CRA will see their county taxes rise as property values and millage rates increase, they are able to recoup the benefit of their tax payments in their community as a portion of the TIF payment. TIF diverts county tax revenues from other sources. While the CRA resident still requires the services of the Supervisor of Elections, Property Appraiser, Tax Collector, Clerk, and perhaps the Sherriff, they effectively pay less for these services than other taxpayers in Bay County. This isn't fair.

Fortunately, this issue is likely not to be revisited by this Court. Parker is a bit of an anomaly. Few municipalities in Florida do not levy ad valorem taxes.[3] In fact, many of the municipalities that have CRAs actually impose a higher millage rate than their host county. [4] Still, with a $40 million dollar price tag, the Parker CRA is not insignificant. Certainly, it is important to Bay County.

Faced with a series of interrelated ordinances, resolutions, and an interlocal agreement controlling a trust and the issuance of bonds, the trial court also struggled with a statute, which is needless to say "pro-CRA" in its application. Perhaps it was the current legislative activity regarding property taxes that motivated Judge Costello to throw out the CRA.[5] Perhaps it was the pending uncertainty regarding taxes in Florida. (Id.) Ben Franklin said, "In this world nothing is certain but death and taxes." He should live today.

This Court must construe the Act and arrive at its own determination. Bay County hopes it will decide to preserve the County's tax revenues and uphold the trial court's decision not to validate the bonds.

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[3] There are only 31 municipalities in Florida that do not levy ad valorem taxes. See, Brief of Amicus Curiae, Florida Redevelopment Association, Inc., at fn 3, citing Florida Department of Revenue, 2006 Florida Property Valuation & Tax Data (June 2006).

[4] See, "Local Government Concerns Regarding Community Redevelopment Agencies in Florida", January 2005, Legislative Committee on Intergovernmental Relations.

[5] See, SJR4B, (2007), Ch. 2007-321, Laws of Florida, Ch. 2007-322, Laws of Florida

FIRST CROSS APPEAL ISSUE: THE TRIAL COURT APPLIED THE INCORRECT STANDARD FOR DETERMINING THE EXISTENCE OF BLIGHT.

Pursuant to Section 163.355, Fla. Stat. (2006), prior to the creation of the CRA, and as a condition precedent to exercising any of the powers of the Community Redevelopment Act, the City of Parker was obligated to "*adopt a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area*" met the criteria as a "*blighted area*", set forth in Section 163.340(8), Fla. Stat. (2006). To understand why Bay County believes the trial court erred in upholding the City's determination of blight, this Court must examine the significant legislative amendments made to the Act in 2002.

At the time this Court considered the CRA in Panama City Beach Community Redevelopment Agency v. State of Florida, 831 So. 2d 662 (Fla. 2002), the requirements governing the determination of the existence of blight were substantially more lax than they are today. In 2001, a blighted area was defined as:

> *8) "Blighted area" means either:*
> *(a) An area in which there are a substantial number of slum, deteriorated, or deteriorating structures and conditions that lead to economic distress or endanger life or property by fire or other causes or one or more of the following factors that substantially impairs or arrests the sound growth of a county or municipality and is a menace to the public health, safety, morals, or welfare in its present condition and use:*
> *1. Predominance of defective or inadequate street layout;*

2. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

3. Unsanitary or unsafe conditions;

4. Deterioration of site or other improvements;

5. Inadequate and outdated building density patterns;

6. Tax or special assessment delinquency exceeding the fair value of the land;

7. Inadequate transportation and parking facilities; and

8. Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or

(b) An area in which there exists faulty or inadequate street layout; inadequate parking facilities; or roadways, bridges, or public transportation facilities incapable of handling the volume of traffic flow into or through the area, either at present or following proposed construction.

Section 163.340(8) of the Florida Statutes (2001).

As a result of concerns relating to the potential abuse of redevelopment areas, in 2002 the Legislature addressed the requirements for blighted areas and adopted substantial amendments to the Community Redevelopment Act to more closely define the conditions that must be present to create a CRA. In Chapter 2002-294, Laws of Florida, effective July 1, 2002, the requirements governing a finding of blight were substantially altered as follows:

(8) "Blighted area" means an area in which there are 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 in which two or more of the following factors are present:

(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;

(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;

(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

(d) Unsanitary or unsafe conditions;

e) Deterioration of site or other improvements;

(f) Inadequate and outdated building density patterns;

(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;

(h) Tax or special assessment delinquency exceeding the fair value of the land;

(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;

(j) Incidence of crime in the area higher than in the remainder of the county or municipality;

(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;

(l) 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;

(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or

(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

However, the term "blighted area" also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to s. 163.387(2)(a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. Such agreement or resolution shall only determine that the area is blighted. For purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area as defined in this subsection.

As a result of the 2002 amendments to the Act, the Legislature created a minimum threshold standard comprised of two prongs that must be established to create a CRA. The first prong standard requires determination that there are "*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 . . . .*" After this prong has been established, and only after it is established, then the second prong requires an analysis of the remaining fourteen factors, two of which must be present. The purpose of the amendments by the Legislature was to narrow the application of the Community Redevelopment Act and to confine its application to those circumstances more closely related to its original purpose. It was also an express recognition of the adverse economic impact that the establishment of redevelopment areas can have on other taxing authorities. [6]

In the present case, the analysis prepared for the City of Parker, as contained within the Findings of Necessity Study, fails to satisfy the first prong of the determination governing a finding of blight. (City App. Ex. 5). In analyzing the presence of the various factors, the report states:

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[6] See, Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 102, March 12, 2002, page 6-7, , House of Representatives, Committee on Local Government & Veterans Affairs, Final Analysis CS/HB 1341, 2ND ENG I(July 1, 2002) at 4-7.

> Chapter 163.340(8) F.S. provides no specific criteria or guidance regarding the definition or attributes of deteriorating structures save that implied in the balance of the legislation which focuses on a series of indicators that in the aggregate are assumed to lead to economic, physical or social distress. Generally, blight conditions in the study area include bad traffic management practices, insufficient roadway capacity to handle peak periods, infrastructure deficiencies, and higher incidences of crime. In the present case, buildings and structures except a few are largely of acceptable physical condition but many of the commercial buildings are functionally deteriorated, rendered obsolete by the constraints caused by diversity of ownership, site, access, and mediocre aesthetics. Whatever their apparent physical condition, such condition should not be construed as a measure of their useful life.
>
> In our opinion, these varied conditions and circumstances are documented herein. Collectively and individually, they represent a "substantial number of deteriorated or deteriorating structures" such that they are "leading to economic distress or endanger life or property." (Emphasis added). (Id at 52)

The City's expert, Gail Corless, who testified about her determination of the existence of blight, said she applied a "functional" standard for determining the existence of the threshold requirement for the presence of a substantial number of deteriorating structures. (TR. Page 199-200) Notably, there is no special "functional" standard for determining blight in the statute. More importantly, she also testified that she examined the fourteen criteria of the second prong and used them to determine the presence of the initial threshold criteria or first prong. (TR. Page 201) This is contrary to the express language of the Act. If the other criteria can be used to meet the threshold requirement, then there would be no reason to

require a separate and distinct component that must be satisfied before you even begin to analyze the fourteen criteria.

The distinction between the respective requirements of the two prongs of the definition of blight has been judicially recognized. In Fulmore et. al. v. Charlotte County, 928 So. 2d 1281 (Fla. 2d DCA 2006), the court addressed, among other issues, the scope of the term "*structure*" in the threshold prong of the test for the presence of blight. In determining that the term was broader than just buildings and included roads, the court specifically recognized that the requirements of the initial prong of the test for blight were different from the remaining fourteen criteria contained in the second prong. The Court stated:

> The Landowners argue that "structures" was not meant to refer to roads because the first factor set forth in the second part of the definition of blight includes roadways. We disagree 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. (Emphasis added)

(Id. at 1288).

Also not addressed by the report is the remaining requirement of the initial prong of the definition of blight. Not only must there be a showing of "*a substantial number of deteriorated or deteriorating structures*", but they must create conditions, which "*. . . as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property.*"

(Emphasis added) The evidence presented both in the Necessity Report and at trial was that the assessed values, vacancy rates and lease rates within the Redevelopment Area were not indicative of "*economic distress*." The Necessity Report fails to support this requirement with evidence. There was no data and analysis before the City on which it could conclude that "*economic distress*" was occurring; just unsupported conclusions and statements.

Therefore, not only was the first requirement not met, but there was no data or analysis available or considered, which met the other requirements of the Act. In an area declared "*Blighted*" there must be a "*substantial number of deteriorated structures*" that results in "*economic distress or endanger life or property*." Section 163.340(8), Fla. Stat. (2006). The Report found that property values in the Study Area increased faster than property values in the City as a whole from 2002-2006. (City App. Ex. 5 Page 41) It said the "Study Area" property values increased 18.1%. Overall the City property values increased 16.1%. (Id). If the Study Area was blighted, its property values should have increased by less than the City average, not by more than the City average. Thus, the City's own evidence shows there is no "*economic distress*" in the Study Area.

As noted by Dr. Fishkind, there is no data quantifying that there are a "*substantial number of deteriorated structures*" No one actually stopped to count the structures but Dr. Fishkind, and he concluded the number was not "*substantial*".

The City convinced the trial court to accept an improper interpretation of the Act. Therefore, the trial court's final judgment supporting the finding of necessity should be reversed, because it fails to comply with the requirements of law, i.e. the requirements set forth in Section 163.340(8), Fla. Stat. (2006). Also, there is no competent substantial evidence to support a finding that the first prong of the definition of blighted areas was met. See, Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997).

SECOND CROSS APPEAL ISSUE: THE CRA PLAN DOES NOT CONFORM TO THE PARKER COMPREHENSIVE PLAN.

The Community Redevelopment Act is connected to the Growth Management Act at Section 163.360(2)(a), Fla. Stat. (2006), which provides in part as follows:

> *(2) The community redevelopment plan shall:*
> *(a) Conform to the comprehensive plan for the county or municipality as prepared by the local planning agency under the Local Government Comprehensive Planning and Land Development Regulation Act.* (Emphasis added)

The City of Parker adopted a Comprehensive Plan, which was found to be in compliance with the requirements of Chapter 163, Part II, Florida Statutes. (County App. Ex. 5) The Comprehensive Plan contains a Future Land Use Element, a Capital Improvements Element, a Transportation

Element, a Coastal Management Element, and a Future Land Use Map among other provisions.

Elliot Kampert was the County's expert planning witness. His testimony was unrefuted. He showed that the CRA Plan did not "*conform*" to the Future Land Use Element of the Comprehensive Plan. The CRA Plan proposed new land uses, and new CRA policies for redevelopment, but they were not even mentioned in the Land Use Element of the Comprehensive Plan.

The Future Land Use Element of the Comprehensive Plan is supposed to be based upon "*surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of water supplies, public facilities, and services; the <u>need for redevelopment, including the renewal of blighted areas</u> and the elimination of nonconforming uses . . .*"Section 163.3177(6)(a), Fla. Stat. (2006). (Emphasis added). Mr. Kampert reviewed the data and analysis supporting the Parker Comprehensive Plan and found that while it briefly mentioned that there were a few areas in need of redevelopment, the data upon which the Comprehensive Plan was based actually "concluded there was no blight". (TR. Page 65, line 103).

As regards the $40 million dollars worth of capital improvements in the CRA Plan, Mr. Kampert found these were not even addressed in the Capital Improvements Element of City's Comprehensive Plan. (TR. Page 61).

Finally, the CRA Area was not identified on the Future Land Use Map of the Comprehensive Plan. The proposed new CRA land uses, the "main street district", the "commercial intensive district", or the "historic district" are not on the Future Land Use Map. (TR. Page 66, line 15-21)

Parker avoids this overwhelming evidence of a disconnect between the CRA Plan and the Comprehensive Plan by claiming that the requirement of "*conformity*" is not the same as "*consistency*", which is a standard used in the Growth Management Act. It is clear from reading the trial court's final judgment that it was lead astray by the City on this point. This is where the lower court committed reversible error.

The terms "*conformity*" and "*consistency*" are used interchangeably in the Growth Management Act. For example, Section 163.3161(5), Fla. Stat. (2006), states:

> *(5) It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except <u>in conformity</u> with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.* (Emphasis added)

In other places the statute uses the term "*consistency*". See, 163.3177(10), Fla. Stat. (2006), which states:

> *(a) The Legislature finds that in order for the department to review local comprehensive plans, it is necessary to define the term "consistency." 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 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 plan. For the purposes of determining consistency of the local plan with the state comprehensive plan or the appropriate regional policy plan, the state or regional plan shall be construed as a whole and no specific goal and policy shall be construed or applied in isolation from the other goals and policies in the plans.*

See also Section 163.3194, Fla. Stat. (2006).

Therefore, in the end, it doesn't matter whether Mr. Kampert applied the term "*conform*" or "*consistent*". In fact, he testified he felt the terms were interchangeable. (TR. Page 94 line 17). The City's argument still does not detract from evidence or control the legal requirement. The evidence is that the CRA Plan did not "*conform*" to the Comprehensive Plan, and in certain respects actually violated certain provisions. The requirement of "*conformity*" is a question of law that may be reviewed de novo by this

Court.[7] Therefore, this Court can determine on its own whether the CRA Plan conforms to the Comprehensive Plan.

The City's second defense to the conformity requirement is that the CRA Plan does not authorize development. Again, this is irrelevant. The statute says the CRA Plan "*shall conform to the comprehensive plan*". Section 163.360(2)(a), Fla. Stat. (2006). It may be, as Parker argues, an issue of timing. If the CRA does not "*conform*" to the Comprehensive Plan, it simply cannot be approved. Planning has to occur first under the Growth Management Act, before redevelopment may occur. In other words, for the CRA to "*conform*" to the Comprehensive Plan, the later must be amended.

Such planning for redevelopment is not a hollow gesture. It involves public hearings, public notice and public input. Section 163.3184, Fla. Stat. (2006). Admittedly this occurred with the adoption of the CRA Plan, but that's where the similarity stopped. The Comprehensive Plan is reviewed by the Department of Community Affairs and other state and regional agencies. (Id.) Also, there is an opportunity for administrative review. The County may seek a formal administrative hearing pursuant to Chapter 120,

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[7] See, Dixon v. City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000)(consistency with the comprehensive plan held to be a "question which is purely one of law". Therefore, review was de novo and no deference was given to the City's interpretation of its own comprehensive plan).

Fla. Stat.(2006) to contest comprehensive plan amendments. (Id) This administrative remedy is obviated by ignoring the comprehensive planning process. More importantly, such administrative review is entirely nullified if a CRA Plan can be validated pursuant to Chapter 75, Fla. Stat. (2006).

Yes, comprehensive planning should precede community redevelopment planning. That's what the statute says. This conclusion also furthers the goals expressed in the CRA Act's "sister Act", Chapter 163, Part II, Fla. Stat. (2006), the Growth Management Act. Because there was no competent substantial evidence to support the trial court's conclusion that the CRA Plan conformed to the City's Comprehensive Plan, and the Court misconstrued the legal requirements, the final judgment should be reversed and the bonds not validated. See Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997).

THIRD CROSS APPEAL ISSUE: THE ORDINANCES AND RESOLUTIONS AND SECTION 163.387, FLORIDA STATUES (2006), WHICH AUTHORIZE TAX INCREMENT FINANCING, ARE UNCONSTITUTIONAL AND VIOLATE ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION.

Article VII, Section 12 of the Florida Constitution, requires a referendum before a local taxing authority may issue bonds payable from ad valorem taxation, as follows:

> *SECTION 12. Local bonds.--Counties, school districts, municipalities, special districts and local governmental bodies with*

> *taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:*
>
> *(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of free-holds therein not wholly exempt from taxation; or*
>
> *(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.* (Emphasis added)

The resolution creating the CRA Plan (Res. No. 06-01), the ordinance establishing the CRA Trust Fund (Ord. No. 06-312), the Joint Resolutions (07-256(City) and 07-02 (Agency)), the Interlocal Agreement between the City and the CRA, and the Ordinance (No. 07-313) that authorized the issuance of the bonds, each contemplate that County ad valorem taxes obtained through the TIF program will either directly or indirectly be used to support the bonds.

Admittedly, these resolutions and ordinances are statutorily authorized. Section 163.387, Fla. Stat. (2006), authorizes Parker to utilize tax increment financing to "*fund*" a "*redevelopment trust fund*" and to "*finance or refinance any community redevelopment.*" Nowhere is a referendum even mentioned. The statute states in part:

> *The annual funding of the redevelopment trust fund shall be in an amount not less than that increment in the income, proceeds, revenues, and funds of each taxing authority derived from or held in connection with the undertaking and carrying out of community redevelopment under this part. Such increment shall be determined annually and shall be that amount equal to 95 percent of the difference between:*

1. The amount of ad valorem taxes levied each year by each taxing authority, exclusive of any amount from any debt service millage, on taxable real property contained within the geographic boundaries of a community redevelopment area; and

2. The amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for each taxing authority, exclusive of any debt service millage, upon the total of the assessed value of the taxable real property in the community redevelopment area as shown upon the most recent assessment roll used in connection with the taxation of such property by each taxing authority prior to the effective date of the ordinance providing for the funding of the trust fund.(Emphasis added)

As noted above, Section 163.387(2)(a), Fla. Stat. (2006), requires as follows:

(2)(a) . . . upon the adoption of an ordinance providing for funding of the redevelopment trust fund as provided in this section, each taxing authority shall, by January 1 of each year, appropriate to the trust fund for so long as any indebtedness pledging increment revenues to the payment thereof is outstanding (but not to exceed 30 years) a sum that is no less than the increment as defined and determined in subsection (1) or paragraph (3)(b) accruing to such taxing authority. . (Emphasis added)

There is a penalty imposed on the County if it fails to pay into the CRA Trust Fund. This Section goes on to state:

(b) Any taxing authority that does not pay the increment revenues to the trust fund by January 1 shall pay to the trust fund an amount equal to 5 percent of the amount of the increment revenues and shall pay interest on the amount of the unpaid increment revenues equal to 1 percent for each month the increment is outstanding, provided the agency may waive such penalty payments in whole or in part. (Emphasis added)

The bonds are leveraged by the funds paid into the CRA Trust Fund. Section 163.387(4), Fla. Stat. (2006), provides as follows:

> *(4) The revenue bonds and notes of every issue under this part are payable solely out of revenues pledged to and received by a community redevelopment agency and deposited to its redevelopment trust fund. The lien created by such bonds or notes shall not attach until the increment revenues referred to herein are deposited in the redevelopment trust fund at the times, and to the extent that, such increment revenues accrue. The holders of such bonds or notes have no right to require the imposition of any tax or the establishment of any rate of taxation in order to obtain the amounts necessary to pay and retire such bonds or notes.* (Emphasis added)

While Parker will probably never admit it, the County's TIF debt is paid with ad valorem revenues. First of all, the amount the County owes the CRA Trust fund each year is based on the millage rate in relation to the "*ad valorem taxes levied*". To assume the funds to pay the TIF obligation do not come from ad valorem taxes is to engage in an expensive and quite unconstitutional illusion.

Certainly, Dr. Fishkind and Parker's lawyers knew that CRA payments came from ad valorem revenues. Note this dialogue between Parker's attorney and Dr. Fishkind.

> Q. Isn't it true, Dr. Fishkind, that any time you create a CRA regime under Florida's Community Redevelopment Act, that you will result in transferring tax revenues to the CRA trust fund that would otherwise go to, into the back, be retained by the County.
>
> A. Absolutely.
>
> (TR. Page 147, lines 14-19)

Dr. Fishkind testified that the bonds will fund infrastructure improvements in the City of Parker, including such things as streets and sidewalks. Dr. Fishkind presented a PowerPoint presentation. One of the slides stated:

> The benefits from these improvements will flow almost exclusively to residents of Parker. County residents get very little, if any, benefit. The City of Parker has no ad valorem tax. Therefore, the effect of funding the CRA is to transfer property taxes from the County to the Parker CRA. County taxes will be higher than they otherwise would be. County residents essentially will be subsidizing infrastructure improvements in Parker." (County App. Ex. 6, page 21). (Emphasis added)

It is obvious that the money to pay the County's TIF obligations comes from ad valorem taxes collected in the Parker CRA. To funnel these funds through a "Trust Fund" to support the bonds, accomplishes indirectly what the Florida Constitution prohibits directly.

In Volusia County v. State of Florida, et al., 417 So. 2d 968 (Fla. 1982), this Court was faced with a bond scheme that pledged all revenues other than ad valorem taxes. The County there agreed to do all things necessary to continue receiving revenues. This Court upheld the trial court, which had invalidated the bonds under Art. VII, Section 12, Fla. Const., stating as follows:

> We hold that the pledge of all the legally available, unencumbered revenues of the county other than ad valorem taxation, along with a covenant to do all things necessary to continue receiving the revenues, as security for the bonds, will have the effect of requiring increased ad valorem taxation so that a referendum is required. (Id. at 970)

This Court realized the real world impacts of the bonding scheme, concluding "that which may not be done directly may not be done indirectly." (Id. at 972) It cited as authority for this proposition State v. Halifax Hospital District, 159 So. 2d 231 (Fla. 1963). In Halifax, a special district with ad valorem taxing power attempted to pledge as security for bonds all of its available revenues. The district also covenanted to fully maintain its operations in order to ensure that it continued to receive the pledged revenues. The general operations of the district were funded through ad valorem taxation. The Court held that the district's pledge of all available non-ad valorem revenues, together with the promise to maintain all operations during the life of the bonds, would have more than mere incidental effect on the ad valorem taxing power. The Court held that therefore the bonds could not be validated without the approval of the voters. (Id. at 972).

The same thing is going on here. The various ordinances and resolutions, as well as Section 163.387, Fla. Stat. (2006), specifically note that the increment of increase in County ad valorem taxes shall be the amount the County must remit to the City, which will be placed in the Trust Fund. The Trust Fund secures the bonds. The amount of tax revenues expected to be generated by this funding scheme by the City's own analysis is between $40,328,023.00 and $86,939,997.00. It is absurd to expect that these funds will be paid from any source other than the County's general revenue fund, which is mainly comprised of property tax

revenues. Certainly, TIF has an "*effect*" on ad valorem taxes. It shifts the burden to other taxpayers. In fact, to pay the TIF debt from Enterprise funds, or other revenue sources, such as gas taxes, may in fact be illegal. The TIF payments have to come from ad valorem taxes.

Remember, Bay County is not without risk in this TIF scheme. The Interlocal Agreement between the City and the Agency provides at page 4 that the "*Agency will diligently enforce the obligation of any "Taxing Authority" (as defined in Section 163.340(24), Florida Statutes) to appropriate its proportionate share of the tax increment revenues. . . .*" Section 163.387(2)(a), Fla. Stat. (2006), imposes a similar policing obligation. The County can be sued if it fails to appropriate revenues to the Trust Fund to support the bonds to pay for CRA improvements. It is thus obvious that the various resolutions and ordinances, as well as the provisions of Chapter 163, Part III, Fla. Stat. (2006), that authorize Tax Increment Financing for the Parker CRA, both directly and indirectly violate Article VII, Section 12 of the Florida Constitution. The Parker bonds authorize capital projects. The TIF scheme obligates the County to pay ad valorem taxes to the CRA Trust Fund to support the bonds. There was no referendum to approve the bonds. Therefore the bonds and the various resolutions and their statutory authorization are unconstitutional.

Admittedly, Bay County's argument here is at odds with State of Florida, et. al, v. Miami Redevelopment Agency, etc., 392 So. 2d 875, 882 (Fla. 1980). Bay County respectfully requests that this Court revisit that decision and recede from it. Miami authorizes local governments to engage in a bond financing scheme to accomplish indirectly what the Florida Constitution directly prohibits.[8]

In Miami, Justice Boyd dissented. He focused on the intent of the 1968 revision to the Florida Constitution, stating as follows:

> The 1885 constitution had referred only to "bonds." When the people revised the referendum requirement for local bonds in 1968, they spoke out clearly against the Court's carved-out exceptions. They changed the language to its present form, applying the restriction to "bonds, certificates of indebtedness, or any form of tax anticipation certificates, payable from ad valorem taxation…."

Justice Boyd examined that the actual bonds being presented in that case and rejected them stating:

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[8] This court has receded from its prior decisions before. See, Weiand v. State of Florida, 732 So. 2d 1044 (Fla. 1999)(receding from State v. Bobbitt, 415 So. 2d 724(Fla. 1982), adopting Judge Overton's dissent in Bobbitt regarding the duty to retreat from the residence when the defendant uses deadly force in self-defense); Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976)(receding from Kennelly v, Davis, 221 So. 2d 415(Fla. 1969), regarding the standard of proof for a married woman to gain the benefits for her illegitimate child); Morgan v. State, 537 So. 2d 973(Fla. 1989)(receding from Bundy v. State, 471 So.2d 9 (Fla. 1985) regarding a defendant's testimony or statements made to experts by a defendant in preparation of a defense); Alfonso v. Department of Environmental Regulation, 616 So. 2d 44 (Fla. 1993)(receding from Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978)(regarding appellate jurisdiction when notice of appeal is filed in the wrong court); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)(receding from prior cases which held that a municipal corporation is immune from liability for the torts of police officers.)

> . . . we must look at the substance, and not the form, of what the local taxing authorities are undertaking; we must carefully analyze the undertaking and not be deterred by the confusing and seemingly sophisticated language of the statute and the bond resolutions. Id at 900. (Emphasis added)

He realized the "bonds are payable from ad valorem taxation…." Therefore, he concluded they "must be approved by the electorates of the taxing authorities in question". (Id.)

The time to recede from Miami is now. Given the current legislative and constitutional initiatives to roll back, limit or cut property taxes, the loss of existing tax revenues to CRA's through TIF would only worsen the effects on local governments. For this reason, the voters should, now more than ever, have a say in whether to shift their taxes from one "*taxing authority*" to another through the scheme of TIF.

Therefore, because the ordinances, resolutions, interlocal agreement, and bonds adopted by the City of Parker, as well as, Section 163.387, Fla. Stat. (2006), authorize "*bonds. . . payable from ad valorem taxation maturing more than twelve months after issuance. . . to finance or refinance capital projects*" have not been "*approved by vote of the electors*", they violate Article VII, Section 12 of the Florida Constitution. For this reason, the trial court's final judgment should be reversed, and the bonds not validated. See Poe v. Hillsborough County, 695 So. 2d 672, 675 (Fla. 1997).

CONCLUSION.

The trial court was correct in its construction of the Community Redevelopment Act to require that if Parker wished to engage in Tax Increment Financing (TIF), it must itself levy ad valorem taxes. Therefore, this Court should affirm the final judgment on this point.

This Court should reverse the trial court's conclusion of law that the Parker CRA Plan "*conforms*" to the Comprehensive Plan. The trial court was mislead by the City's focus on the terms "*consistency*" vs. "*conformity*" and with the argument that CRA's do not authorize development. Also, the factual record does not support the legal conclusion that the CRA Plan does, in fact "*conform*" to the Comprehensive Plan.

The trial court erred in the application of the two statutory prongs governing the finding of blight, so the judgment should be reversed. Also, there was no factual basis to conclude that a "*substantial*" number of "*deteriorating structures*", were leading to "*economic distress*".

Finally, this Court should revisit its decision in the Miami Beach case. While the goal of redevelopment is unassailable, the means to that end utilizing TIF-supported bonds is simply not constitutional unless the voters approve it in advance. This Court should invalidate the bonds and remand this case to the trial court for entry of an amended final judgment.

Respectfully submitted this ___ day of August 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the persons listed below by First Class U.S. Mail this ____ day of August 2007.

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I Hereby Certify that this brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. Pro.

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