IN THE SUPREME COURT OF FLORIDA

BAY COUNTY,

Appellant,

Vs.

Case No. SC07- 1572
L.T. CASE NO: 07-1771CA
(Core)

TOWN OF CEDAR GROVE,
CEDAR GROVE COMMUNITY
REDEVELOPMENT AGENCY, and
STATE OF FLORIDA, ET AL.,

Appellees.
_____/

ON APPEAL FROM A FINAL JUDGMENT VALIDATING BONDS ISSUED BY THE CIRCUIT COURT OF BAY COUNTY, FLORIDA, FOURTEENTH JUDICIAL CIRCUIT.
LOWER TRIBUNAL CASE NO. 07-1771CA

AMENDED REPLY BRIEF OF BAY COUNTY, FLORIDA TO SECOND AMENDED ANSWER BRIEF OF TOWN OF CEDAR GROVE AND CEDAR GROVE COMMUNITY REDEVELOPMENT AGENCY.

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SUMMARY OF ARGUMENT

The various CRA related resolutions that are the subject of this appeal were not read at two public hearings. The City's claim that an "extraordinary" degree of public participation is required supports the County's argument. Section 125.66, Fla. Stat. (2006), does not apply to municipalities.

This Court got it right in Strand v. Escambia County, No. SC06-1894 (Fla. 2007). There is no "bright-line principle" that a referendum is only required if "debt" is secured by the full faith and credit of the "issuer", or if the bondholders can compel the levy of taxes. The City incorrectly claims that only "debt" is subject to the referendum mandate. The term "debt" is not even mentioned in Art. VII, Section 12, Fla. Const.

The City claims that the "premise" in State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980), was correct and the Constitution only applies to the "act" of taxation. No other "revenue bond" utilizes ad valorem taxes as the basis to calculate the amount of the revenues pledged. The City ignores the plain meaning of Art. VII, Section 12, Fla. Const. Local governments "*may issue bonds. . . payable from ad valorem taxation . ..only. . . when approved by vote of the electors. . .*" Therefore, this Court should invalidate the bonds and hold Section 163.387, Fla. Stat. (2006) unconstitutional.

REPLY TO FIRST ARGUMENT: WHETHER THERE IS A STATUTORY REQUIREMENT THAT THE RESOLUTIONS REQUIRED BY THE REDEVELOPMENT ACT BE READ TWICE

At various points in its Second Amended Answer Brief, the City claims "extraordinary public notice and hearings" governs the creation of CRAs, as if this was a substitute for a referendum. Presumably, however, one public reading is enough for the resolutions creating the CRA, approving the CRA Plan, passing the interlocal agreement, and approving the bonds. The City cannot have it both ways. If the procedures governing the creation of a CRA and the very resolution authorizing the issuance of millions of dollars worth of bonds require only one public hearing, this certainly cannot rise to the level of "extraordinary". Surely, "extraordinary" public involvement requires more than one public hearing. It is the County's interpretation of the Act that provides the most public input. Two hearings are called for by the Act.

The City cites Section 163.346, Fla. Stat. (2006), which defers to either Section 166.041(3)(a) or Section 125.66(2), noting that Chapter 125, Fla. Stat. (2006), does not require two readings for resolutions. That is true. What the City fails to recognize is that Chapter 125, governs counties and Chapter 166, governs municipalities. Certainly the City is not arguing that it could use Section 125.66, Fla. Stat. (2006), to adopt the bond resolution.

Otherwise Bay County stands on its Initial Brief and asks this Court to invalidate the various resolutions adopted by the City after only one public hearing.

REPLY TO SECOND ARGUMENT: WHETHER TAX INCREMENT FINANCING UNDER THE REDEVELOPMENT ACT IS CONSTITUTIONAL AND REQUIRES A REFERENDUM.

This Court having ruled twice since September that tax increment financing, or TIF bonding, requires a referendum, the City still presses for reversal of Strand v. Escambia County, No. SC06-1894 (Fla. 2007). Notably, at the same time, the City apparently agrees with the premise of the County's argument that Section 163.387 of the Redevelopment Act "authorizes TIF bonds without a referendum". Therefore, if this Court ultimately agrees with the County that Article VII, Section 12, Fla. Const. requires a referendum for TIF bonds to be valid, apparently there is no disagreement that Section 163.387, Fla. Stat. (2006) is unconstitutional.

The City claims that the County relied in its Initial Brief on "no other authority other than Justice Boyd's dissent". On the contrary, while it was admittedly not as strong on the details of the history of the bond industry in Florida, the County did cite Volusia County v. State of Florida, et al., 417 So.2d 968 (Fla. 1982), and State v. Halifax Hospital District, 159 So.2d 231 (Fla. 1963), for the proposition that the bonds in this case violate Art. VII, Section 12, Fla. Const. The County also focused on the constitutional provision itself, which states in essence that local governments "*may issue bonds. . . payable from ad valorem*

taxation . . .only. . . when approved by vote of the electors. . ." [1]

The City and Agency argue that they "relied in good faith on long-standing Florida precedent", and for this reason the Court should not receded from State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980). However, it should be noted that before the trial in this case, the County, citing the oral arguments in Strand, questioned the constitutionality of the bonds. Thus, while the City may have relied on Miami Beach initially to develop the TIF scheme for the Core CRA, it then proceeded to press for validation of the bonds in the face of the County's warning that Miami Beach was about to be reversed.

Ultimately, it is this Court's own prerogative to recede from its prior rulings. If the applicable standard is mere "reliance" by the business community, we will seldom see evolution in the law. This Court has receded numerous times from prior precedent, often in cases that involve much more personal and important social issues than bond financing of local government construction projects. Bay County rejects the City's argument that a referendum is only required if the bondholders can "compel the levy of an ad valorem tax" and encourages the Court to stay the course set in Strand.

[1] The County also did not have the benefit of this Court's ruling in Strand when it prepared its Initial Brief.

A. Whether The Referendum Requirement is Only Applicable to Debt Secured by the Full Faith and Credit of the Issuer.

In face of this Court's opinion in Strand, the City argues that Miami Beach should remain good law and that in the "context" of a CRA "no referendum is required for TIF bonds". The City redrafts the Constitution, claiming a referendum is only required if "debt" is secured by the "full faith and credit" of the "issuer". [2] It claims that despite the plain reading of Art. VII, Section 12, Fla. Const. the bonds are valid, because the bondholders lack the power to compel levy of taxes.

The City sets out to review the "history and fundamentals of public finance law" in Florida. It concludes this journey claiming that the issue is one involving "debt", stating "[i]n Florida, local government debt is constrained by the referendum requirement". The County would note that the term "debt" is not the limiting factor in Article VII, Section 12. The term is not even mentioned. The language is actually much broader and specifically includes "*bonds, certificates of indebtednesses or any form of tax anticipation certificates, payable from ad valorem taxation. . .*" As far as history is concerned, revisit Art. 9, Section 6 of the 1878 Constitution, as amended in 1930, the precursor to Art. VII, Section 12. The older version also does not address "debt", but instead focuses on "*bonds*".

[2] Note the "issuer" of the bonds in this case is the City of Cedar Grove. See, Resolution No. 07-007. Also the Cedar Grove Community Redevelopment Agency is comprised of the City Commission. See, Resolution No. 2001-3.

The City cites for authority that "debt" is the culprit, a law review article by Tracy Nichols Eddy, *The Referendum Requirement: A Constitutional Limitation on Local Government Debt in Florida*, 38 U. Miami L. Rev. 677 (1984). We would direct the Court to the conclusion of that article, which establishes the context of the article. It states:

> To promote fiscal home rule principles, the Florida Legislature and voters should amend section 12 to allow permissive referenda for general obligation bonds. Local governments' fiscal integrity would be maintained through the political process and the municipal bond market.

With deference to the claim that the Constitution should be amended to weaken the restriction on bonding ad valorem revenues, the County contends that the voters got it right in 1930 and in 1968, when they made the prohibition even more explicit. It is "*bonds*" and other types of indebtedness issued by local governments "*payable from ad valorem taxation*" that require voter approval, not just "debt."

Admittedly, it would be easier for bond counsel and local governments if an election were not required to issue TIF bonds, but a democratic imperative that has been in our Constitution for over 75 years should not be ignored merely for the sake of market expediency.

Appellees cite State v. City of Panama City Beach, 529 So. 2d 250 (Fla. 1988), quoting that part of the opinion where the Court observed that the referendum requirement "limited the risk associated with bond issues to only that which real property owners chose to accept". The part of the opinion not quoted is perhaps more telling where the Court wrote:

> The "outstanding purpose" of the amendment was to restrain "the spendthrift tendencies of political subdivisions to load the future with obligations to pay for things the present desires, but cannot justly pay for as they go. *Leon County v. State*, 122 Fla. 505, 514, 165 So. 666, 669 (1936).[3] (Emphasis added)

Thus, the desire to avoid placing long-term debt on the backs of future taxpayers is behind the constitutional imperative. The bonds Cedar Grove wants to issue are for a period of 30 years. The bonds for the Core CRA total $41,835,609.00.

Cedar Grove then discusses "revenue bonds". While the County has no qualms with a true revenue bond, it does not think a bond based on TIF is akin to the types of revenue bonds this Court has traditionally recognized as exempt from the referendum requirement. The City admits that "circumventing constitutional limitations can strike the ear of some as pejorative, if not sinister, particularly those

[3] The Panama City case was later questioned and partially receded from for unrelated reasons in State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991), which opinion may be helpful when considering how to "grandfather in" bonds issued prior to Strand.

with limited expertise or practical experience". We of little experience would agree. At first blush revenue bonds do seem to fly in the face of the constitutional mandate, except when one realizes that a true revenue bond is not supported with ad valorem tax dollars. The income stream to pay those types of bonds comes from revenue-generating enterprises, such as utility system revenues, bed taxes, race track and jai alai fronton funds, dormitory-cafeteria revenues, port facilities, cigarette taxes, franchise taxes on electric power, utility taxes, occupational taxes, concession rentals at the airport, occupational and beverage licenses, revenues of electric systems, waterworks revenues, tolls from bridge and road projects, and the like.

We know of no other type of "revenue" bond that uses ad valorem taxes as the basis to calculate the amount of the revenues pledged. Actually, calling TIF bonds "revenue bonds" lies at the heart of the problem with Miami Beach. As this Court realized in Strand, it is a pure legal fiction to assume that the tax increment revenues returned to the CRA will not come from the ad valorem taxes paid by the taxpayers in the CRA. Because ad valorem taxes are the measure of the revenue and the source of the revenue from which the TIF payment is made, an election is required.

The City quotes a Professor Gillette, who calls electoral requirements "anachronistic debt limits". He claims debt election "arose in an era of less

enfranchised citizenry". The County agrees that this may have been true in 1930, but it was certainly less true in 1968 when Art. VII, Section 12 was drafted. At any rate, whether a law professor would have our Constitution "modernized" does not obviate the requirement that the City abide by its dictates now, at least until such time as the Constitution is amended. Gillette also claims that the debt election requirement "preceded the development of bond counsel". So the point is "trust us"? Let bond counsel decide how to spend the taxpayers' money! With all due respect, the stewardship of lawyers is not a sufficient reason to jettison oversight by the voters who pay the taxes in the first place.

B. Whether the Court's Decision in Miami Beach Represents the Majority Rule and Was an Error in Legal Thinking

The City claims the difference between a constitutional bond and an unconstitutional bond is simply whether the bondholders bear the risk that the project will fail. It submits there is a "bright-line principle" purportedly "developed by this Court over the past decades" that focuses on whether the "transaction directly or indirectly obligate(s) the government to impose taxes in order to support the debt obligations".

The City cites no case that even mentions this so called "bright-line principle". The principle is also at odds with this Court's recent construction of Art. VII, Section 12, Fla. Const. in Strand that it is not just the power to levy ad valorem taxation, but also the ad valorem tax revenues that are the subject of the

referendum requirement. The City's argument also ignores reality. Here the City is the "issuer" of these bonds. Cedar Grove will presumably enter into contracts with third persons to perform capital projects in the CRA and satisfy these contracts with bond proceeds. If the TIF revenues are not in the CRA Trust Fund, it would seem reasonable to assume that the City would want to meet its obligations to its contractors and also pay off the bonds. As this Court noted in Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (Fla. 1971), in some instances "the county or the legislature would feel morally compelled to levy taxes or to appropriate funds" to satisfy its bond obligations. Id at 311. (Emphasis added)

Nohrr was receded from on other grounds by this Court in Wilson v. Palm Beach Housing Authority, 503 So. 2d 893 (Fla. 1987). Wilson authorized the Palm Beach County Housing Authority to issue revenue bonds "payable solely from the housing projects' revenues and the bond proceeds investment earnings", noting that the Housing Authority "has no ad valorem taxing authority and, in issuing these bonds, there is no direct or indirect pledge of taxing power." In this case, it is the City of Cedar Grove that is the "issuer" of the bonds. Finally, this Court should be reminded that the County, as well as the City, is a "taxing authority" that must pay tax increment revenues to the City's CRA Trust. The County is legally compelled by Section 163.387(2)(a), Fla. Stat. (2006), to "*appropriate to the trust fund. . . a*

sum no less than the increment. . . accruing to such taxing authority" every year so long as the bonds are outstanding.

The legal fiction that tax increment revenues are not ad valorem taxes has been exposed. Having addressed the dissent of Justice Boyd in the Miami Beach case, we would note Justice Shaw's dissent in State v. Daytona Beach, 484 So. 2d 1214 (Fla. 1986), where he wrote:

> Pledging ad valorem taxes as payment for local bonds requires a referendum vote by the electors. Art. VII, § 12(a), Fla. Const., Coining a new label "ad valorem tax increment" does not change the substance of the ad valorem taxes. They are still ad valorem taxes and a referendum is required before they are pledged to finance or refinance capital projects. Id at 1216.

In State ex rel City of Gainesville v. St. Johns River Water Management District, 408 So. 2d 1067 (1st DCA 1982), the court determined that the District could not be compelled to pay "tax increment appropriation" to a CRA. In doing so and admittedly in dicta, the court wrote:

> Petitioner has suggested that the § 163.387, Florida Statutes, ad valorem tax increment appropriation is merely a measurement formula which does not require the levy or allocation of ad valorem taxes, and which may be financed by funds from other sources. We are not persuaded by this argument, which ignores the financial realities of the tax increment appropriation imposed by § 163.387, and which attempts to accomplish indirectly that which may not constitutionally be done directly. . . . Id at 1069.

The City cites extra-jurisdictional cases for support, including Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975). In Tribe, a two block area was the subject of a project that involved the construction of a parking facility, not hundreds of acres of residential and commercial development as in this instant case. The tax increment from that new facility and the parking revenues it generated were used to support the bond. While the main issue in Tribe involved whether there was a political subdivision under the Utah Constitution, the Court did note that if it were not for the construction of the new parking lot, there would no increase in tax revenues. The case is not on point, because the CRAs here are not developing buildings or projects that will generate new ad valorem taxes. The bulk of the improvements supported by the bonds involve roads, drainage, sidewalks, etc. Also, what Utah allows is not controlling in Florida.

In State v. Dade, 234 So. 2d 651 (Fla. 1970), this Court held that under the 1968 Constitution, certificates of indebtedness could not be issued without approval of the voters. In doing so, it compared the 1968 Constitution to the 1930 version, stating as follows:

> The present Constitution is clearly more restrictive and expresses the will of the people that financial arrangements of the type formerly upheld in the Tapers v. Pichard line of cases be no longer permitted.[4]

[4] This case was questioned on unrelated grounds in State v. Orange County, 281 So. 2d 310 (Fla. 1973), but it is still important for jettisoning Tapers v Pilchard, 169 So. 39 (Fla. 1936) and its progeny.

In Boshen v. City of Clearwater, 777 So. 2d 958 (Fla. 2001), this Court found the referendum provision not applicable to a revenue bond supported with infrastructure taxes, stating as follows:

> Article VII, Section 12, authorizes municipalities to issue bonds to finance capital projects, but requires a referendum when the bonds are payable from ad valorem taxation. *See:* art. VII, § 12, Fla. Const. In the instant case, the funds for repayment of the bonds are derived solely from the pledged infrastructure tax revenues and do not include ad valorem taxes. (Emphasis added) Id at 963

Interestingly, the City did not cite this case, which is consistent with Strand's construction of Article VII, Section 12. Instead, the City focused on a case from Colorado, which did not even involve a referendum requirement.

The City claims Strand incorrectly construed Art. VII, Section 12 to apply to both the act of taxation and the tax itself. The City would have the Constitution limited only to pledging taxing powers. This argument ignores the plain meaning of the Constitution and promotes an analysis that is not even grammatical. How can one make anything "*payable*" from the act of taxation? This Court was correct in Strand. The Constitution clearly prevents ad valorem tax revenues from being used to support bonds without a referendum.

The City correctly states that the Court must presume the Redevelopment Act to be valid and the "county must demonstrate it is unconstitutional beyond a reasonable doubt". First of all, the County is not asking this Court to hold the entire CRA statute unconstitutional. Only Section 163.387, Fla. Stat. (2006).

Secondly, this Court has previously found "reasonable doubt" and rejected a statute authorizing bonds, stating, "if a legislature enactment conflicts with an existing provision of the constitution, such enactment does not become a law. The intent of a constitution may be shown by the implications as well as by the words of express provisions." Nuveen v. Greer, 88 Fla. 249, 258; 102 So. 739 (Fla. 1924). The same analysis holds true in this case.

C. Whether The Plain Meaning of "Payable from Ad Valorem Taxation" Must Be Consistent with the Court's Bright-Line Principle

The City cites its "bright line principle" and chastises this Court for departing from "decades of the Court's own precedents" in Strand. Most bond cases involve pure revenue bonds. The only cases that deal with tax increment financing are Miami Beach and its progeny. Other cases were rejected by this Court in Dade County.

The City addresses the discussion in Strand about the 1968 Constitutional Revision Commission and mentions "committee members were sharing among themselves a law review article which concluded the existing debt-financing provisions have worked quite well in practice. We do not believe that sweeping changes are necessary". If we are going to review law review articles to decide this case, the County advises reading Arnold L. Greenfield, *Flexibility and Fiscal Conservatism: Provisions of the 1978 Constitutional Revision Relating to Bond*

Financing, 6 Fla. S. L. Rev. 821 (1978), wherein the author addressed the proposal to add a new Section 17 to Article VII, which would specifically authorize tax increment financing. Noting the recent adoption of the Community Redevelopment Act, Chapter 77-391 Laws of Fla., the author wrote:

> "However, there is some doubt as to whether such revenue bonds, none of which have been issued to date, can withstand the test of court validation absent a constitutional revision relating to this subject.
>
> Objections might otherwise be lodged under article VII, section 10, relating to lending public credit to private persons and corporations, and article VII, section 12 relating to the use of ad valorem tax funds to pay bond issues without a vote of the electors. This revision is designed to cure any such possible legal problems. Id at 836.

The City takes issue with this Court's statement in Strand that the "premise" underlying Miami Beach was wrong. That *"payable from ad valorem taxation"* does not mean "only the pledge of ad valorem taxation power", but also involves the tax itself.

The County submits that this Court was eminently correct in its interpretation of the Constitution in Strand. It would note that the terms "*taxes*" and "*taxation*", in relation to a referendum requirement, occur twice in Article VII and seem to be used interchangeably. See, Section 9(b), "*exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt*"; Section 12, "*payable from ad valorem taxation and maturing*

more than twelve months after issuance. . .” (Emphasis added)

The terms “*tax*” and “*taxation*” also appear similarly treated in other sections of Art. VII. See, Section 1(a) “. . .*No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law*”, Section 1(b) “*Motor vehicles . . shall be subject to a license tax . . .but shall not be subject to ad valorem taxes*”; Section 2, “*All ad valorem taxation shall be at a uniform rate within each taxing unit, except the taxes on intangible personal property may be at different rates . . .*”; Section 16(b) “*The bonds shall be secured by a pledge of and shall be payable primarily from all or any part of revenues to be derived from the financing, operation or sale of such facilities, mortgage or loan payments, and any other revenues or assets that may be legally available for such purposes derived from sources other than ad valorem taxation, including revenues from other facilities, or any combination thereof. . .*” (Emphasis added)

So the “*ad valorem tax*” is as protected by the referendum requirement as “*ad valorem taxation*”. This implies that the “bright-line” the City claims to see is simply not contained in the Constitution.

D. Whether Tax Increment Financing Under the Redevelopment Act Will Impair the Budget Flexibility of Any Affected Taxing Authority

The City claims that using an "agency" as an intermediary somehow avoids "indirectly pledging the taxing power or taxes". The fact is, here the CRA Agency is the City, just with another hat on. The creation of this fiction with phantom agencies through interlocal agreements should not be allowed to obviate the critical requirement of a referendum. The City cites Wilson v. Palm Beach County Housing Authority. However, as noted above, the financing scheme in Wilson involved revenue bonds "payable solely from the housing projects' revenues and the bond proceeds investment earnings." It did not involve tax increment financing.

The City focuses on Section 163.387(4), Fla. Stat. (2006), and the bond resolution, which both state that the bonds "shall not constitute general obligations or indebtedness of the Issuer" and the bondholders shall not "have the right to compel the exercise of the ad valorem taxing power". This mantra is not controlling. It is hard to believe that if the City is the "issuer" of the bonds, and the County fails or refuses to pay the TIF revenue into the CRA Trust Fund, that the City will not feel compelled to find the money to pay the bondholders. Also, remember the County has a statutory obligation to pay the TIF payment or suffer a 5% penalty, plus interest. Section 163.387(2)(b), Fla. Stat. (2006).

The City argues with the County's position that the TIF payment will come from ad valorem taxes, focusing on the fact that other "non ad valorem revenue" resources make up the County's budget. While the City would educate the Court on "the complex nature of local government budgeting", it has failed to complete the course. The City examines the County's budget, which incidentally was not in the record below, and claims that the TIF payments are so small it doesn't matter. It is true that the law should not concern itself with a trifle, *de minimis non curat lex*, but here we are concerned with bonds worth many millions of dollars. Also, while the initial TIF payment may be low, the County's total TIF payments over the 30 year life of the bonds is estimated to be at least $8.39 million for the Core CRA .

Yes, the County's general fund is comprised of both ad valorem and non ad valorem revenues.[5] However, the County's government and business activities fund is comprised of revenues from a mosquito control district, a municipal service taxing unit (MSTU), enterprise funds for water, sewer, industrial wastewater, solid waste and builders services, state and federal grants, gas taxes, bed taxes, 911 fees, charges for County services, court services, state revenue sharing, and impact fees, all of which are earmarked and cannot be given over to the CRAs.

[5] The City was mistaken; the "general fund" was actually $80,257,836.99 in 2005. The total fund for government and business activities was about $115,000,000.00.

The City argues TIF does not "conjure up the consequences of Halifax and Volusia County", claiming that the "annual contribution to the community redevelopment trust fund can be paid from non ad valorem revenues". The City would place on the County the burden to police the Constitution and segregate its various ad valorem and non ad valorem revenues to ensure that the City's bonds are never paid with ad valorem revenues. This is unreasonable, defies reality, and cannot be a responsible solution to the constitutional question at hand.

The "tax increment" to be refunded to the CRA is 95% of the increased increment of ad valorem taxes paid to the County from property owners in the CRA. The ad valorem taxes within the CRAs are paid to the Tax Collector who then gives these to the County. The County then earmarks these funds for payment to the CRAs. Last year, the County returned almost 14% of its total ad valorem revenues to CRAs, or about $10.3 million in TIF payments.

The City cites Kelson v. Pensacola, 483 So.2d 77 (Fla. 1st DCA 1986), which upheld a challenge to the constitutionality of the Act under Article VII, Section 9(a) and Article I, Section 10, of the Fla. Const. Admittedly, in Kelson the court seemed to slip away from its dicta in State ex rel. Cty of Gainesville v. St. Johns River Water Management District regarding TIF. Still, its holding was based on Miami Beach, which the court was compelled to follow. The City cites Kelson for the proposition that the "fallacy of logic" lies in the "nature of the tax

increment formula", where the only amount a taxing authority has to repay is the increment of increase in taxes. In Kelson the First District wrote:

> The Community Redevelopment Agency creates more revenue by increasing the property value. Such appropriation does not affect any contract or obligation of the County, since the increase in land value creates its own source of revenue, which although it may be pledged to ad valorem obligations, frees up non-ad valorem funds in a concomitant amount. (Emphasis added)

So, one should not complain about what they never had? This makes TIF legal? What about other market forces at play that may increase the tax base. It also ignores the fact that the payment of TIF redirects moneys that would have otherwise been available to pay for other countywide government services and the constitutional officers. Finally, note that the First District's construction of the Act is consistent with Strand.

In this case the testimony on the record was that the ad valorem taxes collected were the measure of the amount and the source of the tax increment payments made to the CRA which financed the bonds. For this reason, the TIF bonds are unconstitutional.

E. Whether The Court Should Limit Its Ruling in Strand to the Facts in Strand

The City discusses the "merger" of "legislative, taxing authority", and states it is the creation of a separate legislative entity that "implicates the referendum requirement". As noted above, the resolution creating the CRA Agency appointed the City Commission as the Agency. Also, Section 163.357, Fla. Stat. (2006) provides that the "governing body" may be the "community redevelopment agency". This argument ignores the ruling in Strand that the terms "*ad valorem taxation*" mean not only the power to tax, but also ad valorem tax revenues.

The City seeks to limit Strand by throwing Escambia County under the bus. The City claims that "[n]owhere under the Redevelopment Act and Miami Beach are ad valorem taxes required to be levied and ad valorem tax revenues are never required to be deposited into the community redevelopment trust fund". It then claims in footnote 33 that "this is expressly prohibited in sections 163.387(4) and (5), Florida Statutes (2006)." While it is true that those sections do not "require" ad valorem taxes to be returned to the CRA and they do proscribe pledging the "*full faith and credit*", nothing in the statute "prohibits" paying TIF with ad valorem tax revenues. In fact, the statute bends the other way. Section 163.387(1)(a), Fla. Stat. (2006), states that the "*increment shall be determined annually and shall be that amount equal to 95 percent of the difference between. . . [t]he amount of ad valorem taxes levied each year by each taxing authority. . .*"

(Emphasis added) Elsewhere the statute specifically requires payment of the bonds "*solely out of revenues pledged to and received by*" the agency, i.e TIF revenues. Section 163.387(4), Fla. Stat. (2006). In the real world, these "*revenues*" are the ad valorem taxes the County receives from the CRA and then returns to the City for deposit in the CRA Trust Fund to pay the bonds. The City knows this, a fact it should be forced to admit during oral argument.

In its conclusion the City asks this Court to "apply the Court's traditional analysis articulated in State v J.P., 907 So.2d 1101 (Fla. 2004)." The County would note that J.P. involved a "constitutional liberty", not a funding mechanism for local government construction projects.

Bay County submits that the decision in Miami Beach was wrongly decided. Clear legal error has now been identified. Because this Court in Strand, "grandfathered in" bonds that were previously issued, there is no reliance problem. The concern about *stare decisis* has been addressed. The Court's decision in Strand is correct. [6]

[6] In this case, the bond validation below never became final because the County appealed the final judgment which stayed its effectiveness. See, Fla. R. App. P. Rule 9.310(b)(2).

CONCLUSION.

The resolutions creating the CRA Plan, the Interlocal Agreement, and which authorized the bonds, as well as Section 163.387, Fla. Stat. (2006), each provide that the increment of increase in County ad valorem taxes collected from the CRA shall be the amount the County must remit to the City, which will be placed in the Trust Fund to support the bonds. Tax increment financing and the bonds in this case authorize a scheme to support "*bonds. . . payable from ad valorem taxes. . ..*" This violates Art. VII, Section 12 of the Fla. Const. unless there has been a referendum approving the bonds.

For these reasons, this Court should invalidate the bonds, hold Section 163.387, Fla. Statute (2006) unconstitutional, and remand with instructions for the court to invalidate the resolutions and ordinances that authorize tax increment financing.

Respectfully submitted this ___ day of November 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 below by U.S. Mail this ____day of November 2007.

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CERTIFICATE OF COMPLIANCE.

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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