IN THE FLORIDA SUPREME COURT
CASE NO. SC07-1574

BAY COUNTY,
Appellants,
vs.

TOWN OF CEDAR GROVE, and CEDAR GROVE COMMUNITY REDEVELOPMENT AGENCY,
Appellees.

L. T. Case No.: 07-1770-CA (Brannonville)

BOND VALIDATION PROCEEDING

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

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PRELIMINARY STATEMENT

The Town of Cedar Grove, Florida ("City"), established one community redevelopment agency and two community redevelopment areas within the City: the Core Community Redevelopment Area and the Brannonville Community Redevelopment Area. Both were brought before the trial court and the trial court validated the issuance of the proposed bonds in both cases. Bay County, Florida, the Appellant ("County"), appealed both validations. This matter involves one appeal. The other appeal is styled *Bay County v. Town of Cedar Grove*, SC07-1572 ("Core").

The Appellee/Plaintiff, the Town of Cedar Grove, Florida, will be referred to as the "City," and the Appellee/Plaintiff, Cedar Grove Community Redevelopment Agency, will be referred to as the "Agency." Collectively, the City and Agency may be referred to as Appellees.

The Appellant/Defendant, Bay County, Florida, will be referred to as the "County."

The Appellant/Defendant, State of Florida, will be referred to as the "State."

References to the County's Initial Brief in this case will be cited by the symbol "BIB" followed by the page number (BIB; page #). References to the Appendix submitted with the County's Initial Brief in this case will be cited as "BAI," followed by the tab number, followed by the page or paragraph number

(BAI-tab#; page#). References to the Appendix submitted with the Appellees' Answer Brief in this case will be cited as "BAII," followed by the tab number, followed by the page or paragraph number (BAII-tab#; page#).

STATEMENT OF JURISDICTION

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i), this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. On July 19, 2007, the Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida, entered such a final order validating the City's proposed bond issuance. (BAI-tab 2).

Under section 75.01, Florida Statutes (2006), a circuit court has "jurisdiction to determine the validation of bonds . . . and all matters connected therewith." Furthermore, the Court has the power to determine whether a "public body had authority to incur the obligation, whether the purpose of the obligation is legal, and whether the proceedings authorizing the obligation where proper." *State v. City of Daytona Beach*, 431 So. 2d 981, 983 (Fla. 1983). The validity of an interlocal agreement is also a proper subject of such proceedings. *See id*. at 982-83.

This Court has mandatory jurisdiction to hear appeals from final judgments entered in a proceeding for the validation of bonds. Art. V, § 3(b)(2), Fla. Const. Section 75.08, Florida Statutes (2006), provides that either party may appeal the

trial court's decision on the complaint for validation. The County filed its Notice of Appeal on August 20, 2007. (BAII-tab 15).

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

The County's Statement of the Case and Facts inappropriately contains mostly argument. (BIB; 2-6). The Appellees therefore submit the following supplemental statement for the Court's consideration.

On July 19, 2007, the trial court rendered a final judgment validating the issuance of not to exceed $23,688,708 Town of Cedar Grove, Florida Capital Improvement Revenue Bonds in one or more series (the "Bonds"), the interlocal agreement between the City and Agency providing for repayment of the Bonds[1] and certain other matters in connection therewith. (BAI-tab 2). The Agency seeks to use the provisions of chapter 163, part III, Florida Statutes (2006) (the "Redevelopment Act" or "Act"), in order to redevelop that area of the City, commonly known as Brannonville, that the Board of Commissioners of the Town of Cedar Grove (the "City Commission") determined to contain blighted area conditions (the "Redevelopment Area" or "Area"). The trial court validated the Bonds and found in favor of the City and Agency on all factual and legal issues. (BAI-tab 2; 4-32).

[1]Resolution No. 07-012 (City)/Resolution No. 07-002 (Agency). (BAI-tab 7).

The proceeds of the Bonds are intended to finance, in part, the cost of infrastructure improvements within the Redevelopment Area. (BAI-tab 5; ex. A at 18-31). The Bonds will be repaid from revenues of the redevelopment trust fund properly established pursuant to section 163.387, Florida Statutes (2006), and supplementally from special assessments or other legally available City revenues. (BAI-tab 9).

To initiate the community redevelopment process under the Act, the City Commission adopted Resolution No. 2000-16 on December 12, 2000, authorizing and directing an investigation into whether the Redevelopment Area constituted an area of slum or blight within the meaning of chapter 163, part III, Florida Statutes (2000) (the "Redevelopment Act (2000)"). (BAI-tab 2; 21); (BAII-tab 2).

On February 27, 2001, the City Commission adopted Resolution No. 2001-3 which (a) determined that the Redevelopment Area contained blighted area conditions as defined in section 163.340, Florida Statutes (2000), (b) provided the finding of necessity required by section 163.355, Florida Statutes (2000), (c) determined a need for the Agency in the City to carry out community redevelopment purposes and projects, (d) created the Agency,[2] (e) declared the

[2]The Agency is a separate legal entity, apart from the City Commission, with a set of separate fiduciary and administrative responsibilities under the Redevelopment Act. The Agency was created pursuant to the Redevelopment Act in 2001 and has now undertaken community redevelopment responsibility in two separate areas: the Brannonville Redevelopment Area and the Core Redevelopment Area (*Bay County v. Town of Cedar Grove*, SC07-1572). Although the City chose

City Commission to act ex-officio as the Agency, and (f) authorized and directed the creation of a redevelopment plan. Resolution No. 2001-3 was adopted after a duly noticed public hearing and timely advance notice to the Bay County Commission. (BAI-tab 2; 21-22); (BAI-tab 3); (BAII-tab 6).

On May 23, 2006, the City Commission adopted Resolution No. 06-007, which: (a) ratified the creation of the Redevelopment Area and (b) authorized a supplemental study to determine whether supplemental findings of necessity should be adopted, or in the alternative whether to pursue the creation of a redevelopment plan for the Redevelopment Area. (BAI-tab 2; 23); (BAII-tab 3).

On March 27, 2007, the City Commission adopted Resolution No. 07-002 which was supported by the Reconfirmation Report of the Brannonville Findings of Necessity and Community Redevelopment Area (the "Reconfirmed Findings") and which (a) confirmed the findings in Resolution No. 2001-3 required by section 163.355, Florida Statutes (2000), (b) also found that the Redevelopment Area contained a substantial number of deteriorated or deteriorating structures that are

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to have the City Commission act ex-officio as the Agency (pursuant to section 163.357, Florida Statutes (2001)), the Agency by law and function is "separate, distinct and independent" from the City Commission. In this context, this Court has recognized such independence where a community development district, municipality, and community redevelopment agency sought validation of bonds and associated obligations, but only the agency appealed the trial court's adverse ruling against that agency in a bifurcated validation of only the bonds of the community development district and the city's obligations. *See Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662 (Fla. 2002).

leading to economic distress and/or endangerment of life and property, (c) ratified the legislative findings that the conditions in the Redevelopment Area met the criteria in section 163.340(8), Florida Statutes (2000), (d) determined that the Redevelopment Area continues to contain blighted area conditions as defined in the Redevelopment Act (2000), (f) confirmed that the Redevelopment Area constitutes a community redevelopment area under Redevelopment Act (2000), (g) found that the Redevelopment Area still contained significant blighted area conditions which, although not required, also meet the definition of "blighted area" contained in the Redevelopment Act, and (h) found that the Agency is still appropriate to carry out the community redevelopment purposes and projects. (BAI-tab 2; 23-24); (BAI-tab 4); (BAII-tab 8).

Pursuant to section 163.360(4), the Town of Cedar Grove, Brannonville Community Redevelopment Plan ("Redevelopment Plan") was prepared and submitted to the City Planning Council (the "Planning Council") on May 21, 2007. (AI-tab 2; 24); (AII-tab 4). As required by section 163.360(5), Florida Statutes (2000), a copy of the Redevelopment Plan was provided to the Agency, the City, and each taxing authority that levies ad valorem taxes on taxable real property contained within the Redevelopment Area. All such governmental entities and all persons affected were afforded an opportunity to present oral and written comments at a duly noticed public hearing conducted by the City Commission on

May 22, 2007. (BAII-tab 14). At the conclusion of such public hearing, the City Commission adopted Resolution No. 07-010, which approved and adopted the Redevelopment Plan. (BAI-tab 2; 24-25); (BAI-tab 5). The Redevelopment Plan meets the requirements of the Redevelopment Act. (BAI-tab 2; 25); (BAII-tab 16; 14-27).[3]

On May 29, 2007, the City Commission enacted Ordinance No. 07-422 (the "Trust Fund Ordinance") which created a community redevelopment trust fund for the Redevelopment Area (the "Redevelopment Trust Fund").[4] (BAI-tab 6). The Trust Fund Ordinance was adopted after a duly noticed public hearing and timely mailed notice to all affected taxing authorities consistent with sections 163.346 and 166.041, Florida Statutes (2006). (BAI-tab 5; ex. B) The tax increment and funds contained in the Redevelopment Trust Fund are to be used for community redevelopment purposes as provided in the Redevelopment Act and the Trust Fund Ordinance. (BAI-tab 2; 25-26); (BAI-tab 6).

On May 29, 2007, the City and Agency entered into an interlocal agreement, authorized by joint Resolution No. 07-012 (City)/Resolution No. 07-002 (Agency),

[3]Adoption of the Redevelopment Plan is not subject to the procedures in section 163.360(6)(b), Florida Statutes (2006), because the City met the dates contained in that section to be exempt from the changes in the law. (BAI-tab 2; 25). The dates contained in section 163.387(1)(b)1., Florida Statutes (2006), relative to the trust fund are the same and are therefore inapplicable as well.

[4]The City demonstrated that it imposed ad valorem taxes at the time it adopted its trust fund ordinance. (BAI-tab 2; 26 fn 14); (BAII-tab 9).

providing for the pledge by the Agency of funds contained in the Redevelopment Trust Fund as payment for debt service on the Bonds (the "Interlocal Agreement"). (BAI-tab 2; 27); (BAI-tab 7); (BAI-tab 8). The Interlocal Agreement has been duly filed with the Clerk of the Circuit Court for Bay County, Florida. (BAI-tab 2; 27); (BAI-tab 8).

Pursuant to the Redevelopment Act the City Commission adopted Resolution No. 07-011 on May 29, 2007 (the "Bond Resolution"). (BAI-tab 2; 27-30); (BAI-tab 9). The Bond Resolution was adopted after a duly noticed public hearing and timely mailed notice to all affected taxing authorities consistent with sections 163.346 and 166.041. (BAI-tab 5; ex. B). The Bond Resolution provides for the issuance of not to exceed $23,688,708 Town of Cedar Grove, Florida Capital Improvement Revenue Bonds, which may be issued in one or more series as provided therein, for the purpose of financing projects[5] identified in the Redevelopment Plan. (BAI-tab 2; 27-30); (BAI-tab 9; title page, 10, 14).

After statutory notice of the City's intention to issue the Bonds, the County intervened and objected to the validation of the Bonds in this proceeding. (BAI-tab 2; 2). The County filed an Answer and Counterclaim in its attempt to challenge the validation of the Bonds. (BAI-tab 1); (BAI-tab 2; 2).

[5]On June 26, 2007, the City adopted Resolution No. 07-014 ratifying, confirming, and clarifying the definition of "Project" under the Bond Resolution. (BAII-tab 10).

The City and Agency objected to the County's attempt to file any counterclaims in this validation proceeding under chapter 75, Florida Statutes. The Court appropriately ordered that all counterclaims be considered answers and defenses, thereby relieving the City and Agency from having to formally respond thereto so as not to admit the allegations and removing the ability for the County to receive affirmative relief. *See* § 75.07, Fla. Stat. (2006); *State v. Fla. Dev. Comm'n*, 143 So. 2d 676, 681 n.14 (Fla. 1962) (counterclaims are not permitted in a bond validation proceedings). (BAI-tab 2; 2). All of the issues the County raised came before the Court for its consideration at the Order to Show Cause hearing. (BAI-tab 2; 2-3).

The Court substantially extended the time originally allocated for the hearing in order to afford all parties adequate time to present their respective positions. (BAI-tab 2; 3). And on July 11, 2007, the Court conducted an Order to Show Cause evidentiary hearing followed by argument ("Hearing"). (BAI-tab 2; 3); (BAII-tab 1). The State required strict proof of the matters alleged and did not otherwise object to the Validation Complaint. (BAI-tab 2; 3). The County moved against and objected to the Validation Complaint. (BAI-tab 2; 3).

On July 19, 2007, the trial court entered the final judgment validating the Bonds. (BAI-tab 2; 30-32). The County's appeal followed. (BAII-tab 15).

SUMMARY OF THE ARGUMENT

The County has appealed the validation based upon three issues: the legal sufficiency of adopting resolutions with one reading, the legal sufficiency of the City's 2001 findings related to blight and necessity, and the constitutionality of tax increment financing without a referendum. The trial court properly validated the City's issuance of tax increment revenue bonds to fund community redevelopment.

First, unless required by unique municipal charter provision, which is not present here, municipalities in Florida are not required to, nor do they, read resolutions twice. The County's strained argument that the cross-reference to section 166.041(3)(a) brings into play ordinance ***adoption*** procedures ignores the plain reading of section 163.346, which simply cross-references those dealing with ***public notice***. This Court should therefore uphold the trial court's determination and plain reading of the statute.

Second, the express language that the Redevelopment Act did not require the City to revisit its threshold determinations and actions duly taken in Resolution No. 2001-3. The County has conceded this issue. This Court should therefore uphold the trial court's finding.

Third, the Court should reject the County's constitutional challenge based on the bright-line principle that a referendum is not required unless bondholders have the power to compel, directly or indirectly, the levy of an ad valorem tax. *See*

State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980), *called into question by Strand v. Escambia County*, 32 Fla. L. Weekly S550 (Fla. Sept. 6, 2007, revised Sept. 28, 2007). This bright-line rule is better understood through a review of the history and fundamentals of public finance law, an understanding of general obligation versus revenue bonds, and a careful analysis of the meaning of "payable from ad valorem taxation." This history supports *Miami Beach*, which represents this country's majority rule and is not an error in legal thinking. The Court should not abandon this bright-line principle without first undertaking its traditional *stare decisis* analysis. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003). This Court should not rewrite the referendum requirement clause "payable from ad valorem taxation" to mean "derived from ad valorem tax revenue." *Miami Beach* remains good law, requiring a referendum only where bondholders have the power to compel, directly or indirectly, the entity with taxing powers to levy an ad valorem tax.

In the end, if the bondholders cannot compel the imposition of ad valorem taxes or if the issuance of the bonds will not necessarily lead to the levy of additional ad valorem taxes, the obligations are not general obligation bonds for constitutional purposes. This not only ensures continued budget flexibility for affected taxing authorities, but accomplishes community redevelopment of slum and blighted areas (beneficial to ***all*** taxing authorities) only with revenues

generated as a result of the redevelopment. The Court should reverse the ruling in *Strand.*

In the event the Court does not overturn *Strand*, it must ensure that its limiting principle does not inadvertently impact other long-standing areas of the law (like the distinction between revenue bonds and general obligation bonds). The limiting principle might be that, when a government pledges the tax increment for bonds, a referendum is required if the government body is at once the issuer, the entity that levies the tax, and the entity that holds the trust fund. This Court has provided guidance through long-standing Florida precedent, upon which the City and the Agency relied in good faith. Tax increment financing under the Redevelopment Act, which includes many procedural and substantive safeguards, is constitutional without a referendum. Outside the context of the Redevelopment Act, courts should carefully scrutinize the use of tax increment financing for compliance with safeguards inherent in statutory community redevelopment financings, to ensure that they do not violate the referendum requirement.

This Court should uphold the trial court's validation of the subject Bonds, and all matters associated therewith, under the long-standing authority of *Miami Beach* and the Redevelopment Act.

STANDARD OF REVIEW

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

The standard of review for the trial court's findings of fact is substantial competent evidence and for its conclusions of law is de novo. *City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003); *City of Boca Raton v. State*, 595 So. 2d 25, 31 (Fla. 1992); *Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662, 665 (Fla. 2002).

Furthermore, a "final judgment validating bonds comes to this Court with a presumption of correctness." *Turner v. City of Clearwater*, 789 So. 2d 273, 276 (Fla. 2001). The County has the "burden of demonstrating that the record and evidence ***fail*** to support the lower court's conclusions." *Id*. 276-77 (emphasis added).

ARGUMENT

I. THERE IS NO STATUTORY REQUIREMENT THAT THE RESOLUTIONS REQUIRED BY THE REDEVELOPMENT ACT BE READ TWICE

Section 163.346, Florida Statutes (2006), provides:

> Before the governing body adopts any resolution or enacts any ordinance required under s. 163.355, s. 163.356, s. 163.357, or s. 163.387; creates a community redevelopment agency; approves, adopts, or amends a community redevelopment plan; or issues redevelopment revenue bonds under s. 163.385, the governing body must provide ***public notice*** of such proposed action pursuant to s. 125.66(2) ***or*** s. 166.041(3)(a) and, at least 15 days before such proposed action, mail by registered mail a notice to each taxing authority which levies ad valorem taxes on taxable real property contained within the geographic boundaries of the redevelopment area.

(emphasis added).[6] The County argues that this cross-reference to section 166.041(3)(a), Florida Statutes (2006), requires that resolutions comply with all the provisions of that section, not just those dealing with ***public notice***. (BIB; 10-11). To the contrary, section 166.041(3)(a) provides:

> [A] proposed ordinance may be ***read*** by title, or in full, on at least 2 separate days and shall, at least 10 days prior to adoption, be ***noticed*** once in a newspaper of general circulation in the municipality. The ***notice*** of proposed enactment shall state the date, time, and place of the meeting; the title or titles of proposed ordinances; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The ***notice*** shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance.

(emphasis added). The County's argument has no basis under statutory interpretation or settled law as there is a clear delineation between the notice and adoption procedures in section 166.041(3)(a). Furthermore, section 125.66(2),

[6]Section 163.346 also requires mailed notice to taxing authorities. The County does not contest the Appellees' compliance with these requirements. (BIB; 10-13).

Florida Statutes (2006), contains no adoption requirements, only those related to public notice thereby rendering absurd the argument that the resolutions in this matter must be read twice in addition to the required public notice.

A. Section 163.346 Requires Compliance with the Public Notice Procedures in Section 166.041(3)(a), Not the Adoption Procedures

The Redevelopment Act specifically cross-references only the public notice portion of section 166.041(3)(a). The County, in its Initial Brief and at Hearing, confuses the public notice requirement with an adoption procedure in that same section. (BIB; 10-13); (BAII-tab 1; 78). To the contrary, the two are quite distinct. The ***public notice*** referred to in section 166.041(3)(a) requires notice be published once in a newspaper of general circulation in the municipality at least ten days prior to adoption and must contain specific information. The separate and distinct ***adoption procedure*** referenced in section 166.041(3)(a) is only applicable to ordinances and requires "a proposed ordinance may be read by title or in full on at least two separate days . . . ." By contrast, there is a separate adoption procedure for resolutions contained in section 166.041(2) that requires each resolution to be introduced in writing and embrace one subject that is clearly stated in the title. That is the ***only*** adoption procedure applicable to resolutions. There is no notice provision generally applicable to resolutions. *See* Op. Att'y Gen. Fla. 81-71

(1981) (the two reading requirement applicable to adoption of non-emergency ordinances did not apply to municipal resolutions).[7]

Absent prior case law interpretations or an error in legal thinking that compels the Court to violate the principle of stare decisis, the words ***public notice*** used in section 163.346 should be given their common and ordinary meaning, not a strained or unusual meaning. *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004); s*ee State v. Nichols*, 892 So. 2d 1221 (Fla. 1st DCA 2005) (an undefined term's common or ordinary meaning controls). Specifically focusing on the public notice versus adoption procedures in section 166.041(3)(a), the common or ordinary meaning of the term "public notice" is not the same as the term "read." The term "public notice" is defined as "[n]otice given to the public or persons affected, usu. [sic] by publishing in a newspaper of general circulation." Black's Law Dictionary 1091 (8th ed. 2004). The term "reading" is defined therein as "the recitation aloud of a bill or other main motion, sometimes by title only . . . ." *Id*. at 1291. The objective of section 163.346 is to simply provide public notice by publication ten days prior to adoption. Unless required by unique municipal charter provision, which is not

[7]*See Beverly v. Div. of Beverage of the Dept. of Bus. Regulation*, 282 So. 2d 657, 660 (Fla. 1st DCA 1973) ("[w]hile the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this State, they are entitled to great weight in construing the law of this State").

present here, municipalities in Florida are not required to, nor do they "read" resolutions twice.

As the Court in *Barnett v. Department of Management Services*, 931 So. 2d 121, 127 (Fla. 1st DCA 2006), recently stated, "[a] well-recognized maxim of statutory construction is that the legislature must be presumed to be aware, at the time it enacts new legislation, of the status of the law then existing, including pertinent judicial case law." Therefore, when the Legislature adopted chapter 84-356, Laws of Florida, which created section 163.346, it was cognizant of section 166.041(3)(a), of existing statutory construction rules, and of the preceding Attorney General Opinion. *See Nicoll v. Baker*, 668 So. 2d 989, 991 (Fla. 1996). Furthermore, it is the duty of the courts, where possible, to construe related statutory provisions in harmony with each other. *McClean v. State*, 934 So. 2d 1248 (Fla. 2006). Applying these principles of statutory construction, this Court should both assume that the legislature did not intend to apply the dual reading requirement to resolutions through its enactment of section 163.346 and should construe section 163.346 in harmony with section 163.041(3)(a) so as to preserve the legislative distinction between ordinances and resolutions.

Contrary to the County's assertion, *City of St. Petersburg v. Austin*, 355 So. 2d 486 (Fla. 2d DCA 1978), does not support this convoluted argument as that case involved the adoption of an ordinance, not a resolution. (BIB; 11-12). The issue

in *Austin* was whether section 166.041(3)(a) allowed an ordinance to be read on less than two days because "may" preceded the adoption requirement. *Austin*, 355 So. 2d at 487. *Austin* does not deal with adoption of resolutions, and is therefore irrelevant.

Webb v. Town Council of Town of Hilliard, 766 So. 2d 1241 (Fla. 1st DCA 2000), likewise fails to support the County's argument. (BIB; 12). *Webb* was a zoning case which stands for the undisputed proposition that zoning must be accomplished by ordinance and must comply with the applicable statutory requirements. *Id.* at 1243-44. Both of those issues are, again, irrelevant to this case.

B. In the Alternative, Section 163.346 Allows Compliance with Section 125.66(2) Which Contains No Adoption Procedures

In the alternative, section 163.346 allows the City to provide public notice under section 125.66(2): "the governing body must provide public notice of such proposed action pursuant to s. 125.66(2) ***or*** s. 166.041(3)(a)." Section 125.66(2) has no requirement that ordinances be read at all, much less that they be read on two separate days. The lack of any ***reading*** requirement for ordinances under section 125.66(2) is clear legislative intent of what is and is not ***public notice*** as specified in section 163.346. *See Koile v. State*, 934 So. 2d 1226, 1230-31 (Fla. 2006) ("[w]hen the statute is clear and unambiguous, courts will not look behind

the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent").

The public notice provisions in both sections 166.041(3)(a) and 125.66(2) are identical. If the legislative intent were that the proposed resolutions must be read on two separate days by title or in full, as is required for municipal ordinances under section 166.041(3)(a), the inclusion of the option of giving public notice under either section 166.041(3)(a) or section 125.66(2) would be meaningless. *See Contractpoint Fla. Parks, LLC* v. State, 958 So. 2d 1035 (Fla. 1st DCA 2007) (finding that "[i]t is axiomatic that we will not interpret a statute in a manner which would lead to an absurd or unreasonable result"). Accordingly, even if this Court were persuaded by the County's creative interpretation of section 166.041(3)(a), the City complied with the alternative reference to section 125.66(2) and the County's argument fails.

II. ONCE THE CEDAR GROVE COMMUNITY REDEVELOPMENT AGENCY WAS CREATED, THE CITY WAS NOT REQUIRED TO READOPT FINDINGS TO COMPLY WITH CHAPTER 163, PART III, FLORIDA STATUTES, AS AMENDED, IN ORDER FOR THE AGENCY TO EITHER ACT TO ADDRESS BLIGHT OR TO REMAIN AS A VIABLE SEPARATE ENTITY

On October 31, 2007, the County served its reply to the (first) amended answer brief, conceding this issue. Accordingly, this second amended answer brief does not address this issue.

III. TAX INCREMENT FINANCING UNDER THE REDEVELOPMENT ACT DOES NOT REQUIRE A REFERENDUM

On May 10, 2007, this Court heard oral argument in *Strand v. Escambia County*, Case No. SC06-1894. In *Strand*, the appellant challenged the county's proposed tax increment financed ("TIF") bonds, arguing that the Redevelopment Act was the only valid context for such bonds. The county argued that its home-rule power provided authority for the bonds. Both parties recognized and respected this Court's precedent validating TIF bonds under the Redevelopment Act. *See State v. Miami Beach Redev. Agency*, 392 So. 2d 875 (Fla. 1980). During oral argument, however, the Court signaled willingness to revisit *Miami Beach*, and particularly its six-page analysis and holding that TIF bonds did not trigger the referendum requirement of article VII, section 12 of the Florida Constitution. *See id.* at 893-99.

Subsequently, in this case the County raised the same argument. It asserted that the proposed bonds were invalid for failure to comply with the referendum requirement, notwithstanding *Miami Beach*. In its Initial Brief, relying on no authority other than Justice Boyd's dissent in *Miami Beach*, the County asks the Court to recede from the decision and to declare unconstitutional section 163.387 of the Redevelopment Act, which authorize TIF bonds without a referendum.

On September 6, 2007, the Court issued an opinion in *Strand* receding from *Miami Beach*. *See* 32 Fla. L. Weekly S550 (Fla. Sep. 6, 2007) (the "initial

opinion"). Before the initial opinion became final, the Court granted several amici leave to appear and scheduled oral argument on rehearing for October 9, 2007. On September 28, 2007, the Court issued a revised opinion that addressed some of the concerns that parties and amici had with the initial opinion, but that also receded from *Miami Beach* (the "revised opinion"). The revised opinion is not yet final, and oral argument was conducted on October 9, 2007.

In this case, the City and the Agency relied in good faith on long-standing Florida precedent. This Court has ***never*** held that referendum requirement applies where prospective bondholders lack the power to compel, directly or indirectly, the levy of an ad valorem tax. Because *Strand* is not final and does not involve the Redevelopment Act, Appellees will demonstrate why *Miami Beach* should remain good law and why no referendum is required for TIF bonds in this context. Alternatively, if the Court leaves *Strand* intact and recedes from *Miami Beach*, Appellees ask the Court to, as a matter of equity and judicial economy, validate the bonds in this case in all other respects, conditioned upon their approval in a later referendum.

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

Before approaching the *Miami Beach* issue, it is useful to review briefly the history and fundamentals of public finance law. A first principle is the critical

distinction between "general obligation" bonds and other types of financing instruments.

> "General obligation" securities are typically considered the most secure form of municipal debt. They are secured by the "faith and credit" of the issuer, a term that implies that the issuer will, in good faith, use any and all available revenue-producing powers to pay the obligation as it becomes due. In most instances, ***the primary source of revenue for repayment of general obligation bonds will be ad valorem property taxes*** levied on the issuer's constituents, but the general obligation is generally not restricted to any particular fund.

Robert S. Amdursky & Clayton P. Gillette, *Municipal Debt Financing Law* 26 (1992) (emphasis added) (hereafter cited as "Amdursky & Gillette"). General obligation bonds, primarily payable from ad valorem taxes, are distinguished from "revenue" bonds, the other major form of municipal security. Traditionally, "these securities, often termed self-liquidating debts, are payable solely from proceeds generated through operations of the facility financed with bond proceeds" (for example, toll bridges, power plants, and utility systems). *Id.* at 29.

Historically, state constitutions and statutes did not employ the terms "general obligation" or "revenue" bonds. Instead, the law generally speaks in terms of "debt." In fact,

> No concept in municipal debt finance is as pervasive and important as "debt." The validity of an obligation may depend on whether the attendant financial commitment falls within the category of "debt" as that term is used in state constitutions and statutes. If it does, the obligation may run afoul of limitations on the amount of debt that the issuer may have outstanding or may contingent on electoral approval.

Id. at 160. The legal characterization is rooted in history:

> These restrictions were adopted after the failure of railroads and other projected internal improvements that were financed with bonds secured by the issuer's faith and credit. The demise of these enterprises ***led to increased property taxes to pay bonds***, or to default and subsequent loss of access to credit markets, while constituents of the issuer received nothing of commensurate value in return.

Id. at 162 (emphasis added); *see, e.g.*, *State v. City of Panama City Beach*, 529 So. 2d 250, 252 (Fla. 1988) (reviewing Florida's "checkered history regarding bonds"), *receded from by State v. City of Orlando*, 576 So. 2d 1315 (Fla. 1991).

Like all other states, Florida today has constitutional restrictions on governmental "debt," that is, borrowing pledging the state's "faith and credit" and backed by the power of ad valorem taxation. In Florida, local governmental debt is constrained by the referendum requirement, by a general restriction against financing private ventures, and by limiting certain bonding to finance or refinance capital projects. Art. VII, §§ 10, 12 Fla. Const. (1968). *See* Joseph W. Little, *The Historical Development of Constitutional Restraints on the Power of Florida Governmental Bodies to Borrow Money*, 20 Stetson L. Rev. 647, 653-54 (1991); *see also* Tracy Nichols Eddy, *The Referendum Requirement: A Constitutional Limitation on Local Government Debt in Florida*, 38 U. Miami L. Rev. 677 (1984).

The Court has observed that the referendum requirement "***limited the risk*** associated with bond issues to only that which real property owners chose to

accept." *City of Panama City Beach*, 529 So. 2d at 253 (emphasis added). This observation plainly applies to general obligation bonds. Concerning revenue bonds, the Court observed that they "are not considered to be, strictly speaking, debts of the issuer" and that the referendum requirement does not apply to them because "they are not supported by the full faith and credit of the issuer." *Id.* at 251-52 (citing, *inter alia*, *State v. City of Miami*, 152 So. 6 (Fla. 1933)).[8]

As a result, revenue bonds "can also be used to circumvent constitutional debt limitations." *Id.* at 252. "Circumventing" constitutional limitations can strike the ear of some as pejorative, if not sinister, particularly those with limited expertise or practical experience. *See, e.g.*, Note, *Bond Financing and the Referendum Requirement: Harmless Creative Financing or Assault on the Constitution?*, 20 Stetson L. Rev. 989 (1991). The truth is, however,

> Courts have accommodated such efforts by excluding a variety of transactional forms from the category of "debt" that is subject to constitutionally mandated referendums. Thus, even where bond election requirements exist, officials may incur obligations for capital improvements without voter approval by limiting repayment to distinct revenue sources (even revenue sources whose diversion to pay debt service requires increases in other taxes), or by using lease-purchase arrangements, "take-or-pay" obligations, non-apportionment debt, tax increment financing, or any of the other myriad measures of "creative financing." . . . [A] significant majority of judicial opinions place each of these arrangements outside of the scope of "indebtedness to which bond election prerequisites apply."

[8]The Court's explanation of this difference is one of its many applications of the bright-line principle that a referendum is not required unless bondholders have the power to compel, directly or indirectly, the levy of an ad valorem tax.

Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. Contemp. Legal Issues 365, 373 (2004). Professor Gillette continues:

> Before condemning all evasions of electoral requirements, however, consider whether anachronistic debt limits themselves pose the greatest threat to a municipality's fiscal well-being. Debt election requirements, after all, arose in an era of a less enfranchised citizenry (property-holding requirements limited the right to vote in such elections), and, more importantly, before the advent of sophisticated constraints on municipal debt. The inclusion of debt election requirements in state constitutions preceded the development of bond counsel as a legal specialty to pass on the legality and sufficiency of bonds, the birth of rating agencies to track the financial stability of issuers, and the creation of robust secondary markets for government debt. Each of these developments creates a market-based, and arguably more precise, restraint on the quality and quantity of local debt than broad-based legal limitations.

Id. at 373-74.

It is no accident that for more than a century courts across the country have concluded judiciously that certain financing methods should "circumvent" or "evade" or "avoid" what on first glance appear as plain legal limits. It cannot be the case that this reality – the law of the land, not just Florida – stems from mistaken judgment, antidemocratic sentiment, malicious intent, or indifference to property holders' rights. The American judiciary deserves more credit than these explanations provide. Through the state courts' careful application of nineteenth-century constitutional principles, local governments in modern America have unleashed tremendous energy and wealth, and have adeptly responded to changing social pressures, while managing to avoid the debt-ridden disasters of yesteryear.

It can be a daunting task to master the history of this area of the law, but the effort to do so yields clearer understanding of when and why it is appropriate to conclude that a financing approach is, or is not, a debt subject to constitutional constraints like the referendum requirement. Experts have "attempt[ed] to find some theme that unifies the decisions in this area" and concluded:

> Courts have demonstrated a remarkable resistance to development of any general standard that consolidates the existing case law. They have tended instead to analyze each transaction on an ad hoc basis. [Nonetheless,] these opinions reveal a recurrent, if not immutable, theme in which ***the existence of a "debt" depends on whether the issuer or the bondholders bear the risk that the project financed with bond proceeds will fail***. If the issuer bears that risk, if the obligation to pay the bonds exists independent of the consideration received by the issuer's constituents, then the transaction properly falls within the scope of debt as the term is used for setting debt limitations or requiring a bond election. If, on the other hand, the risk of failure is borne by the bondholders who have no recourse against the general assets of the issuer, the transaction falls outside the scope of debt restrictions.

Amdursky & Gillette 161-62 (emphasis added). This theme is perfectly consistent with the bright-line principle developed by this Court over the past decades: does the transaction directly or indirectly obligate the government to impose taxes in order to support its debt obligations? If the project fails, can a bondholder compel the government to exercise its taking powers?

B. The Florida Constitution Has Never Required a Referendum to Issue Bonds When the Bondholders Lack the Power to Compel the Levy of a Tax

Before 1930, the Florida Constitution did not impose any limitation on the

power of local governments to incur debt. Following the growth of local government debt during the 1920s, much of which later defaulted, citizens amended the 1885 Constitution in 1930 by adding a new referendum requirement in article IX, section 6. The new requirement did not facially distinguish between general obligation and revenue bonds, but the Court soon drew that distinction in approving the issuance of revenue bonds without a referendum. *See State v. City of Miami*, 152 So. 6 (Fla. 1933) (approving bonds to finance additions to municipal water supply system through revenue certificates payable from future net revenues of system).

City of Miami recognized that "municipal obligations, which are not payable from taxes, but are provided to be payable solely from the revenues of an independent revenue producing asset or utility, do not constitute a debt of the municipality, within the prohibition of a constitutional or statutory debt limit." *Id.* at 9. The Court further recognized that the water revenue certificates "do not directly, indirectly, or contingently obligate the city to levy or to collect any form of taxation whatever therefor." *Id.* at 13.

From *City of Miami* in 1933 until today, there has been a clear, undisturbed line of precedent applying the principle that a bond or similar obligation is subject to the referendum requirement ***only where*** it directly or indirectly obligates the

government to exercise its taxing powers.[9] This analysis requires a review of the substance of the transaction undertaken, and not the mere form that was followed. *Id.* at 11. Implicit in this analysis is the issue of whether the governmental agency holding the tax increments also actually possesses the power to levy an ad valorem tax. If the tax increment is transferred to an entity that does not have such power, the referendum requirement does not come into play.[10]

The Court further developed the principle in *Seaboard Air Line Railroad Co. v. Peters,* 43 So. 2d 448 (Fla. 1949). In *Seaboard,* a port authority proposed to issue bonds payable solely from a special fund, into which the authority would deposit the net operating revenues of the airport and the proceeds of ad valorem taxes it was authorized to levy for the purchase of land and for the expansion and development of the airport. The bonds did not grant any rights to the bondholders to compel ad valorem taxation, but rather created solely a lien on the funds in the

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[9]*See, e.g., State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978); *Nohrr v. Brevard County Ed. Facilities Auth.*, 247 So. 2d 304, 309 (Fla. 1971); *State v. Tampa Sports Auth.*, 188 So. 2d 795, 797-98 (Fla. 1966); *State v. Monroe County*, 81 So. 2d 522, 523 (Fla. 1955); *State v. City of Miami*, 72 So. 2d 655, 656 (Fla. 1954); *State v. City of Jacksonville*, 53 So. 2d 306, 308 (Fla. 1951); *State v. City of Key West*, 14 So. 2d 707, 708 (Fla. 1943); *State v. Dade County*, 200 So. 848, 849 (Fla. 1941); *State v. City of Hollywood*, 179 So. 721, 723-24 (Fla. 1938); *Flint v. Duval County*, 170 So. 587, 597-98 (Fla. 1936).

[10]The referendum requirement by its very terms applies only to governmental units that possess power to levy ad valorem taxes. CRAs have no taxing power.

special fund. As a result, there was no prohibited pledge of the taxing powers of the authority, and no violation of the referendum requirement. Subsequently, the Court again confirmed the constitutionality of ***using*** ad valorem taxes as long as the power to tax was itself not ***pledged***, and reiterated that the referendum requirement encompassed only bonds or certificates of indebtedness that directly obligate the ad valorem taxing ***power***. *Town of Medley v. State*, 162 So. 2d 257, 258 (Fla. 1964).[11]

The 1968 constitutional revision amended the referendum requirement and relocated it to article VII, section 12. The revision broadened the class of instruments subject to referendum and rejected the *Tapers* doctrine,[12] but it did not disturb the line of authority stretching from *City of Miami* to *Town of Medley*. In fact, one of the principal drafters of the new constitution commented,

> In 1930, article IX, section 6 of the 1885 Constitution was amended to provide that no local governmental unit could issue bonds without the approval of a freeholder election. It did provide that refunding bonds could be issued without a referendum.

[11]Observing that the Court had "consistently and repeatedly so held," *Town of Medley* cites many authorities from the preceding decades. *See* 162 So. 2d at 258.

[12]*See State v. County of Dade*, 234 So. 2d 651, 652-53 (Fla. 1970). The *Tapers* doctrine authorized the financing of "essential government requirements" without a freeholder vote. *Tapers v. Pichard*, 169 So. 39 (Fla. 1936).

> Except for the fact that the new constitution limits local bonding to capital projects, ***the new constitution offers the same basic provision as did the 1885 Constitution after 1930***.

Art. VII, § 12, Fla. Const, Commentary by Talbot "Sandy" D'Alemberte, 26A Fla. Stat. Ann. § 101 (1995) (emphasis added); *see State v. Orange County*, 281 So. 2d 310, 312 (Fla. 1973) (1968 constitutional revision did not abrogate *Town of Medley*). Because the referendum requirement remains similar in this regard, pre-revision precedents remain good authority. *See, e.g., Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256-62 (Fla. 2005).

Ten years after the constitutional revision, the Court recognized that there was no prohibition against a local government ***using*** ad valorem tax revenues where it was required to compute and set aside a prescribed amount, when available, for a discreet purpose (servicing the bond obligations). *Tucker v. Underdown*, 356 So. 2d 251, 254 (Fla. 1978).[13]

C. *Miami Beach* Appropriately Articulated and Applied the Referendum Requirement in the Context of the Redevelopment Act and Should Not be Overruled

Miami Beach recognized and respected the long-standing bright-line

[13]Footnote 3 of the initial opinion dismisses *Tucker* because, in the Court's view, it involved the violation of bond covenants, rather than the pledge of ad valorem taxes and the referendum requirement. We respectfully but strongly disagree. *Tucker* specifically cites to article VII, section 12, at page 254, and to *Rianhard v. Port of Palm Beach District*, 186 So. 2d 503 (Fla. 1966), which applies the bright-line principle at page 506.

principle that the referendum requirement applies only when bondholders have the power to compel, directly or indirectly, the levy of an ad valorem tax.

> What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation. Under the statute authorizing this bond financing [*i.e.*, the Redevelopment Act] the governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year. The only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year.

Miami Beach, 392 So. 2d at 898-99.

In so ruling, *Miami Beach* joined the vast majority of jurisdictions around the country that have upheld tax increment financing. *See Okla. City Urban Renewal Auth. v. Medical Tech. & Research Auth. of Okla.*, 4 P.3d 677, 687 n.42 (Okla. 2000) (collecting cases);[14] *see generally* Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, 81 Fla. B.J. 66 (Aug. 2007).

Tax increment financing eases some of the tension running through the referendum requirement cases, that is, the need to draw the line between

[14]While upholding tax increment financing, the Supreme Court of Oklahoma subjects such transactions to that state's broader constitutional referendum requirement. *See* 4 P.3d at 680 n.3

transactions that "incidentally affect" the ad valorem taxing power[15] and those that "indirectly pledge" them. Tax increment financing avoids this exercise simply because it is self-limiting – there can never be pressure on the general ad valorem taxing power because the bondholders bear the entire risk that insufficient funds will be available to satisfy the bonds. Page 6 of the initial opinion concisely describes the concept, but it is vitally important to understand exactly how it works. In particular, the "tax increment" is ***a measure*** of the amount of money that the local government puts into the trust fund to which bondholders may look for payment (if and only if deposits are made). The measure derives from increases in taxable value within a designated area, but the money itself can come from any source, and often does. In other words, the funds are measured by the ad valorem tax revenues attributable to increased taxable values, but they are not required to be ***appropriated*** from ad valorem taxes. In fact, taxing authorities have no obligation to levy any ad valorem taxes and may, in their sole discretion reduce ad valorem taxation in any given year.

Following *Miami Beach*, the Court has continued to apply the bright-line principle and sanction the use of ad valorem tax revenues to pay debt service

[15]The Court has consistently held that an incidental impact on ad valorem taxes does not trigger the referendum requirement. *See, e.g., Murphy v. City of Port St. Lucie,* 666 So. 2d 879, 881 (Fla. 1995); *Rowe v. Pinellas Sports Auth*., 461 So. 2d 72, 78 (Fla. 1984); *City of Palatka v. State*, 440 So. 2d 1271, 1273 (Fla. 1983).

without a referendum. *See Panama City Beach Comm. Redev. Agency v. State*, 831 So. 2d 662 (Fla. 2002); *State v. City of Daytona Beach*, 484 So. 2d 1214 (Fla. 1986); *Holloway v. Lakeland Downtown Dev. Auth.*, 417 So. 2d 963 (Fla. 1982); *see also State v. Inland Protection Fin. Corp.*, 699 So. 2d 1352, 1357 (Fla. 1997) (bonds did not violate article VII, section 11, because no bondholder could initiate judicial action to levy taxes in satisfaction of the debt represented by the bonds); *State v. Fla. Dev. Fin. Corp.*, 650 So. 2d 14, 18 (Fla. 1995) (state bonds did not violate article VII, section 10, because "bondholders clearly cannot compel a levy of taxes to pay the bond obligations").

The bright-line principle accounts for the Court's decisions invalidating bonds for failure to comply with the referendum requirement. For example, where a local government pledges all legally available non-ad valorem sources of revenue, while also covenanting to maintain programs entitling it to receive the various revenues, there is a substantial impact on the taxing power. *See Volusia County v. State*, 417 So. 2d 968 (Fla. 1982). Similarly, where a contractual non-substitution clause for expensive and mission-critical equipment deprives a government of budgetary flexibility and would inevitably force it to spend ad valorem tax dollars under the contract, the referendum requirement applies. *See Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1025-26 (Fla. 2000). Further, if the bond covenants of a special hospital district legally obligate the

district to levy ad valorem taxes to provide the funds necessary to operate the hospital, the referendum requirement applies because the district indirectly obligated itself to exercise its tax powers. *See State v. Halifax Hosp. Dist.*, 159 So. 2d 231, 232 (Fla. 1963).

The bright-line principle developed in 1933 and consistently applied through today practically protects taxpayers' interests while also providing local governments access to necessary capital. When analyzing the substance of a transaction proposed by a government with the power to tax, the critical constitutional question is, does the transaction directly or indirectly obligate the government to impose taxes in order to support its debt obligations? Stated more precisely, can a holder of that debt compel the government to exercise its taxing powers?

D. The Court's Decision in *Miami Beach* Represents the Majority Rule and Was Not an Error in Legal Thinking

TIF bonds emerged from the general milieu described in the previous section. California pioneered the concept in 1952, but it did not spread rapidly; by 1970, only six other states had followed suit. In the mid-1970s, the use of TIF expanded nationwide "due to a number of factors, most important, a steady decline in federal aid, a steady economic and concomitant social decline in some urban areas, and substantial public pressure against general tax increases." Craig L. Johnson & Kenneth A. Kriz, *A Review of State Tax Increment Financing Laws*, in

Tax Increment Financing and Economic Development 31, 31 (Johnson & Man eds. 2001). Today, TIF is an integral tool in local redevelopment efforts and is authorized in 49 states, with North Carolina most recently adopting the method in 2004.[16]

Florida was part of this general trend, and in 1977 the Legislature amended the Redevelopment Act to provide for tax increment financing. *See* Ch. 77-391, Laws of Fla., *see generally* Fla. Dep't of Cty. Affairs, *Using Tax Increment Financing for Community Revitalization* (1978). By then, opponents of TIF had already begun constitutional challenges in other states. The Supreme Court of Utah was one of the first courts of highest jurisdiction to dispose of such a challenge, and in doing so it rejected a variety of state and federal constitutional attacks, including the claim that the TIF bonds constituted a debt under the state constitution and thus required voter approval. *See Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975). The court noted that both the authorizing statute and the redevelopment agency's bonds provided that the bonds were not a debt or

[16]Notably, North Carolina's action is completely consistent with the principles discussed in the previous section: "As long as the local government unit ***does not pledge its taxing power as security for the bonds***, the amendment circumvents the traditional requirements found in the constitution's other sections dealing with local government debt – namely, the constitutional mandate that local governments seek voter approval before increasing their general obligation debt levels." P. Michael Juby, *Tax Increment Financing in North Carolina: The Myth of the Countermajoritarian Difficulty*, 83 N.C. L. Rev. 1526, 1532 (2005) (emphasis added).

obligation of the city or county, the pertinent documents prohibited use of the city's credit for repayment of the bonds, and the "bondholders can look only to revenues from operation of the facility ***and the allocated taxes***, for retirement of the bond obligation." *Id.* at 503 (emphasis added).

A thoughtful concurring opinion reasoned that the "proposition which must be forth-rightly faced is this: the proposed bonds should be regarded as either one classification or the other . . . ." *Id.* at 505 (Crockett, J., concurring). If they were revenue bonds, they should be paid by the revenues derived from the redevelopment project. In that event, "there would be no problem and no need of this lawsuit." *Id.* Under the competing classification, they would be "financed by the revenues, and also by taxes to be imposed and collected by the city," which would trigger various constitutional questions, including whether a referendum was required. Justice Crockett noted "somewhat of a paradox in this situation," because the bonds were devised as revenue bonds but at the same time their payment was "assured, at least in part, by taxes levied and collected by the city." *Id.* He noted, however, that "it is only the extra taxes generated from the amount of increased valuation over the base year . . . that is diverted into a special fund and used to pay on the bonds. . . . and this tax allocation together with the anticipated revenues from the operation of the parking facility will constitute the sole revenues obligated to retire the bonds." *Id.* at 506. In resolving the paradox and

determining that the bonds were revenue bonds not subject to constitutional debt constraints, Justice Crockett concluded:

> The significant points to note here are that this plan does not provide for nor contemplate that the City can or will impose any tax, or increase any mill levy, to support this Agency or its purposes, or to finance these bonds. Further, the Agency itself has no power to impose or collect any taxes, but its only benefit therefrom will be from the special fund set aside from the increased taxes generated by the enhancement of assessed valuation of property in the project area.

Id. at 507. There was a sole but passionate dissent, which illustrates the complexity of fitting redevelopment TIF bonds into the traditional constitutional debt categories.

Although complex, courts continued to face the question of how to categorize TIF bonds and continued to reject arguments that they triggered constitutional debt requirements. In October 1980, the Supreme Court of Colorado rejected the City of Denver's challenge to the Denver Urban Renewal Authority's ("DURA") proposed redevelopment TIF bonds:

> Denver argues that the bonds are retired by ad valorem tax revenues which would otherwise be available for the payment of Denver's general obligations, and therefore an indebtedness is created within the constitutional or charter sense. We disagree.
>
> While the bonds are partially retired with ad valorem tax revenues, the tax-allocation bond financing scheme is carefully devised so that the monies which will be utilized to retire the bonds would not otherwise have been available to Denver for its general revenue purposes. Taxes are allocated to DURA only in an amount equal to the levy against the increased assessed valuation of property within the project area subsequent to the valuation. . . . The tax allocation structure has been carefully drafted so that there is a direct relationship between the

> increased valuation of property within the project area, and thus, increased ad valorem tax revenues, and the project financed by the bond issue. Denver has not lost the benefit of any ad valorem tax revenues which would otherwise have been available for its general revenue purposes had the plan never been adopted. . . . Consequently, Denver will not be indebted as a result of the tax allocation financing scheme.
>
> The obligation created as a result of the bond issuance is solely that of DURA. A special DURA fund, supported by the allocation of tax revenues as above discussed, is irrevocably pledged by DURA to repay the principal and interest on the bonds. Since the obligation is DURA's, and not Denver's, we find no violation of the constitutional and charter debt limitation provisions imposed upon Denver.

Denver Urban Renewal Auth. v. Bryne, 618 P.2d 1374, 1382 (Colo. 1980) (citations omitted).

Two months later, in December 1980, this Court decided *Miami Beach* and likewise upheld redevelopment TIF bonds against sustained constitutional attack, including the claim that they violated the referendum requirement. *See* 392 So. 2d at 893-98. Page 9 of the revised opinion in *Strand* unfairly characterizes *Miami Beach* as providing "no explanation" and "no historical support" for its conclusions, when in fact the Court's six-page analysis covers a century of Florida precedents, is consistent with the nationwide principles outlined above in section II.A., and reaches the same conclusion as the vast majority of other state supreme courts ruling on similar attacks at the same time and subsequently.[17] That

[17]In likewise rejecting constitutional challenges to redevelopment TIF bonds a year after *Miami Beach*, the Supreme Court of Indiana noted that 23 states had authorized such bonds. In more than half (12 states) constitutional attacks had

conclusion is that redevelopment TIF "bonds are not general obligation bonds of the municipality because they are not secured by the full faith and credit of the municipality." 1 M. David Gelfand, *State & Local Government Debt Financing*, § 2:06, at 9 (2000); *see also* 15 McQuillin, *The Law of Municipal Corporations*, § 40:5 (July 2007). This is but another way of articulating that the bondholders, not the issuer, bear the risk in the event of project failure, and that bondholders cannot compel the levy of an ad valorem tax.

The rule in Florida, embodied by *Miami Beach*, recognizes that redevelopment TIF bonds are a form of revenue bond, not a general obligation bond that requires referendum approval. This was the majority rule in 1980 and remains so today, and the Court cannot fairly conclude that *Miami Beach* is an anomaly or "error in legal thinking" that compels the Court to violate the important principle of *stare decisis*. To be sure, Justice Boyd presented an alternative, minority, view of redevelopment TIF bonds and the referendum requirement in *Miami Beach* and in other cases (as did dissenting justices in other jurisdictions),

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risen to the appellate courts. Including Indiana, 10 other states had, like this Court in *Miami Beach*, rejected such challenges, and only Arizona and Kentucky had held that such legislation violated certain restrictions in their respective constitutions. *See South Bend Public Transp. Corp. v. City of South Bend*, 428 N.E.2d 217, 225 n.2 (Ind. 1981). While some states have since joined the minority view, others have joined Florida in the majority. *See, e.g., Tax Increment Fin. Comm'n of Kansas City v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70, 78 (Mo. 1989); *Wolper v. City Council of the City of Charleston*, 336 S.E.2d 871, 874-75 (S.C. 1985).

but his analysis was out of line with the principles of public finance law in Florida and throughout the nation. The Court must strive to remain faithful to the clear principles of public finance law, and resist the temptation in both *Strand* and this case to decide on an ad hoc basis. *See* Amdursky & Gillette 162. Before following the County's invitation to declare the Redevelopment Act unconstitutional, this Court must presume the Act valid and the County must demonstrate it is unconstitutional beyond a reasonable doubt. *See Stewart v. Green*, 300 So. 2d 889, 893 (Fla. 1974). If the Redevelopment Act can be rationally interpreted to harmonize with the constitution, it is the duty of the Court to adopt that construction. *Id*.

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

The revised opinion in *Strand* considers the "plain meaning" of the phrase "payable from ad valorem taxation." Revised Op. 19-20 & n.7. Appellees agree that the Court should consider and enforce the spirit as well as the letter of the phrase. While dictionaries are certainly useful in this endeavor, the Court properly has rejected overly simplistic or slavish adherence to them and recognized that words take meaning from their context. *Miele v. Prudential-Bache Sec., Inc.*, 656 So. 2d 470, 472 (Fla. 1995) ("the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes") (citation omitted). Out of

context, many words have more than one meaning or sense, with varying degrees of consistency. The *Strand* revised opinion recognizes this and refers to one dictionary for two senses of the word "taxation": the action of taxing, and an amount obtained by taxation. Other dictionaries recognize even more nuance among senses of the word "taxation": "(1) a taxing or being taxed; (2) a tax or tax levy; (3) the principle of levying taxes; (4) revenue from taxes; (5) in law, the act of taxing or assessing a bill of costs." *Webster's New Twentieth Century Dictionary* 1870 (2d ed. 1975).

Finding more than one meaning of the word "taxation," the revised opinion in *Strand* simply concludes that all must apply, that is, that "ad valorem taxation" means **both** the action of imposing ad valorem taxes (the taxing power) **and** the amount of ad valorem revenues obtained (tax revenue). In so doing, the revised opinion departs from decades of the Court's own precedents that distinguish between (1) pledges of revenue only and (2) pledges of the taxing power, pursuant to which bondholders have the power to compel the government to exercise its taxing power. Not only does this conclusion drastically disrupt the law of municipal finance, it also departs from the history of judiciously examining and selecting the ***right*** meaning of term when faced with various senses, rather than simply concluding all apply.

For example, when the Court found two varying senses of the plain meaning

of the word "toll," the Court carefully examined its context and the history of its interpretation. *Hankey v. Yarian*, 755 So. 2d 93, 95-97 (Fla. 2000). When faced with competing senses of the plain meaning of the word "maliciously," a court picked one, not both, and did so by considering its context and the discernable purposes of its use. *Seese v. State*, 955 So. 2d 1145, 1149 (Fla. 4th DCA 2007). Where a regulated professional was denied a state license because she had not earned a master's degree from a college "approved" by a federal agency, the court examined the plain meaning of "approved" and found two different senses; however, the court did not automatically conclude that the law consisted of both meanings of the term, but rather interpreted the term logically and reasonably within its context. *See Anderson v. Dep't of Prof. Regulation*, 462 So. 2d 118, 119-20 (Fla. 2d DCA 1985); *see also, e.g., State v. Huggins*, 802 So. 2d 276 (Fla. 2001) ("occupied structure or dwelling" susceptible of two reasonable interpretations, but Court picked one rather than apply both); *Getty Oil Co. v. Dep't of Nat. Resources*, 419 So. 2d 700, 704-05 (Fla. 1st DCA 1982) (examining varying common meanings of "within" and selecting one, rather than concluding all apply).[18]

[18]Superficially, "plain meaning" has a nice ring to it, but words often have more than one meaning, and it goes to the heart of the judicial function to consider carefully the differences among them and the consequences of interpretation, as demonstrated by countless examples. *See, e.g., General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-98 (2004) (examining and selecting among competing

In line with courts nationwide, this Court has long distinguished between the taxing power and tax revenues. This distinction is the foundation of the difference between general obligation bonds and revenue bonds. *See, e.g., Klein v. City of New Smyrna Beach*, 152 So. 2d 466, 470 (Fla. 1963) (not bonds within meaning of constitution because "no pledge of the ad valorem ***taxing power*** is imposed to support them") (emphasis added); *Leon County v. State*, 165 So. 666, 667 (Fla. 1936) (constitutional limitations on issuance of "bonds" relate to "contemplated obligation of the ***powers*** of future taxation") (emphasis added). This distinction is also the foundation of the bright-line principle the Court has honored as long as there have been constitutional limits on local bonds.

The "payable from ad valorem taxation" language added in the 1968 revision does not support abandoning this bright-line principle. There is no evidence in *Strand* or in the documents of the Constitutional Revision Commission that anyone ever intended to break from history on this point. Diligent inquiry has uncovered a single obscure comment by Mr. Askew explaining why this phrase was added: it was an "attempt to clarify that you cannot only issue bonds pledging full faith and credit, but you can issue bonds which would be pledging the ad

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senses of the word "age"); *Bragdon v. Abbot*, 524 U.S. 624, 638 (1998) (court divided over competing senses of the work "major"); *Fort Stewart Schools v. Federal Labor Relations Auth.*, 495 U.S. 641, 645-46 (1990) (examining and selecting between two common meanings of "working conditions").

valorem taxation only."[19] Transcript of Constitution Revision Comm'n 62, Last Select Committee Report on Amend. 74 & 142 (1966). He went on to explain that "those basically are language changes that we are recommending" before reaching the real substantive issue posed by the amendment, which was whether the required vote should be a majority of the electorate or simply a majority of those voting in the election. *Id.* 63.

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

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[19] "Bonds which would be pledging the ad valorem taxation only" are called "limited ad valorem bonds." They are a form of limited general obligation bond, under which bondholders' only remedy is to compel the government to exercise its power to impose ad valorem taxes (as opposed to recovering from other sources). These are sometimes called "limited" tax bonds, as distinguished from "unlimited" tax bonds which are backed by full faith and credit.

In Florida, TIF redevelopment bonds are revenue bonds and ***not*** limited general obligation bonds, and the referendum requirement does not apply to them. *See* §§ 163.385, .387, Fla. Stat. (2006). To illustrate this point, it is useful to compare the law of Michigan, where the redevelopment financing law provides:

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

In re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186, 190 (Mich. 1988).[20] The first part of this law is an example of a limited general obligation bond (a "limited tax pledge to support the . . . bonds"). The Michigan law exempted such obligations from a referendum, which was required only when the government pledged its full faith and credit. In Florida, both options would be subject to the referendum requirement, probably since 1930 but without question following the 1968 constitutional revision. This result was the intent and practical effect of the new phrase "payable from ad valorem

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

taxation." This interpretation better fits the historical record and makes far more sense than concluding that the drafters intended to cloak with constitutional constraints every dollar of revenue derived from ad valorem taxation.

While property owners in 1968, as always, were concerned with protecting their property from excessive taxes, sentiment at the time reflected that the growth in public debt over the preceding two decades was "not out of line with nationwide trends." Manning J. Dauer, et al., *Should Florida Adopt the Proposed 1968 Constitution? An Analysis* 32 (Public Admin. Clearing House, Univ. of Fla., 1968). Committee records reflect that members were familiar with and 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." Grover C. Herring & George J. Miller, *Florida Public Bond Financing – Comments on the Constitutional Aspects*, 21 U. Miami L. Rev. 1, 34 (1966). The drafters followed this advice with respect to article VII, section 12: "Except for the fact that the new constitution limits local bonding to capital projects, ***the new Constitution offers the same basic provision as did the 1885 Constitution after 1930***." Art. VII, § 12, Fla. Const., Commentary by Talbot "Sandy" D'Alemberte, 26A Fla. Stat. Ann. § 101 (1995) (emphasis added). Mr. D'Alemberte was actively involved with the 1968 revision and his perspective should not be cast aside lightly. Another first-hand participant was

Judge Hugh M. Taylor, who worked on a Senate special study subcommittee on bonding – and who later argued *Miami Beach*. It is inconceivable that these direct actors, one of them an experienced bond lawyer, somehow missed a major rewrite of constitutional law, effected by the addition of the phrase "payable from ad valorem taxation." If this Court is determined to change the law now, it cannot fairly do so by reference to the "plain meaning" of the people's will 39 years ago.

CONCLUSION

This Court should uphold the trial court's finding that the Agency was duly created in 2001 and capable of implementing its power within the community redevelopment area without revisiting its findings of blighted area conditions and of necessity from 2001. This Court should uphold the trial court's finding, which the County has conceded, that there was no requirement for the City to "read" its resolutions twice to meet the public notice requirements in the Redevelopment Act.

This Court should not reassess its premise in *Miami Beach* relied upon by the City and should conclude that no referendum is required for the City to use TIF. In such analysis the Court should distinguish the facts here from the facts in *Strand* and overrule or narrowly construe *Strand.* In the end, if the bondholders cannot compel the imposition of ad valorem taxes or if the issuance of the bonds will not necessarily lead to the levy of additional ad valorem taxes, the obligations are not general obligation bonds for constitutional purposes. In the event the Court

does not overturn *Strand*, it must ensure that its limiting principle does not inadvertently impact other long-standing areas of the law (like the distinction between revenue bonds and general obligation bonds).

This Court should uphold the trial court's validation of the subject bonds, and all matters associated therewith, under the long-standing authority of *Miami Beach* and the Redevelopment Act.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United Parcel Service to **William A. Lewis**, Chief Assistant State Attorney, 421 Magnolia Avenue, Panama City, Florida 32401 and **Terrell K. Arline**, Bay County Attorney, 810 W. 11th Street, Panama City, Florida 32401, this ___ day of November 2007.

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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that the font size and style in the Appellees' Second Amended Answer Brief is 14 Times New Roman and that Appellees' Second Amended Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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