IN THE SUPREME COURT OF FLORIDA

BAY COUNTY,

Appellant,

Vs.

Case No. SC07- 1574
L.T. CASE NO: 07-1770CA
(Brannonville)

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. 07-1770CA

INTITIAL BRIEF OF BAY COUNTY, FLORIDA

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PRELIMINARY STATEMENT.

This appeal involves the review of a Final Judgment validating $23,688,708.00 in bonds issued pursuant to Chapter 75, Fla. Stat. (2006), and the creation of a Community Redevelopment Area (CRA) for an area called "Brannonville" in the City of Cedar Grove, pursuant to Chapter 163, Part III, Fla. Stat. (2006), the Community Redevelopment Act (the Act). Bay County intervened in the bond validation proceeding.

This Court should know that Bay County filed an appeal simultaneously with this instant appeal regarding the Town's bond validation and creation of another CRA called the "Core" CRA. Bay County v. Cedar Grove, et al, SC07-1572. Also, the case styled City of Parker et al. v Florida et al. and Bay County, SC 07-1400, which is pending before this Court, poses similar issues.

An Appendix has been filed with this Initial Brief pursuant to 9.110(i) and 9.220, Fla. R. App. P. The Appendix will be referred to as "App" followed by the exhibit and page number. (App. Ex. x at y). The Transcript contained in the Appendix will be referred to as (TR. Page x, line y).

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction pursuant to 9.030(b)(i) Fla. R. App. P. This case involves an appeal of a final judgment entered in a bond validation proceeding under Chapter 75, Fla. Stat. (2006).

STATEMENT OF CASE AND FACTS.

On May 30, 2007, the Town of Cedar Grove ("Town" or "Cedar Grove") filed a complaint to validate $23,688,708.00 in bonds issued pursuant to Chapter 75 and Chapter 163, Part III, Florida Statutes, the Community Redevelopment Act (the Act). The bonds financed capital projects planned for a community redevelopment area (CRA) in Cedar Grove called "Brannonville". Bay County intervened in the proceeding and filed an answer and a counterclaim. (App. Ex. 1). The County claimed that the City's ordinances and resolutions, as well as certain provisions of the Act, which authorize the use of Tax Increment Financing (TIF), were unconstitutional and violated the referendum requirement set forth in Article VII, Section 12 of the Florida Constitution.[1] The County alleged that the Town applied the wrong statutory provisions governing the finding of blight set forth in Section 163.340(8), Fla. Stat. (2006). The County also alleged that the Town failed to comply with the statutory procedural requirements to have two public readings prior to the adoption of the various resolutions regarding the CRA.

A final hearing on a notice to show cause was held on July 11, 2007. Both the Brannonville and Core CRA bond validation proceedings were heard at the same time. On July 19, 2007, Circuit Court Judge Dedee S. Costello issued a Final Judgment validating the Brannonville bonds. (App. Ex. 2). A separate judgment

[1] This issue was raised after the undersigned viewed the online oral arguments before this Court in Strand v. Escambia County, No. SC06-1894.

was issued on the Core CRA. This appeal followed.

On February 27, 2001, Cedar Grove Town adopted Resolution 2001-3, which purported a finding of blighted conditions, created the Brannonville Community Redevelopment Area, and appointed the City Commission as the Community Redevelopment Agency. (App. Ex. 3) From February 2001 to March 2007, Cedar Grove Town did nothing to further the CRA for Brannonville. No CRA Plan was adopted. No CRA Trust Fund was established and no bonds were considered or authorized.

Six years later, on March 27, 2007, the Town adopted Resolution 07-002, "ratifying the creation of the Brannonville Community Redevelopment Area and the creation of the Cedar Grove Community Redevelopment Agency, pursuant to Chapter 163, Part III, Florida Statutes (2000)". (Emphasis added) (App. Ex. 4) Resolution 07-002 contained the following statement:

> (a) The Redevelopment Area is a blighted area in which there are a substantial number of deteriorated or deteriorating structures, and such area exhibits conditions, as indicated and confirmed by the "Reconfir-ma tion Report of the Brannonville Findings of Necessity and the Commun-ity Redevelopment Area" (attached hereto as Exhibit A), leading to economic distress and/or endangerment of life or property. (Emphasis added)

Attached to Resolution 07-002 was a "Reconfirmation Report of the Brannonville Findings of Necessity and Community Redevelopment Area", which intentionally applied the statutory definition of blighted areas in effect in 2000.

(Id) The Report states in part, "the team [the consultants who prepared the Reconfirmation Report] in preparing this study considered the specific conditions that constitute blighted area conditions as listed in the Community Redevelopment Act identified by the 2000 Florida Legislation". (Emphasis added) (Id. at Page 5).

Notably absent from the Report were facts, data, studies, statistics or analysis that supported the conclusion set forth above in Resolution 07-002, that a "*substantial number of deteriorated or deteriorating structures…[sic] leading to economic distress and/or endangerment of life or property*." (Emphasis added) Also, the Report cited and applied the wrong law. The Report states it applied the statutory requirements governing the finding of blight that were in effect in 2000. However, the Report quotes statutory provisions that are not the same as those contained in the 2000 version of statute.

Paul Simms, who has a degree in real estate and thirty three years of experience in construction and development, testified about the Brannonville Area. (TR. Page 56, lines 14-25.) The CRA is approximately 900 acres. (TR. Page 60, line 21). He was personally familiar with the Brannonville Area. He recently developed a new 238 unit subdivision on Blysma's Dairy on 82.13 acres in the CRA. (TR. Page 60, lines 3-23). The subdivision is called Blysma's Manner Estates. (TR. Page 63, line 9). Mr. Simms has knowledge about the land values in the area as he had developed land in the CRA and inquired about purchasing an

approximately 599 acre parcel in the CRA from the St. Joe Company. (TR. Page 58, lines 3-8). He testified that real estate land values in the Brannonville Area over the past 5 years had "increased dramatically". (TR. Page 62, line 9). He said that based on his experience with property values in the Brannonville area that there was no economic distress. (TR. Page 62, lines 15-20). He wrote a letter to the Town expressing his concerns that Brannonville was not blighted, explaining that he had sold lots in his subdivision for 70,000.00 and 75, 000.00 dollars and had 10 homes scheduled to be built for between 250,000 and 360,000 dollars. (TR. Page 63, lines 7-22).

On May 22, 2007, the Town adopted Resolution 07-010 "Approving the Brannonville Community Redevelopment Plan" (CRA Plan). (App. Ex. 5). On May 29, 2007, Cedar Grove adopted Ordinance No 07-422, which created the Redevelopment Trust Fund, and adopted Joint Resolution 07-012 (City)/Resolution 07-002(Agency), an Interlocal Agreement, and Resolution 07-011, which authorized the bonds that are the subject of these proceedings. (App. Ex. 6, 7, 8, and 9) Each of these ordinances and resolutions was based upon Resolution 2001-3, Resolution 07-002, and the "Reconfirmation Report".

The Town admitted at the final hearing that every resolution regarding the CRA was adopted at one hearing, and that the various resolutions <u>were not read on two occasions</u> before they were adopted. (TR. Page 35, lines 19-24)

The County proffered testimony of the Bay County Budget Director, Mary Dayton. (TR. Pages 48-55) She testified that the County's TIF payments to CRAs in general, and specifically to the Town if this CRA's bonds are validated, come from the County's general revenue, which is comprised of ad valorem taxes. (TR Page 51, line 21) She testified that based on the Town's own estimate, the amount of ad valorem taxes the County would pay to Cedar Grove if the Brannonville CRA bonds were validated could be "as high as 10 million dollars and as low as 364,000." (TR. Page 51, lines 4-5)

STANDARD OF REVIEW.

This is a review of a final order issued in a bond validation proceeding initiated pursuant to Chapter 75, Fla. Stat. (2006). As set forth in Poe v. Hillsborough County, 695 So. 2d 672 (Fla. 1997), the scope of review 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.

Although legislative findings carry a presumption of correctness, they are not automatically binding and unassailable. Courts are not required to blindly accept legislative findings, determinations and proclamations when they are shown to be clearly erroneous or nothing more than recitations or mere conclusions. See,

Moore v. Thompson, 126 So. 2d 543, 549-550 (Fla. 1961), and Stadnik v. Shell's City, Inc., 140 So. 2d 871, 874 (Fla. 1962). The Court in Panama City Beach Community Redevelopment Agency, 831 So. 2d 662 (Fla. 2002), recognized that a city council cannot simply label an area "blighted" and make it so.

This Court's appellate review of the conclusions of law, even in a bond validation proceeding, is *de novo*. See, Panama City Beach Community Redevelopment Agency v. Florida, 831 So.2d 665; City of Gainesville v. State, 863 So.2d 138 (Fla. 2003). This same standard governs the resolution of issues regarding statutory construction. See, Foundation Health v. Westside EKG Ass., 944 So.2d 188 (Fla. 2006). Therefore, the County's claims that the Town and the trial court misapplied the statutory criteria governing the finding of blight are not shielded from review on appeal. A similar *de novo* standard of review governs the County's claim that the Town failed to comply with the statutory requirements for two readings of the various resolutions adopted for the CRA.

Finally, this Court review of the constitutionality of a statute is *de novo*. See, American Federation of Labor and Congress of Industrial Organizations, et al. v. Hood, 885 So. 2d 373 (Fla. 2004). Therefore, this Court may consider the County's request to revisit and recede from State of Florida, et. al, v. Miami Redevelopment Agency, etc., 392 So. 2d 875, 882 (Fla. 1980), and conclude that the scheme of TIF authorized by the Town and Section 163.387, Fla. Stat. (2006),

violates Article VII, Section 12 of the Florida Constitution.

SUMMARY OF ARGUMENT.

The Community Redevelopment Act requires the adoption of various "resolutions" regarding the finding of blighted areas, necessity, and the adoption of the CRA Plan. The Town adopted joint resolutions authorizing the use of Tax Increment Financing (TIF) to fund the CRA Trust Fund. Section 163.346, Fla. Stat. (2006), sets forth the procedural requirements for the adoption of any resolution or ordinance adopted under the Act. This Section specifically requires compliance with Section 166.041(3)(a), Fla. Stat. (2006), which requires that there be two readings at two public meetings. Because the resolutions were only read once, they failed to comply with the statutory criteria governing their adoption. For this reason the Final Judgment should be reversed and the bonds not validated.

Section 163.355, Fla. Stat. (2006), requires that the Town adopt a "*Finding of necessity*" based on "*data and analysis*" that the criteria governing the definition of "*blighted areas*" have been met before the Town can "*exercise the community redevelopment authority conferred*" by the Act. Section 163.340(8), Fla. Stat. (2006), sets forth the criteria governing this analysis in the definition of "*blighted areas*". Cedar Grove attempted to apply the criteria governing the definition of blighted areas that was in effect in 2000. It did not apply the law as amended in 2002. Also, there is no competent substantial evidence in the record that a

"*substantial number of deteriorating structures*" were leading to "*economic distress*" only mere conclusions. Therefore, the bonds should not be validated and the Final Judgment must be reversed.

This Court should recede from its decision in State of Florida, et. al, v. Miami Redevelopment Agency, etc., 392 So. 2d 875, (Fla. 1980), and conclude that the various statutes, ordinances and resolutions, which support the bonds with TIF violate the requirement for a referendum set forth in Article VII, Section 12 of the Florida Constitution. The Town did not hold a referendum. The bond ordinance and resolutions, as well as Section 163.387, Fla. Stat. (2006), require the County to pay an increment of ad valorem taxes to the Town to support the bonds. Thus, the Town attempts to do indirectly what the Constitution prohibits directly. For this reason the bonds should not be validated and the Final Judgment should be reversed.

FIRST ISSUE:
THE TOWN FAILED TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR TWO READINGS BEFORE ADOPTING RESOLUTIONS FOR THE CRA.

The Town adopted several "resolutions" to authorize the Brannonville CRA and the bonds that are the subject of these proceedings. There was Resolution 2001-3, which purported to make the initial finding of blight in 2001, Resolution 07-002, adopted in March of 2007, which purportedly ratified the 2001 Resolution, Resolution 07-010 which approved the "Brannonville Community Redevelopment Plan" (CRA Plan), and Joint Resolution 07-012 (City)/Resolution 07-002(Agency), which authorized an Interlocal Agreement supporting and implementing the CRA Trust Fund.

Section 163.346, Fla. Stat. (2006), sets forth the procedural requirements for the adoption of any resolution or ordinance regarding CRAs, stating as follows:

> *163.346 Notice to taxing authorities.-<u>Before the governing body adopts any resolution</u> 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, <u>the governing body must provide public notice of such proposed action pursuant to s. 125.66(2) or s. 166.041(3)(a)</u> 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)

Section 166.041(3)(a), Fla. Stat. (2006), which is specifically cited in the above-referenced statute as controlling the procedural requirements for the adoption of resolutions, states in part as follows:

> *(3)(a) Except as provided in paragraph (c), 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 claims Section 163.346, Fla. Stat. (2006), makes Section 166.041(3)(a), Fla. Stat. (2006), applicable to both ordinances and resolutions. Thus, resolutions must be read by title "*on at least 2 separate days*". Therefore, because the Resolutions were not read twice, they were not adopted in compliance with the requirements of the Act. For this reason, the bonds cannot be validated.

The trial court adopted the Town's argument that these procedural provisions governed only the requirement for "*notice*", and agreed with the Town that the requirement for a reading "*on at least 2 separate days*" did not apply to resolutions, only to ordinances.

While there is no case on point, case law does hold that the term "*may*" as used in Section 166.041(3)(a), Fla. Stat. (2006), imposes an obligation that a proposed ordinance must be read aloud at two separate meetings. Thus, "*may be*

read" means "*shall be read*". See City of St. Petersburg v. Austin, 355 So.2d. 486 (Fla. 2nd DCA 1978). Moreover, it has long been held that an ordinance or resolution adopted in violation of procedural requirements is void. See, Webb v. Town of Hilliard, 766 So.2d 1241 (Fla. 1st DCA 2000)(compliance with the notice requirements in Section 166.041 is a jurisdictional and mandatory prerequisite.)

This requirement for two readings is not a hollow gesture. Section 163.355, Fla. Stat. (2006), states in part as follows:

> *163.355 Finding of necessity by county or municipality.--No county or municipality shall exercise the community redevelopment authority conferred by this part until after the governing body has adopted a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria described in s. 163.340(7) or (8).* (Emphasis added).

Therefore, if the Resolution regarding the finding of necessity and blight (i.e. Resolution 07-002) fails to comply with the requirements of Section 163.346, Fla. Stat. (2006), because it was not read "*on at least two separate days*", the Town did not have the authority to adopt the resolutions and ordinances regarding the CRA. Therefore, these resolutions and the bonds they authorize are invalid.

This is not a hyper-technical claim where the cure changes nothing. Admittedly, if this Court agrees with the County, the Town will have to conduct new hearings and adopt new resolutions. However, this will benefit Bay County.

Section 163.387, Florida Statutes, as amended in 2002, imposes deadlines on the adoption of the various Resolutions called for in the Act. See, 2002-294, Laws of Fla. If a CRA is created after these deadlines, the affected county is provided more input and control of the TIF financing scheme and the implementation of the CRA Plan. After one deadline, June 7, 2007, a concept called "millage parity" comes into play. See, Section 163.387(1)(b)(1)a, Fla. Stat. (2006). This means the County would calculate its TIF payment based on the Town's millage rate. If the Town's rate was lower than the County's, the County would not have to divert all of the TIF increment to the Trust Fund and could keep for itself that amount of tax revenue based on its higher millage rate. Another new statutory provision allows the County to reduce the amount of the TIF after 24 years. (Id.) The deadlines have all passed. Therefore, if the Town is required to readopt its resolutions, Bay County is placed in a position to limit its financial exposure to support the Brannonville CRA.

To conclude, this Court should determine that the Resolutions adopted by the Town failed to comply with the statutory, procedural requirements governing the adoption of resolutions contained in Section 163.346, Fla. Stat. (2006). For this reason, the Final Judgment should be reversed and the bonds not validated. See Poe v. Hillsborough County, 695 So. 2d 672, (Fla. 1997).

SECOND ISSUE: THE FINDING OF BLIGHT FAILS TO COMPLY WITH THE STATUTORY CRITERIA.

On February 27, 2001, Cedar Grove adopted Resolution 2001-3, which purported to make a finding of blighted conditions. It created the Brannonville Community Redevelopment Area and appointed the City Commission as the Community Redevelopment Agency. In adopting Resolution 2001-3, Cedar Grove applied the provisions of the Act as they existed in 2001.

The Resolution concluded that the Brannonville area was blighted under the law in effect in 2001, stating as follows:

> (c) Within the Redevelopment Area there exists a lack of adequate infrastructure; faulty or inadequate street layout; previous mining activities have attracted garbage and crime to the area; or roadways or other public transportation facilities incapable of handling the volume of traffic flows into or through the area, either at present or following substantial improvement within the area. The Redevelopment Area suffers from a predominance of defective or inadequate street layout, lack of infrastructure or aging infrastructure and design, and deterioration of site or other improvements. (Emphasis added).

From February 2001 to March 2007 Cedar Grove did nothing to further the CRA for Brannonville, i.e. no CRA Plan was adopted, no Trust Fund was established, nor were bonds considered or authorized. On March 27, 2007, the Town adopted Resolution 07-002, "ratifying the creation of the Brannonville Community Redevelopment Area and the creation of the Cedar Grove Community Redevelopment Agency, pursuant to Chapter 163, Part III, Florida Statutes (2000)". (Emphasis added)

Bay County notes that Resolution 07-002 contains the following statement:

> (a) The Redevelopment Area is a blighted area in which there are a substantial number of deteriorated or deteriorating structures, and such area exhibits conditions, as indicated and confirmed by the "Reconfirmation Report of the Brannonville Findings of Necessity and the Community Redevelopment Area" (attached hereto as Exhibit A), leading to economic distress and/or endangerment of life or property. (Emphasis added)

Notwithstanding this naked conclusion, attached to the Resolution 07-002 was a "Reconfirmation Report of the Brannonville Findings of Necessity and Community Redevelopment Area", which purports to apply the definition of blighted areas in effect in 2000! The Report states in part "the team [the consultants who prepared the Reconfirmation Report] in preparing this study considered the specific conditions that constitute blighted area conditions as listed in the Community Redevelopment Act identified by the 2000 Florida Legislation". (Emphasis added) (App. Ex. 4 at 5)

There are no facts, data, studies, statistics or analysis in the Reconfirmation Report that support the self-serving statement set forth above in Resolution 07-002, that a "*substantial number of deteriorated or deteriorating structures…are leading to economic distress and/or endangerment of life or property*." (Emphasis added) Also, the Report cites the wrong law. The Report states it applied the legal requirements that were in effect in 2000; however, it then purports to quote statutory provisions which are not the same as those in effect in 2000. (Id).

On the other hand, the testimony of a property owner, developer, and realtor, Paul Simms, was that land values had risen in Brannonville over the past 5 years. (TR. Page 62, line 9) He also said the area was not suffering "economic distress". (TR. Page 62, lines 15-19).

On May 22, 2007, the Town of Cedar Grove adopted Resolution 07-010 "Approving the Brannonville Community Redevelopment Plan" (CRA Plan). This Resolution was based upon Resolution 07-002, which concluded that Brannonville was a blighted area under the law that existed in 2000. On May 29, 2007, Cedar Grove adopted Ordinance No. 07-422, which created the Redevelopment Trust Fund, Joint Resolution 07-012 (City)/Resolution 07-002(Agency), an Interlocal Agreement, and Resolution 07-011, which authorized the bonds that are the subject of these proceedings. It is important to realize that each of these ordinances and resolutions are based upon Resolution 2001-3, Resolution 07-002, and the "Reconfirmation Report", which all applied or attempted to apply the law in effect in 2000, <u>not the current law</u>.

With Chapter 2002-294, Laws of Fla. the Legislature imposed significant limitations on local governments regarding the creation of CRAs. This law changed the criteria governing the finding of blight and necessity that was in effect in 2000. One significant change dealt with the definition of blighted areas. Prior to 2002, the definition of blighted areas was as follows:

(8) "Blighted area" means either:
(a) An area in which there are a substantial number of slum, deteriorated, or deteriorating structures and conditions that lead to economic distress or endanger life or property by fire or other causes or one or more of the following factors that substantially impairs or arrests the sound growth of a county or municipality and is a menace to the public health, safety, morals, or welfare in its present condition and use:
1. Predominance of defective or inadequate street layout;
2. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
3. Unsanitary or unsafe conditions;
4. Deterioration of site or other improvements;
5. Inadequate and outdated building density patterns;
6. Tax or special assessment delinquency exceeding the fair value of the land;
7. Inadequate transportation and parking facilities; and
8. Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(b) An area in which there exists faulty or inadequate street layout; inadequate parking facilities; or roadways, bridges, or public transportation facilities incapable of handling the volume of traffic flow into or through the area, either at present or following proposed construction.

However, for purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area described in paragraph (a). (Emphasis added)

So at the time the Town adopted Resolution No. 2001-03, a local government could determine that an area was blighted three ways. It could base this on: 1) a finding that "*a substantial number of . . . deteriorating structures*" were leading to "*economic distress or endanger life or property*", or on 2) a finding that one or more of the 8 listed criteria were met that "*substantially impairs*

*or arrests sound gro*wth" and "*is a menace to public health, safety, morals, or welfare*", or 3) upon a finding that an area has faulty or "*inadequate street layout, inadequate parking facilities,*", roadways and bridges, etc. Resolution 2001-3, focused on the third criteria, inadequate street layout and infrastructure.

The 2002 law changed the definition of blighted areas, making it significantly more difficult to establish CRAs, stating as follows:

> *(8) "Blighted area" means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property, and in which two or more of the following factors are present:*
> *(a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;*
> *(b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;*
> *(c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;*
> *(d) Unsanitary or unsafe conditions;*
> *(e) Deterioration of site or other improvements;*
> *(f) Inadequate and outdated building density patterns;*
> *(g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;*
> *(h) Tax or special assessment delinquency exceeding the fair value of the land;*
> *(i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;*
> *(j) Incidence of crime in the area higher than in the remainder of the county or municipality;*
> *(k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;*
> *(l) A greater number of violations of the Florida Building Code in the*

area than the number of violations recorded in the remainder of the county or municipality;
(m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or
(n) Governmentally owned property with adverse environmental conditions caused by a public or private entity. (Emphasis added)

The Act as amended mandates two prongs of analysis. It requires that the criteria in the introductory paragraph must be met, in addition to two of the following 14 listed special criteria for an area to qualify as blighted. In 2007, when the Town established the CRA Plan, Trust Fund, Joint Resolutions and authorized the bonds, a legal condition precedent to a finding of blight and necessity was that a "*substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property. . .*". (Emphasis added)

Another important change the Act involved the evidentiary support for a finding of blight and finding of necessity as forth in Section 163.355, Florida Statutes. In 2001, this provision read as follows:

163.355 Finding of necessity by county or municipality.--No county or municipality shall exercise the authority conferred by this part until after the governing body has adopted a resolution finding that:
(1) One or more slum or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, exist in such county or municipality; and,
(2) The rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas, including, if appropriate, the development of housing which residents of low or moderate

income, including the elderly, can afford, is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality.

In 2002, this provision was amended to read as follows:

163.355 Finding of necessity by county or municipality.--No county or municipality shall exercise the community redevelopment authority conferred by this part until after the governing body has adopted a resolution, supported by data and analysis, which makes a legislative finding that the conditions in the area meet the criteria described in s. 163.340(7) or (8). The resolution must state that:
(1) One or more slum or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, exist in such county or municipality; and
(2) The rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas, including, if appropriate, the development of housing which residents of low or moderate income, including the elderly, can afford, is necessary in the interest of the public health, safety, morals, or welfare of the residents of such county or municipality. (Emphasis added)

The added requirement in 2002 that the finding of necessity and the existence of blight be based upon "*data and analysis*" mirrors the changes made to the definition of "*blighted areas*" that such finding be "*indicated by government-maintained statistics or other studies*". (See, 2002-294 Laws of Fla.). Thus, after 2002 the Legislature required strong documentary evidence to support a finding of blight and necessity.

Section 163.355 Fla. Stat. (2006), limits the authority of Cedar Grove to "*exercise the community redevelopment authority conferred by this part*". The import of this sentence is to limit the local government exercise of power in all

actions regarding CRAs. It limits the power to make the CRA Plan, to create the Trust Fund, to authorize bonds, and to utilize Tax Increment Financing.

Thus, unless the "*finding of necessity*" and the determination that an area is "*blighted*" meets the dual prong test set forth in Section 163.340(8), Fla. Stat. (2006), the City is not authorized to "*exercise*" the authority granted by the Act. In other words, Cedar Grove may not stand on its unsupported resolution in 2001 or upon its ill-supported resolution in 2007, because both fail to comply with the requirements of Chapter 163, Part III, Florida Statutes as amended in 2002.

As noted above, the "*Reconfirmation Report*" fails to support the finding in Resolution 07-002 that Brannonville meets the criteria for "*a blighted area*" as amended in 2002. To mouth the right words in the resolution is not enough. See, Panama City Beach Community Redevelopment Agency, which recognized that a city council cannot simply label an area "blighted" and make it so. Now, under the 2002 amendments, the test is even stronger. There must be "*data and analysis*" to support the finding of blight.

The terms "*data and analysis*" are terms of art. They are contained in other laws governing local planning. See, Section 163.3177(6)(a), Fla. Stat. (2006)("*the future land use plan shall be based upon surveys, studies, and data*", (Emphasis added) Section 163.3177(6)(f)1.g, Fla. Stat. (2006)("*the goals, objectives, and policies of the housing element must be based on the data and analysis prepared*

on housing needs in local government"), (Emphasis added); Section 163.3177(8), Fla. Stat. (2006)("*All elements of the comprehensive plan, whether mandatory or optional, shall be based upon data appropriate to the element involved*", (Emphasis added); and Rule 9J-5.005(2)(2), *Data and Analyses Requirements,* Fla. Admin. Code. (Emphasis added)

To conclude, the Town and the trial court failed to apply the correct law governing the finding of necessity and blighted areas. The Town also failed to support its findings of necessity and blight with *data and analysis.* There was no competent substantial evidence that there are a "*substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property"*. In fact, the evidence is to the contrary.

For these reasons, Resolution 07-002 (Finding of Necessity), Resolution 07-010 (CRA Plan), Ordinance 07-422 (Trust Fund), the Joint Resolutions 07-12 and 07-002, the Interlocal Agreement, and Resolution 07-011 that authorized the bonds, all fail to comply with the requirements of law, because they were based on the law in effect prior to the 2002 amendments to the Act. Therefore, the Final Judgment should be reversed and the bonds not validated. See Poe v. Hillsborough County, 695 So. 2d 672 (Fla. 1997).

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

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

> *SECTION 12. Local bonds.--Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:*
>
> *(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of free-holds therein not wholly exempt from taxation; or*
>
> *(b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.* (Emphasis added)

The Resolution creating the CRA Plan, Resolution 07-010, Ordinance No. 07-422, which created the Redevelopment Trust Fund, Joint Resolution 07-012 (City)/Resolution 07-002(Agency), the Interlocal Agreement, and Ordinance 07-011, which authorized the bonds, each contemplate that County ad valorem taxes will either directly or indirectly be used to support the bonds through TIF.

Admittedly, these resolutions and ordinances are statutorily authorized. Section 163.387, Fla. Stat. (2006), authorizes the use of tax increment financing to "*fund*" a "*redevelopment trust fund*" and to "*finance or refinance any community*

redevelopment." The statute states:

> *The annual funding of the redevelopment trust fund shall be in an amount not less than that increment in the income, proceeds, revenues, and funds of each taxing authority derived from or held in connection with the undertaking and carrying out of community redevelopment under this part. Such increment shall be determined annually and shall be that amount equal to 95 percent of the difference between:*
>
> *1. The amount of ad valorem taxes levied each year by each taxing authority, exclusive of any amount from any debt service millage, on taxable real property contained within the geographic boundaries of a community redevelopment area; and*
>
> *2. The amount of ad valorem taxes which would have been produced by the rate upon which the tax is levied each year by or for each taxing authority, exclusive of any debt service millage, upon the total of the assessed value of the taxable real property in the community redevelopment area as shown upon the most recent assessment roll used in connection with the taxation of such property by each taxing authority prior to the effective date of the ordinance providing for the funding of the trust fund.*(Emphasis added)

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

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

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

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

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

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

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

The County proffered testimony of the Bay County Budget Director, Mary Dayton. (TR. Pages 48-55). She said that the County's TIF payments to CRAs come from the County's general revenue fund, which is comprised of ad valorem taxes collected by Bay County. (TR. Page 51) She testified that based on the

Town's own estimations, the amount of ad valorem taxes paid to Cedar Grove for the Brannonville CRA could be "as high as 10 million dollars" (TR. Page 51, Lines 4-5).

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

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

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

This Court realized the real world impacts of the bonding scheme, concluding "that which may not be done directly may not be done indirectly." (Id. at 972) It cited as authority for this proposition State v. Halifax Hospital District, 159 So. 2d 231 (Fla. 1963). In Halifax, a special district with ad valorem taxing power attempted to pledge as security for bonds all of its available revenues. The

district also covenanted to fully maintain its operations in order to ensure that it continued to receive the pledged revenues. The general operations of the district were funded through ad valorem taxation. The Court held that the district's pledge of all available non-ad valorem revenues, together with the promise to maintain all operations during the life of the bonds, would have more than mere incidental effect on the ad valorem taxing power. The Court held that therefore the bonds could not be validated without the approval of the voters. (Id. at 972).

The same thing is going on here. The various ordinances and resolutions, as well as Section 163.387, Fla. Stat. (2006), specifically note that the increment of increase in County ad valorem taxes shall be the amount the County must remit to the Town, which will be placed in the Trust Fund. The Trust Fund secures the bonds. All done without voter approval.

It is absurd to expect that these funds will be paid from any source other than the County's general revenue fund, which is comprised of property tax revenues. In fact, to pay the TIF debt from Enterprise funds, or other revenue sources, such as gas taxes, may in fact be illegal. The TIF payments come from ad valorem taxes. Certainly, TIF has an "*effect*" on ad valorem taxes. It shifts the burden to other taxpayers.

Bay County is not without risk in this TIF scheme. The Interlocal Agreement between the Town and the Agency provides at page 4 that the "*Agency*

will diligently enforce the obligation of any "Taxing Authority" (as defined in Section 163.340(24), Florida Statutes) to appropriate its proportionate share of the tax increment revenues. . . ." Section 163.387(2)(a), Fla. Stat. (2006), imposes a similar policing obligation. (App. Ex. 8 at 4). The County can be sued by the Town if it fails to appropriate revenues to the Trust Fund to support the bonds.

The various resolutions and ordinances, as well as the provisions of Chapter 163, Part III, Fla. Stat. (2006), that authorize Tax Increment Financing for the CRA directly and indirectly violate Article VII, Section 12 of the Florida Constitution. The bonds authorize capital projects. The TIF scheme obligates the County to pay ad valorem taxes to the CRA Trust Fund to support the bonds. There was no referendum to approve the bonds. Therefore, the bonds and the various resolutions, as well as their statutory authorization, are all unconstitutional.

Admittedly, Bay County's argument is at odds with State of Florida, et. al, v. Miami Redevelopment Agency, etc., 392 So. 2d 875 (Fla. 1980). Bay County respectfully requests that this Court revisit that decision and recede from it. [2]

[2] This court has receded from its prior decisions before. See, Weiand v. State of Florida, 732 So. 2d 1044 (Fla. 1999)(receding from State v. Bobbitt, 415 So. 2d 724(Fla. 1982), adopting Judge Overton's dissent in Bobbitt regarding the duty to retreat from the residence when the defendant uses deadly force in self-defense); Gammon v. Cobb, 335 So. 2d 261 (Fla. 1976)(receding from Kennelly v, Davis, 221 So. 2d 415(Fla. 1969), regarding the standard of proof for a married woman to gain the benefits for her illegitimate child); Morgan v. State, 537 So. 2d 973(Fla. 1989)(receding from Bundy v. State, 471 So.2d 9 (Fla. 1985) regarding a defendant's testimony or statements made to experts by a defendant in preparation

Miami authorizes local governments to engage in a bond financing scheme to accomplish indirectly what the Florida Constitution directly prohibits.

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

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

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

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

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

The time to recede from Miami is now. Given the current legislative and constitutional initiatives to roll back, limit or cut property taxes, the loss of existing

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of a defense); Alfonso v. Department of Environmental Regulation, 616 So. 2d 44 (Fla. 1993)(receding from Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978)(regarding appellate jurisdiction when notice of appeal is filed in the wrong court); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)(receding from prior cases which held that a municipal corporation is immune from liability for the torts of police officers.)

tax revenues to CRA's through TIF would only worsen the effects on local governments. See, Senate Joint Resolution 4B (2007), Ch. 2007-321, Laws of Fla., and Ch. 2007-322, Laws of Fla. For this reason, the voters should, now more than ever, have a say in whether to shift their taxes from one "*taxing authority*" to another through the scheme of TIF.

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

CONCLUSION.

The Act requires that the adoption of resolutions follow the same procedural requirements that govern ordinances. Thus, a resolution must be read on at least two separate days pursuant to Section 163.346, Fla. Stat. (2006). The Town admitted this did not occur. Therefore, Resolution 2001-3, Resolution 07-002, Resolution 07-010, and Joint Resolution 07-012 (City)/Resolution 07-002(Agency), are invalid. Because the bonds are based on these Resolutions, the Final Judgment should be reversed with instructions not to validate the bonds.

The trial court erred in concluding that the finding of necessity and blight complied with the law. The Town applied outdated statutory definition of blight. When it adopted resolutions and ordinances under the Act, as amended in 2002, the Town was required to find that the Brannonville CRA met the current definition of blight. This it failed to do. Also, the Town did not provide "*data and analysis*" to support a conclusion that a "*substantial*" number of "*deteriorating structures*", were leading to "*economic distress*". Therefore, the Final Judgment should be reversed with instructions not to validate the bonds.

This Court should revisit its decision in Miami Beach. While the goal of redevelopment is unassailable, the means to that end by using TIF-supported bonds is simply not constitutional unless the voters approve it in advance. The Final Judgment should be reversed and the bonds should not be validated.

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CERTIFICATE OF SERVICE

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

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

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