Filing # 20167358 Electronically Filed 11/04/2014 11:44:08 AM

RECEIVED, 11/4/2014 11:48:36, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

ROBERT REYNOLDS,	**)**	
Appellant,	**)**	
vs.	**)**	
	)	**APPEAL NO. SC14-1618**
FLORIDA DEVELOPMENT	**)**	**L.T. CASE NO. CA14-548**
FINANCE CORP, et al.,	**)**	
Appellees.	**)**	
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEON COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE
STATE ATTORNEY, TENTH JUDICIAL CIRCUIT

JERRY HILL
STATE ATTORNEY
TENTH JUDICIAL CIRCUIT

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I. Preliminary Statement

Pursuant to its duty under *Lakes of Emerald Hills v. Silverman*, 558 So. 2d 442, 443 (Fla. 4th DCA 1990), to respond to appellate briefs, the State Attorney for the Tenth Judicial Circuit, by and through his undersigned Assistant State Attorney, herein responds to the Appellant's brief filed on October 6, 2014, and intends to apply the same conventions as the Appellant in referring to the *Appendix* to Appellant's initial brief. *See Initial Brief, Reynolds v. Florida Dev. Finance Corp. et al.,* Case No. SC14-1618 at 2 (Fla. Oct. 6, 2014)(*Initial Brief*).[1]

II. Statement of the Case, Jurisdictional Statement, and Standard of Review

Appellant appeals a final order of Second Circuit Judge, the Honorable John Cooper, rendered on July 18, 2014, granting the prayer of the Florida Development Finance Corporation (FDFC), a Legislatively-created corporation, to validate a bond issue pursuant to the Florida PACE Act, § 163.08 Fla. Stat. Appellant has authority to appeal pursuant to § 75.08 Fla. Stat. (2014).

The Tenth Circuit State Attorney was joined below because § 163.01 Fla. Stat. (2014), and § 288.9606 Fla. Stat. (2014), require service of a complaint for bond validation upon the

[1] Appellee will refer to the Appendix filed by Appellant herein as (App).

state attorney in each circuit where a project lies or the bonds are to be issued. Hardee County, within the Tenth Judicial Circuit, is one of the localities entering into an interlocal agreement with FDFC in this case. (App. 133). Section 75.05 Fla. Stat. (2014) requires the state attorney to "examine" a complaint for bond validation, and to defend against it if it appears on its face to be defective, insufficient, untrue, or otherwise unauthorized.[2] The Tenth Circuit State Attorney, as a separate party to this action below, therefore bears the responsibility to brief the Court in this matter. *See* Phillip J. Padovano, *Florida Appellate Practice*, § 16:2, at 292 n.7 (West 2013). The undersigned is a duly appointed Assistant State Attorney in the Tenth Circuit, and therefore may wield the State Attorney's power and bear his duties in this appeal. *See* § 27.181 Fla. Stat. (2014).

This Court has direct appellate jurisdiction over bond validation issues. See Fla. R. App. P. 9.030(b)(1)(A). It reviews the trial court's application of law to the facts herein *de novo*, while affording deference to the lower court's factfinding. *See City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003). The Court's scope of review is limited to (1) determining whether FDFC was authorized to issue bonds; (2) whether the obligation's purpose was legal; and (3) ensuring

[2] The Second Circuit State Attorney's Office appeared for Appellee below.

that the issuance complies with law. *See State v. Inland Prot. Fin. Corp.*, 699 So. 2d 1352, 1355 (Fla. 1997).

Here, Appellant does not contest FDFC's authorization to issue bonds or the purpose of those bonds. Rather, he claims that the bond issuance fails to comply with the law because (1) he was denied due process in the hearing below; (2) the proposed bond issue was unripe for review; (3) the validated bond agreement unlawfully transfers local government assessment power to the corporation; and (4) the PACE Act is unconstitutional as applied to Appellant because the financing agreement authorizes judicial foreclosure as a remedy for failure to pay. *See Initial Brief* at 8-16. Appellee will address each contention in turn *infra*.

III. Facts

Appellee accepts the statement of facts set out in the *Initial Brief* at 2-7, other than arguments made in their presentation, and subject to additional facts from the available record to be related in its own argument herein.

IV. Summary of the Argument

This Honorable Court should **affirm** the bond validation because it comported with the law. Appellant, present at the hearing through counsel, was heard regarding all aspects of the proposed bond issue. His objection on appeal to the amended documents produced at hearing was not sufficient to preserve the

argument for appeal, and on the merits, fails for lack of a prejudice showing. The proposed bond issue was ripe for review, even though the interlocal agreements have not yet been promulgated, because the corporation has entered into agreements with the listed governments on other matters and intends to proceed on PACE Act agreements with those same governments as soon as the validation takes place; the substance of the law has thus been complied with. Assessment power is lawfully to be delegated to the corporation via interlocal agreement, as the authorizing statute provides. Finally, § 163.08 Fla. Stat. is not unconstitutional as applied, because the lower court severed the remedy of judicial foreclosure from the financing agreement in its authorizing order. This Court should **affirm**.

V. Argument

Appellant attacks multiple features of the lower court bond validation proceeding in this case. The Florida Development Finance Corporation (FDFC), the primary appellee, is a Florida public corporation, established by statute in 1993. *See State v. Florida Dev. Fin. Corp.*, 650 So. 2d 14, 15 (Fla. 1995). Its purpose is to enhance economic activity in our state by attracting and fostering small business. *See id.* When activated by interlocal agreement under the Florida Interlocal Cooperation Act of 1969, it becomes an instrumentality of local government and functions within the corporate limits of that local

government. *See id.* Its authorizing statutes specifically allow it to issue revenue bonds to finance and refinance capital projects. *See id.* The Florida Property Assessment Clean Energy ("PACE") Act, § 163.08 Fla. Stat. *et seq.*, allows local governments to enter interlocal agreements with FDFC to administer PACE Act programs in their corporate limits. *See* § 163.08(6) Fla. Stat. (2014).

A final judgment of validation comes to this Court clothed in a presumption of correctness, with Appellant vested with the responsibility to demonstrate that the record and evidence below fail to support the lower court's conclusions. *See Miccosukkee Tribe v. S. Fla. Water Mgt. Dist.*, 48 So. 3d 811, 817 (Fla. 2010). In this Argument, Appellee will begin by discussing the due process requirements attendant to bond validation hearings, and then apply those requirements to the events taking place in the lower court, showing that Appellant did in fact receive sufficient procedural due process. Any objection to the documents below was insufficiently preserved for appellate review, and even if this is not the case, Appellant has not demonstrated prejudice to his interests. Appellee will then address the ripeness concern, and show that in substance, the issue was ripe for review. In addition, Appellee will point out that this issue was not preserved for review in this Court. It will then show how FDFC and the local government work together

at law, so that assessment power is lawfully delegated and carefully restricted. Finally, since the lower court severed the remedy of judicial foreclosure for failure to pay from the approved agreement, the PACE Act is not unconstitutional as applied to Appellant. This Court should **affirm.**

Issue I: Appellant received due process.

In bond validation proceedings, procedural due process means "fair notice and a real opportunity to be heard." *Keys Citizens for Responsible Gov't. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001). Notice must (1) apprise those interested that the action is pending, and (2) provide the opportunity to present objection. *See id.* It is not a "technical concept" with a "fixed content unrelated to time, place, and circumstances." *Id.* It is flexible. *See id.*

Section 75.04 Fla. Stat. (2014) provides that a legally sufficient complaint for bond validation must

> set out the plaintiff's authority for incurring the bonded debt or issuing certificates of debt, the holding of an election and the result when an election is required, the ordinance, resolution, or other proceeding authorizing the issue and its adoption, all other essential proceedings had or taken in connection therewith, the amount of the bonds or certificates to be issued and the interest they are to bear; and, in case of a drainage, conservation, or reclamation district, the authority for the creation of such district, for the issuance of bonds, for the levy and assessment of taxes and all other pertinent matters.

Section 75.05 Fla. Stat. (2014) requires a copy of the complaint to be served upon the state attorney, with an order requiring him to show cause why the bonds should not be validated. Section 75.06 Fla. Stat. requires the order to be published.

Here, Appellant does not take position that the complaint is legally insufficient. His position is that certain documents that were appended to the complaint were changed at the hearing. *See Initial Brief* at 11. From review of the Record, Appellee does not see where this claim was preserved by contemporaneous objection below. If it was not properly preserved, it should not be considered on appeal. *See Swan v. Fla. Farm Bureau Ins. Co.*, 404 So. 2d 802, 803 (Fla. 5th DCA 1981). Lacking preservation, the lower court should be **affirmed** as to this issue.

If the Court finds that this issue was sufficiently preserved and chooses to confront it on the merits, in his *Initial Brief* Appellant takes position that once the show cause order is published, no changes can subsequently be made, and if they are made then due process fails. *See id.* at 12. He refers the Court to *Ingram v. City of Palmetto*, 93 Fla. 790; 112 So. 861 (1927) as authority for this proposition. But *Ingram* is not so clear for that proposition of law.

Ingram, 112 So. at 862, involved a municipal bond issue of the City of Palmetto. The city fathers served the bond issue upon the state attorney for the jurisdiction, who was ordered to

show cause why the bonds should not be validated. *See id.* at 794. The state attorney affirmed that he could not show such cause. *See id.* at 793-94. Ingram, a citizen, intervened and demurred. *See id.* at 794. After the demurrer, the trial court allowed the petition to be amended, correcting the deficiency. *See id.* This Court held that the amendment was unauthorized, because Ingram was not given the opportunity to contest the facts that the amendment added. *See id.* at 795.

The key to *Ingram*, and the reason that Appellant cites it, is that Ingram was shut out of the process to challenge the amendment because it happened without giving him a chance to be heard on it. Appellant feels that the same has happened to him, and therefore the bond validation must fail because he was not allowed a meaningful opportunity to challenge the amended documents at the hearing. *See Initial Brief* at 12. But does the record of that proceeding, placed against *Ingram*, support Appellant's claim? Appellee takes position that it does not.

In *Ingram*, there is no suggestion that a hearing of any kind took place prior to the bond issue being amended and subsequently validated. If a hearing proceeded on the issue, the opinion is silent thereon. It therefore is not helpful to our consideration. Here, Appellant was present in court, with counsel. (App. 166). Counsel for Appellant was advised at the outset that the proposed finance agreement was not the same as

originally appended to the complaint. (App. 168). That exhibit was not admitted immediately. *See id.* Testimony began with FDFC's executive director, William Spivey. (App. 169). He testified that Section 4 of the finance agreement, FDFC's Exhibit 5, had been modified. (App. 175). This was to ensure that special assessments authorized by the interlocal agreements were collected per the Uniform Assessment Collection Act. (App. 176). That was the only change made. *See id.* Appellant agreed that the exhibit be entered into evidence. *See id.* Appellant then extensively cross-examined. (App. 179-92). Most of the cross-examination revolved around the financing agreement. *See id*. During it, Appellant discovered that Exhibit 5 was not in final form and the FDFC board of directors would have to approve it. (App. 182-84). He also learned that the only method of collection would be via non-*ad valorem* collections under the uniform collection act. (App. 184).

If anything, from these events Appellant has not shown that he did not have a fair hearing and adequate notice of the proceedings. Appellant's concerns here verge on the technical, similarly to what took place in *State v. Sarasota*, 154 Fla. 250, 251; 17 So. 2d 109 (1944). There, a petition for bond validation was filed and order to show cause issued on December 7, 1943. *See id.* Seven days thereafter, the petitioner found an error in the publication, moved the court to vacate the order to show

cause, and filed an amendment. *See id.* The state attorney promptly made answer. *See* 154 Fla. at 252. Following validation of the bonds, the state attorney appealed, taking position that an entirely new petition had been called for, and that once the order to show cause had been filed the court was without jurisdiction to revoke its order to show cause and allow changes to the petition. *See id.* This Court observed that

> [i]f we understand the contention of the State Attorney correctly, it is that the court, upon discovering the irregularity in the publication of the notice and order of December 7, 1943, should have dismissed the proceedings and required the petitioner to file a new petition, although it may have been a verbatim copy of the original petition. We do not see how any good purpose could have been subserved by following such a course, which would only have resulted in loss of time and additional expense. The record shows that the proper order was made upon the filing and presentation of the petition and the second order only became necessary because of some irregularity in the publication of notice in the newspaper. But even if the irregularity had been in the order itself, it is well settled that courts of general jurisdiction have authority to correct their orders, judgments and decrees during the term at which they were rendered, or before they have become final and absolute under the statute.
>
> While it is most forcefully and plausibly argued that under said Section 75.05 the court can only render the order of notice and to show cause "upon the filing and presentation" of the petition, as stated in the statute, our view is that a reasonable interpretation of this language should be accorded by the courts.

154 Fla. at 254. Bond statutes being remedial in nature, it is the substance and not the form of the process that is important. *See* 154 Fla. at 253. Here, Appellant knew where to be, when to

be there, and what was to be heard. He also had enough information to conduct an extensive cross-examination and make adequate argument. The purposes of due process having been served, Appellant should not be heard to complain that he lacked for notice and a fair hearing. The validation should be **affirmed.**

Issue II: The bond validation was ripe for review.

Appellant next takes aim at the timing of the bond issue, taking position that because no interlocal agreements yet have been signed, the lower court lacked jurisdiction to hear the issue. *See Initial Brief* at 13. Mr. Spivey testified that Exhibit 3 to the complaint for validation was "a list of the interlocal agreements [FDFC then had] in place." (App. 172, lines 8-9). These agreements apparently were for other capital improvement programs that FDFC administers, as opposed to the PACE Act. (App. 8). Mr. Spivey testified that a separate interlocal agreement would be sought in each of those local government areas to enable FDFC to issue PACE Act assessments as authorized therein. (App. 172 at lines 8-15). FDFC's intention as set forth in the complaint was to enter into interlocal agreements that would delegate to it the ability to levy special assessments "on the property of owners who voluntarily participate in the Program located within their respective jurisdictions." (App. 8).

Appellant did not raise ripeness in the lower court, either in writing or orally. His written argument in answer to the order to show cause was not that no interlocal agreements had been entered into, and thus the question was not ripe for review, but that interlocal agreements could not provide for delegation of assessment powers. (App. 157). He argued use of invalid remedies in enforcement. (App. 158). Appellant's oral argument in the lower court likewise did not raise a ripeness claim. (App. 213-221). As argued *supra*, if this issue was not properly preserved, it should not be considered on appeal. *See Swan*, 404 So. 2d at 803. The lower court thus should be **affirmed** as to this issue.

On the merits, ripeness is a fact-intensive question. *See, e.g. City of Riviera Beach v. Taylor*, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995) ("Decisions on ripeness issues are fact-sensitive")). Appellee has located no reported decisions construing when a bond validation is ripe for appellate review, and therefore turns to analogous cases to derive an appropriate rule. In the land-use context, a question is ripe for review when at least one meaningful application for use of the land is before the reviewing authority. *See id.* In *Collie v. State*, 710 So. 2d 1000, 1007 (Fla. 2d DCA 1998), the Second District Court of Appeal observed that it would not consider hypothetical acts when assessing a statute's constitutionality, and the fact that

Collie was contesting a statute that had not been applied to him rendered the question unripe. In *Venice Hosp. v. Nelson*, 445 So. 2d 621, 622 (Fla. 1st DCA 1994), a case involving a workman's compensation claim, the appellate court dismissed the appeal, holding that an interlocutory order did not "resolve all matured issues in controversy." These cases have in common that the appellate court wished to see some finality before ruling.

Cases seem to indicate that where a court is considering a prospective action, the cause is not ripe for review. This would appear to support Appellant's claim on the merits, because FDFC related in its pleadings below that its intention to enter into interlocal agreements was prospective. However, FDFC also informed the lower court that it had existing agreements with the localities set out in Exhibit "C" of the appendix to its complaint (App. 133), and its executive director's testimony indicated that that further agreements were to be sought with those localities. (App. 172). FDFC's service of its complaint for validation upon the state attorneys in those jurisdictions lends further weight to that conclusion. The lower court found in its order validating the bonds that FDFC intended to enter into interlocal agreements with the local governments. (App. 312). Section 163.01(15)(i) Fla. Stat. provides in relevant part that the provisions of that subsection shall be liberally construed to effect their stated purposes. Allowing the lower

court's order the presumption of correctness, *see Miccosukkee Tribe, supra,* Appellant has not shown that this issue was unripe for review. The validation should be **affirmed.**

Issue III: Local assessment power is lawfully delegated.

Here, Appellant takes position that FDFC, an entity lacking the power to impose non-*ad valorem* assessments on its own, may not obtain that power via interlocal agreement. *See Initial Brief* at 14. Appellant claims that Judge Cooper therefore validated bonds that were not in compliance with the law. *See id.* Appellant is incorrect, because the interlocal agreements lawfully delegate local assessment power as limited strictly within the agreement, effectuating the letter and spirit of the PACE Act.

FDFC's exercise of corporate power is "the performance of an essential public function." § 288.9604(1) Fla. Stat. (2014). FDFC may operate within the corporate limits of a local government with which it has entered into an interlocal agreement. *See id.* It may issue bonds, and "exercise all powers in connection with the authorization, issuance, and sale of bonds. . . ." § 288.9605(2)(h) Fla. Stat. (2014). Pursuant to § 288.9606(7)(c) Fla. Stat., FDFC specifically has power under the PACE Act to finance qualifying projects as defined in § 163.08. FDFC pled this in its complaint for validation. (App. 7). It may enter into interlocal agreements under Chapter 163 "for the

exercise of any power, privilege or authority consistent with the purposes" of its enabling act, Chapter 288. § 288.9605(2)(e) Fla. Stat. (2014). Those purposes are, in relevant part to this appeal, to encourage and assist new business and industry, and to increase both the purchasing power of and opportunities for gainful employment to Florida citizens. *See* § 288.9602(6)-(7) Fla. Stat. (2014). FDFC's enabling statute specifically contemplates that it will work with local governments through interlocal agreements under Chapter 163. *See* §§ 288.9602(8); 288.9603(13)-(14) Fla. Stat. (2014). When it is activated by interlocal agreement under § 163.01(7), it may issue the same types of indebtedness as any other public agency, including local government. *See* § 288.9696(1) Fla. Stat. (2014). Such issues are deemed made for essential public purposes, and must be authorized by interlocal agreement. *See* § 288.9696(2) Fla. Stat. (2014).

Appellant takes position that § 163.01(4) restricts a public agency such as FDFC to exercising only those powers jointly with local government that it can wield in its own right. *See Initial Brief* at 14. But as to FDFC, that is not the law. FDFC's enabling statutes confer upon it broad power to act within the boundaries of governments with which it has interlocal agreements. Certainly, FDFC does not have the power to assess <u>taxes</u>, and it is questionable whether the local

government could delegate its taxing power by interlocal agreement. *See* § 163.01(7)(c) Fla. Stat. (2014); *see also West v. Lake Placid*, 97 Fla. 127, 138; 120 So. 361 (1929)(*holding that* government may not delegate unlimited taxing power). This Court holds that a legally imposed non-*ad valorem* special assessment is not a tax, however. *See Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992). Appellant does not argue that PACE Act assessments are taxes. *See Initial Brief* at 14-15. The question therefore is whether a local government can delegate its ability to impose PACE Act special assessments by interlocal agreement, and on these limited facts, the answer is "yes."

Neither § 163.01 nor Chapter 288 restrict FDFC from imposing special assessments, <u>if</u> such are allowable in the law; in fact, § 288.9605(2)(e) allows the exercise of <u>any</u> lawful power in furtherance of FDFC's enabling act. Section 163.08(6) Fla. Stat. (2014) specifically allows local governments to exercise discretion to have FDFC administer the PACE program in their jurisdictions. This lawful delegation of the local government's powers under the PACE Act does not relieve the local government of its obligations under the law. Rather, reading the statutes *in pari materia* with the financing agreement and testimony at the hearing before Judge Cooper, FDFC will act as local government's agent, exercising powers delegated to it strictly as the interlocal agreement allows. *See*

§ 163.08(3)-(8) Fla. Stat. (2014)(*referring to* local government power to collect assessments and allowing a corporate entity to administer the program at the government's discretion); App. 140 (Section 4(a) of the interlocal agreement, expressly providing a delegation of local government assessment power to FDFC); App. 172 (FDFC's executive director testifying that a separate interlocal agreement would be required to collect PACE Act assessments).

Assessment powers may be delegated to quasi-public corporations to advance public purposes. *See Smith Bros. v. Williams*, 100 Fla. 642, 652; 126 So. 367 (1930)(Brown, J. *dissenting*). An analogous situation arose in *County Collection Services v. Charnock*, 789 So. 2d 1109, 1110 (Fla. 4th DCA 1996), where Palm Beach County contracted with a third party to enforce certain types of code enforcement liens. The contract allowed the third party to collect a certain percentage of the amount recovered. *See id.* The county assigned to the third party by resolution its right to enforce the liens. *See id.* The third party then attempted to enforce a lien on Charnock's property, and in a motion to dismiss the enforcement action, Charnock countered that this improperly delegated the county's police powers. *See id.* The trial judge agreed with Charnock, holding that the county had delegated away its power to enforce code enforcement liens. *See id.*

On appeal, the district court reversed. It held that given later developments in this Court's jurisprudence, and the enactment of home rule powers legislation with the 1968 Florida Constitution, local government had broad power to effect local goals, consistent with general law. *See id.* at 1112. Nothing existed in statute that precluded the local government from delegating its powers to the third party to enforce its code enforcement liens. *See id.* And the county retained the power to decide what liens to assign; what collection techniques were permissible; to take back any lien assigned; and to terminate the contract for any reason. *See id.* Only if it were powerless to direct the exercise of its police powers would the delegation be unlawful. *See id.*

Another analogous situation is *St. Johns Co. v. Northeast Fla. Builders Assoc.*, 583 So. 2d 635 (Fla. 1991), where this Court confronted whether a county could use impact fees on new construction to pay for schools. One defense raised was unlawful delegation of county assessment power to a local school board. *See id.* at 642. This Court took position that the delegation was lawful, because it was restricted; there the county placed the impact fees in a separate trust fund, the money could only be spent for educations facilities consistent with the delegation, and the school board had to account for the money. *See id.*

In *St. John's Co.*, while discussing the delegation issue, this Court cited its decision in *Brown v. Apalachee Reg'l. Planning Council*, 560 So. 2d 782 (Fla. 1990). *Brown* is helpful, because there, the Court answered a certified question regarding whether the power to set certain fees was properly delegated to a regional planning council. *See id.* at 783. Answering the question in the affirmative, this Court approved the district court's observation that the rules under attack were merely technical interpretations following a policy decision already set in motion by the Legislature. *See id.* at 784. There was, therefore, no constraint on the Legislature's power to set policy, or delegation of unlimited power to set policy correctly within the Legislature's purview. *See id.*

Where a delegation of power does not bind the local government's hands, or is merely technical in nature, it is not an unlawful delegation. Here, the interlocal agreements have elements of both. *Compare* with the above cases. The agreement is restricted solely to the PACE Act assessments. (App. 140). It requires FDFC to comply with the Uniform Assessment Collection Act and the PACE Act. *See id.* It requires FDFC to provide all relevant notices to property owners voluntarily participating in the program, and to coordinate with the tax assessor and property appraiser. *See id.* Part of the interlocal agreements' purpose was for the consenting local governments to use their

assessment powers to enforce the program. (App. 174; 179). Sections 288.9605(2)(h) and (p) provide FDFC statutory authority to enter into such agreements. (App. 175). Mr. Spivey, for FDFC, stated that the interlocal agreements allow FDFC "to request" the local government "to place [PACE Act] special assessments on the tax roll." (App. 186, lines 8-12).

The interlocal agreement and bonds issued by FDFC are not debts or liabilities of the local government. (App. 141). The agreement may be amended at any time in writing on concurrence of the local government and FDFC. *See id.* And it may be reassigned by either party, with prior written consent of the other party. *See id.* It specifically is governed by and to be construed in accord with state law. *See id.* FDFC is therefore bound by every provision of the PACE Act, and its failure to comply would be judicially reviewable. And on its face, the agreement in no way ties the hands of the local government. This is a proper delegation of a limited special assessment power, and one that the property owner has to enter into voluntarily. The lower court's validation should be **affirmed.**

Issue IV: Judicial foreclosure was severed from the finance agreement.

Appellant's final issue claims that the PACE Act was applied to him unconstitutionally, impairing mortgage contracts. *See Initial Brief* at 17. This is because within the

documentation, it included the remedy of judicial foreclosure for special assessment defaults. *See id.* Appellant did not argue this at the hearing below. (App. 213-22). Appellant's argument, in fact, stipulated that the bonds at issue did not impair contract. (App. 216, lines 14-17)("I am in favor of the fact that the bonds aren't invalid because of impairment of contract"). The remedy of judicial foreclosure was raised in Appellant's answer to the order to show cause. (App. 158).

Appellee concedes that judicial foreclosure is an inappropriate remedy under the PACE Act and the Uniform Assessment Collection Act. *See* §§ 163.08(4); 197.3632(8)(a) Fla. Stat. (2014). Judge Cooper also recognized this, and ordered that the Uniform Assessment Collection Act be the method of collection. (App. 219; 223-24). The lower court properly severed the remedy of judicial foreclosure from the finance agreement in its final order, when it directed that FDFC's financing agreements must comply with the PACE Act and be collected through the Uniform Collection Act. (App. 219; 223-24; 312-13; 319). And FDFC also recognized the issue when it circulated a corrected finance agreement. (App. 182; 184). FDFC intends to collect via the Uniform Act. *See* App. 184-85.

"As a general rule, contractual provisions are severable, where the illegal portion of the contract does not go to its essence, and, with the illegal portion eliminated, there remain

valid legal obligations." *Fonte v. AT&T Wireless Svcs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 2005). In *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 478 (Fla. 2011), this Court viewed an arbitration agreement as going to the very essence of a contract between a nursing home and patient, as altering it essentially would force the trial court to rewrite the contract. *Compare with Fonte*, 903 So. 2d at 1024, where a customer challenged a wireless service contract. The arbitration clause within contained a provision prohibiting attorney's fees, and the agreement had a severability clause. *See id.* This Court held that the provision prohibiting attorneys' fees did not go to the heart of the contract, and could be severed, to bring the service contract within the unfair trade practices laws. *See id.*

Here, section 16 of the financing agreement sets forth that each provision therein is severable if declared unenforceable by a court of competent jurisdiction. (App. 148). And the portion of the agreement's section 4 dealing with judicial foreclosure does not alter FDFC's right on behalf of the local government to place liens where a homeowner voluntarily participating in the PACE Act defaults. The judicial foreclosure language in section 4 is, therefore, severable, because it does not go to the heart of the contract between the homeowners and FDFC, acting on the local government's behalf. (App. 146). This Honorable Court

should **affirm** the lower court's validation of the bonds in this case.

VI. Conclusion

Both Appellant and Appellee recognize the important public purpose that the PACE Act serves. And the proceedings in the lower court were not unflawed; it is rare in the human endeavor that anything is perfect. Appellant's complaints center on four discrete issues: First, that the lower court violated procedural due process in two ways; by allowing amendments to FDFC's attachments to its complaint and by considering an unripe case; third, by validating bonds where FDFC has no power to assess; and last, by impairing contracts because judicial foreclosure is a remedy in the financing agreement. Each of these issues is answerable.

Appellant simply has not preserved his due process complaint and his ripeness complaint for review. As to the due process complaint, even if he did properly preserve it, he was present for and had enough notice of the proceedings to make extensive arguments and to preserve the record for review of the substantive issues. And the case itself was indeed ripe for review, because in substance FDFC is far enough along in the process for the Court to adjudicate it on the merits. As to the assessment power, as shown *supra*, the interlocal agreement will properly delegate limited assessment power to FDFC, and FDFC

will not bind the local government in a way that it cannot properly oversee the use of this power. Finally, the judicial foreclosure portion of the financing agreement was properly severed. This Honorable Court should **affirm**, because the bonds were properly validated.

VII. Certificate of Service and Font Compliance

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served via the Florida Courts E-Filing Portal upon the following on this, the 4th day of November, 2014:

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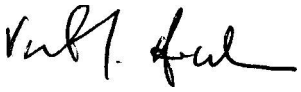
I FURTHER CERTIFY that this brief is typed in 12-point Courier New font, in compliance with the font requirements of Fla. R. App. P. 9.100 (*l*) and 9.210(a)(2).

Respectfully submitted,



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