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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1618

ROBERT REYNOLDS,

Appellant,

vs.

STATE OF FLORIDA, et al.,

Appellees.

_____/

L.T. Case No.: 2014 CA 000548

ON APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE, THE FLORIDA DEVELOPMENT FINANCE CORPORATION

KREUSLER-WALSH, COMPIANI & VARGAS P.A.
Jane Kreusler-Walsh
Florida Bar No. 272371
Rebecca Mercier Vargas
Florida Bar. No. 0150037
Stephanie L. Serafin
Florida Bar. No. 58390
501 S Flagler Drive, Suite 503
West Palm Beach, Florida 33401
Telephone: (561) 659-5455
Facsimile: (561) 820-8762
E-mail: janewalsh@kwcvpa.com
E-mail: rvargas@kwcvpa.com
E-mail: sserafin@kwcvpa.com

WHITE & CASE LLP
Raoul G. Cantero
Florida Bar No. 552356
T. Neal McAliley
Florida Bar No. 172091
Jesse L. Green
Florida Bar No. 95591
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 995-5290
Facsimile: (305) 358-5744
E-mail: rcantero@whitecase.com
E-mail: nmcaliley@whitecase.com
E-mail: jgreen@whitecase.com

NABORS, GIBLIN & NICKERSON, P.A.
Gregory T. Stewart
Florida Bar No. 203718
Lynn M. Hoshihara
Florida Bar No. 41194
Carly J. Schrader
Florida Bar No. 14675
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
Telephone: (850) 224-4070
Facsimile: (850) 224-4073
Email: gstewart@ngnlaw.com
E-mail: lhoshihara@ngnlaw.com
E-mail: cschrader@ngnlaw.com

L. Thomas Giblin
Florida Bar No. 393010
2502 N. Rocky Point Dr., Suite 1060
Tampa, Florida 33607
Telephone: (813) 281-2222
Facsimile: (813) 281-0129
E-mail: tgiblin@ngn-tampa.com

Counsel for Appellee, the Florida Development Finance Corporation

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment of the circuit court for the Second Judicial Circuit, which validated bonds to be issued by Appellee Florida Development Finance Corporation ("FDFC"). The bonds will pay for improvements to existing homes and businesses in Florida related to energy conservation, clean energy, and hurricane protection. The costs of the improvements are repaid through non-ad valorem property assessments on the properties. This property-assessed clean energy ("PACE") program is authorized by Chapter 10-139, Laws of Florida (codified at §§ 163.08, 288.9606(7)(c), Fla. Stat. (2014)) (the "PACE Act"), which was enacted to encourage such improvements by making them affordable and tying the repayment obligation to the properties instead of the individuals. The PACE Act authorizes the FDFC to issue revenue bonds to support PACE programs. Under this authority, the FDFC sought validation of revenue bonds to be secured by special assessments.

Appellant Robert Reynolds challenges the validity of the FDFC bonds on technical grounds. He essentially criticizes the circuit court's efforts to address the very issues he raised, and ignores the FDFC's broad power to finance PACE improvements.

A. Facts Relevant to the Appeal

In 2010, the Legislature passed the PACE Act to facilitate energy and hurricane-related improvements to Florida homes and businesses. The PACE Act authorizes non-ad valorem assessments to pay for improvements to buildings for energy conservation (such as insulation and replacement of windows); renewable energy (such as solar panels); and wind resistance (such as roof improvements and hurricane shutters). § 163.08(2)(b), Fla. Stat. (2014). The law essentially adds PACE improvements to the list of capital improvements that qualify for non-ad valorem property assessments. *Cf.* §§ 125.01(1) & 170.01(1), Fla. Stat. (2014) (listing activities such as road, drainage, and other capital improvements).

Under the PACE program, property owners find a licensed and registered contractor to install the improvements. § 163.08(11). They then execute financing agreements with a local government to pay for those improvements over time through a non-ad valorem assessment on the property. § 163.08(3), (4). To avoid public debt, the FDFC or local governments issue bonds to obtain funding, §§ 163.08(7), 288.9606, Fla. Stat. (2014), and may engage private companies to administer the program, § 163.08(6). Local governments then assess the properties to repay the bonds over the improvements' functional life. § 163.08(3).

Like other non-ad valorem assessments, PACE assessment liens enjoy equal dignity to county tax liens, which are superior to all others. § 163.08(8). The

property owner must pay the assessment in annual installments as part of the property tax bill. *See* Florida House of Rep. Staff Analysis, CS/HB 7179, at 4 (2010). Even though assessments liens are superior to mortgage liens, the PACE Act includes added protections for mortgage holders. § 163.08(9)-(14).

The Legislature found that this program would have both private and public benefits. A retrofitted property "receives the special benefit of alleviating the property's burden from energy consumption" and "potential wind damage." § 163.08(1)(b). These improvements also "promote energy conservation, energy security, and the reduction of greenhouse gases," and fulfill Florida's "hurricane mitigation policies," thereby reducing the damage hurricanes cause to homes, businesses and the Florida community. § 163.08(1). The Legislature found these interests compelling, and also found that "there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance." § 163.08(1)(b)-(c).

The FDFC is a public corporate body created by section 288.9604, Florida Statutes. The PACE Act explicitly authorizes the FDFC as an entity to finance "qualifying improvement projects" under the PACE program. Ch. 10-139, § 6, Laws of Fla. (codified at § 288.9606(7)(c), Fla. Stat. (2014)).

In 2014, the FDFC enacted a program to issue bonds to support PACE programs (A. 22-30).[1] In January 2014, it adopted Resolution No. 14-02, which authorized it to issue bonds in an aggregate principal amount not to exceed $2,000,000,000, the proceeds of which would be "made available to property owners to fund Qualifying Improvements" as defined in the PACE Act (A. 26). Under the resolution's terms, the FDFC will enter into a program administration agreement with Renovate America, Inc., which will administer the program and locate investors to purchase the bonds (A. 24, 28). The FDFC will also execute interlocal agreements with participating local governments, in which the FDFC will provide financing for PACE improvements and the local governments will levy non-ad valorem assessments on properties receiving the improvements (A. 27). Participating property owners will execute financing agreements under which assessments will be levied on their properties to repay the FDFC bonds (A. 27).

B. Course of Proceedings

The FDFC filed a complaint in the circuit court of the Second Judicial Circuit seeking to determine "the validity of the Bonds, the pledge of revenues for the payment thereof, the validity of the non-ad valorem assessments which shall comprise all or in substantial part the revenues pledged, the lien priority of such

[1] "App. #" refers to the page number of Reynolds's appendix; "S.A. #" refers to the page number of the appendix to this brief.

assessments, the proceedings relating to the issuance thereof and all matters connected therewith" (A. 6). The complaint attached the master bond resolution, a form master indenture agreement, a list of local governments that have executed interlocal agreements with the FDFC, a form interlocal agreement, and a form financing agreement to be executed by participating property owners (A. 21-154).

The circuit court issued an order requiring interested parties to appear at a hearing to show cause why the complaint for validation should not be granted (A. 2-4). The court required that its order to show cause (but not the complaint or its exhibits) be published in newspapers of general circulation in Leon County and within the boundaries of each local government that had previously executed an interlocal agreement with the FDFC (A. 3).

Nine parties, including eight States Attorney and Appellant Reynolds, answered the complaint or responded to the order (A. 155-61). Only two objected: the State Attorney for the Seventeenth Judicial Circuit (Broward County) and Reynolds (A. 155-61). The Broward State Attorney presented no evidence, and made only a limited appearance at the hearing (A. 211-12).

Reynolds raised three issues: (1) he objected to including the remedy of judicial foreclosure in the model financing agreement (A. 158-60); (2) he argued that the FDFC has no power to impose special assessments and that it cannot obtain this authority through an interlocal agreement (A. 156-58); and (3) he

argued that the bond validation was premature (A. 250-51). He argued that the special assessments do *not* impair preexisting mortgage contracts (A. 211-16).

At the hearing, the FDFC presented as an exhibit an amended form financing agreement that addressed Reynolds's first concern and removed the reference to judicial foreclosure in the collection provision, replacing it with the remedies provided under the uniform method for the levy, collection, and enforcement of non-ad valorem assessments ("Uniform Method") established in section 197.3632, Florida Statutes (S.A. 2). The FDFC's executive director testified that the form financing agreement attached to the complaint was not an executed contract, but was a general form that the FDFC board would have to approve before it became an executed contract with individual property owners (A. 174-75). He also testified that under the interlocal agreements, the FDFC would issue the bonds and the local governments would assess the properties (A. 174, 186).

At the hearing, the circuit court ordered the FDFC to clarify that (i) the collection of special assessments will utilize the Uniform Method in section 197.3632, and (ii) local governments, not the FDFC, will impose the assessments supporting the bonds (A. 223-24). The court then issued a final judgment validating the bonds (A. 227-44). Reynolds moved for rehearing (A. 245-52), and the court held a hearing on his motion (A. 256-87). The court then issued an amended final judgment (the "Judgment") addressing Reynolds's objections and

again validating the bonds (A. 288-305). This appeal follows. The Florida Bankers Association has appealed separately (Case no. SC14-1603).

C. Standard of Review

In bond validation proceedings, courts must "(1) determine if a public body has the authority to issue the subject bonds; (2) determine if the purpose of the obligation is legal; and (3) ensure that the authorization of the obligation complies with the requirements of law." *Strand v. Escambia Cnty.*, 992 So. 2d 150, 154 (Fla. 2008). A judgment validating bonds comes to this Court "clothed with a presumption of correctness." *Id*. The Court "reviews the trial court's findings of fact for substantial competent evidence and conclusions of law de novo." *Id*. (marks omitted).

SUMMARY OF ARGUMENT

Reynolds received due process, as he had notice and twice had an opportunity to be heard. Any change to a model financing agreement attached as an exhibit to the FDFC's complaint did not alter the substance of the complaint, and addressed issues Reynolds himself raised. The bond validation was ripe for review, as the FDFC's governing body adopted a resolution authorizing the bonds, which required the FDFC to commence a validation proceeding.

The FDFC has the authority to execute interlocal agreements by which local governments levy non-ad valorem property assessments to finance PACE bonds.

Finally, Reynolds waived any claim that the bonds will impair mortgage contracts, and, in any event, the circuit court required the FDFC to clarify that the collection of assessments will be consistent with Florida law.

ARGUMENT

I. THE CIRCUIT COURT COMPLIED WITH THE REQUIRED PROCEDURES FOR VALIDATING BONDS AND PROVIDED REYNOLDS WITH DUE PROCESS

Reynolds first argues that, by allowing the FDFC to amend the complaint and the attached exhibits to address his concerns, the circuit court violated due process (br. at 8-13). This argument expands the concept of "due process" beyond recognition. Procedural due process requires only notice and an opportunity to be heard before a person is deprived of life, liberty or property. *Vosilla v. Rosado*, 944 So. 2d 289, 294 (Fla. 2006) (stating that due process "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and [an] opportunity for [a] hearing appropriate to the nature of the case.") The FDFC complied with all procedural requirements for bond validation under chapter 75 and section 288.9606(5), Florida Statutes. It filed a proper complaint under section 75.04, Florida Statutes (A. 5-20). The circuit court then issued an order to show cause under section 75.05 (A. 2-4). The order was then published in compliance with section 75.06, and the court held two hearings to determine the bonds' validity (A. 162-226, 256-87). These procedures provided fair notice to all

defendants and a meaningful opportunity to be heard. In a bond validation proceeding, that is all the process required. *See Keys Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 949 (Fla. 2001) (finding, in the context of bond validation, that publication notice satisfies due process).

As we explain below, (A) allowing FDFC to amend a model financing agreement to address Reynolds's concerns did not violate due process; and (B) the case was ripe for consideration.

A. Allowing FDFC to Amend a Model Financing Agreement to Address Reynolds's Concerns Did Not Violate Due Process

Reynolds claims that his "due process rights were violated by the seemingly well-meaning actions of the trial court" by creating a "workshop environment," whereby an exhibit to the Complaint (a model financing agreement) was amended in response to Reynolds's own objections (br. at 10-11). But he fails to identify any life, liberty, or property interest he was deprived of. Reynolds notes that imposition of a non-ad valorem assessment involves a deprivation of a property right (br. at 8 n.2), but he never explains how the revision of the model financing agreement in response to his own objections results in an assessment on his property. Without a lost property interest, Reynolds has no due process claim. *Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001) (holding that an individual asserting a "deprivation of procedural due process must first establish the existence

of a constitutionally protected property or liberty interest that has been interfered with by the State").

Reynolds also received proper notice of the proceedings under Chapter 75, Florida Statutes, and ample opportunity to be heard—twice. He appeared at the hearing on the order to show cause, where the court considered his concerns about the model financing agreement (A. 224). After the judgment, Reynolds moved for rehearing (A. 245-52); and the court held a hearing where he presented argument about the revised model financing agreement (A. 262-64). Therefore, Reynolds received "fair notice and a real opportunity to be heard," which is all that due process requires. *See Keys Citizens*, 795 So. 2d at 948.

Reynolds lacks standing to bring due process claims on behalf of hypothetical third parties – unidentified members of the public – who did not appear at any hearings or otherwise respond to the complaint. *See State v. Summers*, 651 So. 2d 191, 192 (Fla. 2d DCA 1995) (finding that a party lacked standing to raise due process arguments on behalf of third parties); *State v. Ginn,* 660 So. 2d 1118, 1121 (Fla. 4th DCA 1995) ("This lack of standing to assert the constitutional interests of third parties actually disposes of all of defendant's remaining arguments.").

Even if Reynolds did have such standing, his argument fails. He admits that "published notice in a bond validation proceeding need not be perfect," but must

be "reasonably calculated to appraise [*sic*] the defendants of the nature of the proceeding" (br. at 9). Here, the draft model financing agreement was never published with the order to show cause, so no member of the public would have relied on it. The substance of the complaint—seeking validation of revenue bonds up to $2,000,000,000—and the FDFC board's underlying resolution did not change. The complaint made clear that the financing agreements "shall [] be in compliance with and satisfy the requirements of the Florida PACE Act" (A. 9). It also stated that the special assessments "must be collected pursuant to the uniform collection method set forth in Sections 197.3632 and 197.3635, Florida Statutes" (A. 15). The bond resolution itself states that the financing agreement is a "form" and that it "shall be in compliance with and satisfy the requirements of the Florida PACE Act" (A. 27). The resolution grants the FDFC's designated officer authority to approve modifications to the financing agreement before it is executed (A. 27). And the model agreement's severability clause provides a remedy if some part of the form does not comply with the law (S.A. 4).

The circuit court interpreted the model financing agreement consistent with the complaint, the bond resolution, and Florida law—an accepted method of contract interpretation in bond validation cases. *See Cnty. of Palm Beach v. State*, 342 So. 2d 56, 58 (Fla. 1977) (resolving an ambiguity in bond documents by "accept[ing] the averments of the Commission, cognizant of the fact that if any

attempt is made to use bond proceeds in an improper manner an action for injunctive relief would lie.").

Reynolds argues that "the documents available for inspection by the . . . defendants in a bond validation proceeding cannot be changed after the publication of the Order to Show Cause" (br. at 11). But this Court has never held that the documents supporting bond validation are written in stone. In *State v. Florida State Turnpike Authority*, 80 So. 2d 337 (Fla. 1955), this Court rejected an argument that amendments to the bond documents changing the amount of the bonds to be issued and the projected route of a proposed turnpike extension "were so material that the court could not proceed to a valid decree without a newly instituted proceeding, or a new notice to show cause issued and published after the amendment." *Id.* at 341. The Court held that "the disparity between the two [versions] did not, because of the failure to require a new notice, divest the court of the power to proceed." *Id.*

This Court held similarly in *Rinker Materials Corp. v. Town of Lake Park*, 494 So. 2d 1123 (Fla. 1986). There, the appellant challenged an order approving bonds on due process grounds, arguing that the "resolution authorizing the issuance of the bonds . . . was adopted before the equalization, approval and confirmation of the levying of the special assessments for improvements." *Id.* at 1125. This Court found that although the procedures for special assessments and

the associated bonds "were not literally followed," "the issue is not whether the Town Council deviated from the procedures outlined [by statute], but whether the deviation was so substantial as to deny appellant due process." *Id.* The Court found no violation of due process because the appellant "had actual knowledge of the action contemplated by the Town Council and participated in the second hearing." *Id.*

In other cases, too, this Court has noted that the notice requirements are not so strict that any deviation nullifies the process. *See, e.g.*, *Keys Citizens*, 795 So. 2d at 949 (finding that constructive notice of the complaint satisfied due process even though it did not inform the public that the court would consider the validity of a mandatory sewer connection ordinance and used the wrong case number); *Test v. State*, 87 So. 2d 587, 589 (Fla. 1956) (finding that changes to the original bond resolution "were either clerical corrections or of such nature that they did not in any measure affect either the validity of the bond issue or the authority of the court to amend the original final decree"); *State v. City of Sarasota*, 17 So. 2d 109, 111 (Fla. 1944) (affirming a decree validating bonds notwithstanding an "irregularity in the publication of notice in the newspaper").

Here, in response to Reynolds's concerns, the model financing agreement attached to the Complaint was amended to remove judicial foreclosure as a remedy

and replace it with the Uniform Method. That change was not "so substantial as to deny appellant due process." *Rinker Materials*, 494 So. 2d at 1125.

Reynolds relies on *Ingram v. City of Palmetto*,112 So. 861 (Fla. 1927) (br. at 12), but that case does not apply. There, the circuit court allowed the petition to be amended to change the bond's terms. *Id.* at 861. Here, the FDFC did not amend the complaint or the underlying resolution. It amended only the (unexecuted) model financing agreement to conform to statutory requirements and the terms of the complaint and resolution. Moreover, in *Ingram*, this Court expressed concern that the intervenor "was given no opportunity to take issue on the facts alleged." *Id.* at 861. Here, Reynolds was able to address the modified model financing agreement both at the show-cause hearing and on rehearing—which was the very reason for the change.

Finally, the process Reynolds proposes—requiring a new complaint and a new hearing to address changes to the model financing agreement made in response to Reynolds's own objection—would waste judicial resources. Reynolds has not asserted any objection to the revised model financing agreement. He merely argues that the FDFC must repeat the process, demanding that "correct documents be adopted by [the FDFC's] governing body if the governing body approves, and a new validation proceeding be filed that provides published notice of the correct documentation" (br. at 7). This Court rejected that argument in *City*

of Sarasota, where it stated that "[i]f we understand the contention of the State Attorney correctly, it is that the court, . . . , 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." 17 So. 2d at 111. The same is true here.

B. The Issue was Ripe for Review Because the FDFC Had a Real Interest in Having the Bonds Validated

Reynolds next argues that the circuit court lacked jurisdiction to decide a "hypothetical question" that is "not yet ripe for review" because the FDFC has not yet executed an interlocal agreement whereby a local government will levy a special assessment (br. at 13-14). But an issue is "ripe" for review when "a real, substantial controversy which is definite, rather than an abstract controversy" exists. *Soriano v. Gold Coast Aerial Lift, Inc.*, 705 So. 2d 636, 638 (Fla. 1st DCA 1998). Here, the FDFC is explicitly authorized to issue bonds under section 288.9605(2)(f), Florida Statutes. Its governing body issued a resolution authorizing the bonds (A. 22-30), which allows the FDFC to seek their validation. A real controversy exists. *Id.* at 638.

Reynolds's argument would defeat the purpose of a bond validation proceeding, which is to determine the legality of bonds *before* an agency issues

them. *See Boatright v. City of Jacksonville*, 158 So. 42, 55 (Fla. 1934) (noting that a bond validation proceeding allows "the rights and immunities of [ ] taxpayers and citizens [to] be determined before the bonds are issued") (Whitfield, J., concurring) (emphasis added). The FDFC already has executed interlocal agreements with local governments around Florida to finance various improvements, and upon the bonds' validation, intends to execute interlocal agreements to finance PACE improvements (A. 133, 174).

None of the cases Reynolds cites supports his argument that the FDFC must execute these agreements *before* the bonds are validated. In *City of Naples Airport Auth. v. City of Naples*, 360 So. 2d 48, 49 (Fla. 2d DCA 1978), the court held that when a party seeks a declaratory judgment under section 86.011, Florida Statutes, "it must appear that the question raised is real and not theoretical and that the party raising it has a bona fide and direct interest in the result." Not only does section 86.011 not apply here, but the FDFC clearly has a "bona fide and direct interest" in validating the bonds, and whether such bonds comply with the law is a "real and not a theoretical" issue.

Reynolds also cites *Keys Citizens*, which does not even address ripeness. 795 So. 2d at 946. There, this Court considered whether "the public body has the authority to issue the subject bond." Here, the statute answers that question. It authorizes the FDFC to "exercise all powers in connection with the authorization,

issuance, and sale of bonds," and to finance "qualifying improvements" under the PACE Act. §§ 288.9605(2)(f), 288.9606(7)(c), Fla. Stat. (2014).

II. THE STATUTE GRANTS THE FDFC AUTHORITY TO EXECUTE INTERLOCAL AGREEMENTS UNDER WHICH LOCAL GOVERNMENTS WILL IMPOSE SPECIAL ASSESSMENTS

Reynolds next argues that the FDFC lacks the authority to levy non-ad valorem property assessments (br. at 14-16). But he ignores how the FDFC structured its PACE program. The FDFC will not levy anything. It will issue revenue bonds to finance PACE improvements and, under interlocal agreements, the local governments will levy the assessments (A. 27, 174). The PACE Act provides that "[a] local government may levy non-ad valorem assessments to fund qualifying improvements," § 163.08(3), and Reynolds admits that local governments may levy the assessments (br. at 3).

The circuit court recognized that the FDFC is "proposing to enter into an interlocal agreement, and the assessment power will be exercised by the local entity" (A. 181). The court found that arrangement appropriate, stating that "it seems to me if you are going to sell bonds which the Legislature says that's okay, and if you're going to have special assessments for these PACE bonds, which the Legislature says that's okay, then to sell those bonds you have got to have in place a repayment mechanism for the people that buy the bonds, or unless they're some friends of mine, they won't buy the bonds" (A. 218-19). The court then granted

the relief requested in the complaint but required the FDFC "to make it clear that the [FDFC] is not imposing an assessment" (A. 223).

At the rehearing—conducted at Reynolds's request—the court concluded that "it's clear that the Interlocal Agreements are authorized pursuant to the Florida PACE Act. . . . The assessment shall be pursuant to the authority. The imposition shall be pursuant to the authority of the local governments" (A. 279-80). The court also recognized that the FDFC has the authority to "perform such administrative and procedural acts as may be agreed to between the parties to assist in [ ] facilitating the imposition" of special assessments, and that the finalized interlocal agreements "shall reflect the allocation of the respective functions" (A. 301, 302). The Judgment states that "[t]he imposition of the Program Special Assessments shall be pursuant to *the authority of the local governments* that are parties to the Interlocal Agreements." (A. 321) (emphasis added).

The FDFC is authorized to execute interlocal agreements related to the PACE Act. It has general authority to "[e]nter into interlocal agreements pursuant to s. 163.01(7) with public agencies of this state for the exercise of *any power, privilege, or authority* consistent with the purposes of this act." § 288.9605(2)(e) (emphasis added). Under the PACE Act, local governments have the authority to finance "qualified improvements" and impose non-ad valorem assessments to pay for them. §§ 163.08(2)(a), (3). The PACE Act also explicitly authorizes the FDFC

to finance PACE bonds. § 288.9606(7)(c), Fla. Stat. (2014)). The Legislature plainly authorized the FDFC to execute agreements by which the FDFC issues the bonds and local governments levy the assessments.

Reynolds argues (br. at 15) that section 163.01(4), Florida Statutes, does not authorize the FDFC to levy assessments on real property. That statute provides that "[a] public agency of this state may exercise jointly with any other public agency of the state . . . any power, privilege or authority which such agencies share in common and which each might exercise separately." The FDFC made clear at the show-cause hearing that it would not levy assessments; the local governments would. The interlocal agreements do not provide for a "joint exercise" of assessment power, but rather for the FDFC to exercise *its* power to issue revenue bonds and local governments to exercise *their* powers to levy assessments.

Reynolds cites no authority for his argument that the FDFC lacks authority to execute interlocal agreements under the PACE program (br. at 14). The Legislature granted the FDFC the authority to "[e]nter into interlocal agreements pursuant to s. 163.01(7) with public agencies of this state for the exercise of *any power, privilege, or authority* consistent with the purposes of this act." § 288.9605(2)(e) (emphasis added). This specific language controls over the general language found in section 163.01(4). *Fla. Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 102 (Fla. 2014) ("When reconciling statutes that may appear to conflict, the rules

of statutory construction provide that a specific statute will control over a general statute."); *Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008) ("[W]here two statutory provisions are in conflict, the specific provision controls the general provision."). Moreover, the Legislature also provided that "[t]he powers of the corporation . . . shall include all the powers necessary or convenient to carry out the purposes and provisions of this act." § 288.9605(1), Fla. Stat. (2014). In particular, "[t]he corporation is authorized and empowered to: . . . . [i]ssue from time to time, revenue bonds . . . and exercise all powers in connection with the authorization, issuance, and sale of bonds, subject to the provisions of § 288.9606." § 288.9605(2)(f). This Court has found that similar statutory language grants public entities broad power to act consistent with legislative goals. *Keck v. Eminisor*, 104 So. 3d 359, 368 (Fla. 2012) (finding that although the statute establishing the Jacksonville Transit Authority "was not amended until 2009 to include the specific authority to form public benefit corporations, the statute contained several provisions prior to that time pursuant to which [a corporation] could have legitimately been created").

Any doubt about the FDFC's authority to execute interlocal agreements is resolved by the express authorization that "[t]he corporation in its corporate capacity may, *without authorization from a public agency under § 163.01(7)* [the Interlocal Cooperation Act], issue revenue bonds or . . . under this section . . .

finance qualifying improvement projects within the state under § 163.08 [the PACE Act]." § 288.9606(7)(c) (emphasis added). This authorization would be meaningless if the FDFC lacked the ability to implement the PACE program. Reynolds essentially argues that the Legislature granted the FDFC authority to issue PACE bonds but *not* to either levy assessments itself or execute interlocal agreements with local governments to do so. Such an argument would nullify section 288.9606(7)(c). *See Kasischke v. State*, 991 So. 2d 803, 808 (Fla. 2008) ("We cannot construe the plain language of the statute in a manner that renders this language superfluous.").

III. THE MODEL FINANCING AGREEMENT DOES NOT IMPAIR ANY MORTGAGE CONTRACTS

Finally, Reynolds argues that the PACE Act is unconstitutional as applied here because the model financing agreement in the FDFC's "initial documentation" (not the one ultimately approved) provides for judicial foreclosure (br. at 16-28). This argument is too little, too late. Reynolds concedes that under the plain terms of the PACE Act, special assessments do not result in any impairment of mortgage contracts (br. at 17). Indeed, he exhaustively explains why the PACE Act does not violate the rights of mortgagee holders (br. at 18-26). Reynolds similarly argued below that the bonds would not unconstitutionally impair contracts, and was "in favor of the fact that the bonds aren't invalid because

of impairment of contract" (A. 216). Therefore, he waived any argument that the bonds impair contracts. *See People Against Tax Revenue Mismanagement, Inc. v. Cnty. of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991).

A threshold requirement for demonstrating impairment of contract is identifying at least one contract that a law impairs. *See, e.g., Metro. Washington Chapter v. District of Columbia*, __ F. Supp. 2d __, 2014 WL 3400569, at *21 (D.D.C. July 14, 2014) (dismissing an impairment claim where the plaintiffs "do not identify which contracts would be impaired, only that some hypothetical contracts that some Plaintiff is a party to will be impacted. That is not sufficient to state a claim."). Reynolds identifies not a single one. Courts do not consider hypothetical impairments of contract. *State v. Great N. Insured Annity Corp.*, 667 So. 2d 796, 800 (Fla. 1st DCA 1995) (affirming refusal to find future, hypothetical impairment of contract); *Hous. Auth. of City of Omaha, Neb. v. U.S. Hous. Auth.*, 468 F.2d 1, 10 (8th Cir. 1972) ("[T]he issue of contract impairment at this time is purely hypothetical."). Moreover, he fails to explain how a private *agreement* between consenting parties violates the constitutional prohibition on a "*law* impairing the obligation of contracts." Art. I, § 10, Fla. Const. (emphasis added).

Even if Reynolds properly made and preserved this argument, the record does not support it. He complains about an unexecuted form financing agreement which has since been revised. In response to Reynolds's own objections, the

FDFC amended the model financing agreement attached to the complaint to delete references to judicial foreclosure as a remedy for nonpayment (S.A. 2). Those modifications were valid, as the resolution approving the bonds allows a "Designated Officer" of the FDFC to approve modifications to the financing agreement before execution (A. 27). The resolution and the FDFC's complaint also clarify that any financing agreement executed under the program shall comply with the PACE Act, which requires collection of special assessments under the Uniform Method (A. 9, 27). Finally, the Judgment approved a model financing agreement that complies with the PACE Act's collection methods (A. 312-13). Thus, Reynolds's arguments about a judicial foreclosure remedy are moot.

Even if Reynolds's arguments were not moot, the severability provision in section 16 of the model financing agreement provides that "[i]f any provision of this Financing Agreement is held invalid or unenforceable by any court of competent jurisdiction, such holding will not invalidate or render unenforceable any other provision of this Financing Agreement" (S.A. 4). Courts may sever unenforceable provisions that do not implicate the "essence" of the parties' contract. *See FL-Carrollwood Care, LLC v. Gordon*, 72 So. 3d 162, 167 (Fla. 2d DCA 2011) ("Contractual provisions are severable where the invalid provisions do not go to the essence of the parties' contract and where there remain valid legal obligations even after severing the invalid provisions."); *Fonte v. AT&T Wireless*

Servs., Inc., 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005) ("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."). Here, the judicial foreclosure provisions do not implicate the essence of the finance agreement. The Judgment clarifies that "the Program Special Assessments shall be collected through the Uniform Collection method," which Reynolds concedes is the method Florida law requires (br. at 27; A. 292-93). Thus, "valid legal obligations" remain for both parties to a financing agreement, and the offending provision is severable.

CONCLUSION

For the reasons stated above, this Court should affirm the Judgment.

Respectfully submitted,

KREUSLER-WALSH, COMPIANI & VARGAS P.A.

Jane Kreusler-Walsh
Florida Bar No. 272371
Rebecca Mercier Vargas
Florida Bar. No. 0150037
Stephanie L. Serafin
Florida Bar. No. 58390
501 S Flagler Drive, Suite 503
West Palm Beach, Florida 33401
Telephone: (561) 659-5455
E-mail: janewalsh@kwcvpa.com
E-mail: rvargas@kwcvpa.com
E-mail: sserafin@kwcvpa.com

NABORS, GIBLIN & NICKERSON, P.A.

Gregory T. Stewart
Florida Bar No. 203718
L. Thomas Giblin
Florida Bar No. 393010
Lynn M. Hoshihara
Florida Bar No. 41194
Carly J. Schrader
Florida Bar No. 14675
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
Telephone: (850) 224-4070
E-mail: gstewart@ngnlaw.com
E-mail: tgiblin@ngn-tampa.com
E-mail: lhoshihara@ngnlaw.com
E-mail: cschrader@ngnlaw.com

WHITE & CASE LLP

/s/ *Raoul G. Cantero*
Raoul G. Cantero
Florida Bar No. 552356
T. Neal McAliley
Florida Bar No. 172091
Jesse L. Green
Florida Bar No. 95591
Southeast Financial Center, Suite 4900
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 995-5290
E-mail: rcantero@whitecase.com
E-mail: nmcaliley@whitecase.com
E-mail: jgreen@whitecase.com

Counsel for Appellee, the Florida Development Finance Corporation

CERTIFICATE OF SERVICE

I certify that on December 1, 2014, a copy of the foregoing was served by e-mail to all counsel on the attached service list.

By: /s/ *Raoul G. Cantero*
Raoul G. Cantero

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

By: /s/ Raoul G. Cantero
Raoul G. Cantero

SERVICE LIST

J. Steven Menton
Rutledge Ecenia, P .A.
119 S. Monroe Street, Suite 202
Tallahassee, FL 32301
Telephone: (850) 681-6788
Facsimile: (850) 681-65 15
E-mail: smenton@rutledge-ecenia.com

Counsel for Appellant, Robert Reynolds

Bernie McCabe, State Attorney
Damien N. Kraebel
Office of the State Attorney
Sixth Judicial Circuit of Florida
P.O. Box 5028
Clearwater, Florida 33758
Telephone: (727) 464-6221
E-mail:
SA6eService@pinellascounty.org

William "Willie" N. Meggs
Georgia Cappleman
Office of the State Attorney
Second Judicial Circuit of Florida
Leon County Courthouse
301 South Monroe Street
Telephone: (850) 606-6000
Facsimile: (850) 488-7340
Tallahassee, Florida 32301
E-mail: CaplemanG@leoncountyfl.gov

Jerry Hill, State Attorney
Brian W. Haas
Victoria J. Avalon
Office of the State Attorney
Tenth Judicial Circuit of Florida
255 N. Broadway Avenue
Bartow, Florida 33830
Telephone: (863) 534-4800
E-mail: bhaas@sao10.com
E-mail: vavalon@sao10.com

R. J. Larizza, State Attorney
Phillip D. Havens
Office of the State Attorney
Seventh Judicial Circuit of Florida
Office of the State Attorney
251 N. Ridgewood Avenue
Daytona Beach, Florida 32114
Telephone: (386) 239-7710
Facsimile**:** (386) 239-7711
E-mail: havensd@sao7.org
E-mail: olmsteadk@sao7.org

Mark Ober, State Attorney
Ada Carmona
Office of the State Attorney
Thirteenth Judicial Circuit of Fla.
419 N. Pierce Street
Tampa, Florida 33602-4022
Telephone: (813) 272-5400
Facsimile: (813) 274-1976
MailProcessingStaff@sao13th.com
E-mail: carmona_a@sao13th.com

Dave Aronberg, State Attorney
Jean-Adel Williams
Office of the State Attorney
Fifteenth Judicial Circuit of Florida
401 North Dixie Highway
West Palm Beach, Florida 33401
Telephone: (561) 355-7100
Facsimile: (561) 366-1800
E-mail: jwilliams@sa15.org
E-mail: lwilson@sa15.org
E-mail: mseaton@sa15.org

Michael J. Satz, State Attorney
Kathryn P. Heaven
Office of the State Attorney
Seventeenth Judicial Circuit of Fla.
660-B Broward County Courthouse
201 Southeast Sixth Street, Ste 655
Fort Lauderdale, Florida 33301-3302
Telephone: (954) 831-6955
Facsimile: (954) 931-6198
E-mail: courtdocs@sao17.state.fl.us
E-mail: kheaven@sao17.state.fl.us
E-mail: mwilliams@sao17.state.fl.us

Mark G. Lawson
James C. Dinkins
Mark G. Lawson, P.A.
2860 Braddock Ct.
Tallahassee, Florida 32308-0559
Telephone: (850) 591-5630
E-mail: mlawson@markglawson.com
E-mail: ccavallaro@markglawson.com
E-mail: jdinkins@markglawson.com
E-mail: kgfraser1@gmail.com

Pam Bondi
State of Florida
Office of the Attorney General
The Capitol PL-01
Tallahassee, Florida 32399
Telephone: (850) 245-0157
Facsimile: (850) 487-2564
E-mail:
oag.civil.eserve@myfloridalegal.com

Counsel for Robert Reynolds

Phil Archer, State Attorney
Robert Wayne Holmes
Office of the State Attorney
Eighteenth Judicial Circuit of Florida
2725 Judge Fran Jamieson Way, Bldg. D
Viera, Florida 32940
Telephone: (321) 617-7510
Facsimile: (321) 617-7542
E-mail: wholmes@sa18.org

Glenn L. Hess, State Attorney
Office of the State Attorney
Fourteenth Judicial Circuit of Fla.
Post Office Box 1040
Panama City, Florida 32401
Telephone: (850) 872-4473
Facsimile: (850) 747-5863
E-mail: glenn.hess@sa14.fl.gov