Filing # 19067335 Electronically Filed 10/06/2014 07:09:21 PM

RECEIVED, 10/6/2014 19:14:20, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1618[03]

L.T. CASE NO. 14-CA-000548

ROBERT REYNOLDS,

Appellant,

v.

FLORIDA DEVELOPMENT FINANCE CORPORATION,

Appellee.

On Appeal from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida

---

INITIAL BRIEF of APPELLANT

J. STEPHEN MENTON
Florida Bar Number 331181
Rutledge Ecenia, P.A.
119 South Monroe Street
Suite 202
Tallahassee, FL 32301
smenton@rutledge-ecenia.com
Telephone: (850) 681-6788
Facsimile: (850) 681-6515

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is an appeal arising from a bond validation proceeding brought by Appellee, the Florida Development Finance Corporation, against all the taxpayers, citizens, and property owners of the State of Florida for validation of $2,000,000,000 in revenue bonds. (App. 5.) After a show cause hearing and a hearing on a motion for reconsideration, the Circuit Court issued an Amended Final Judgment purporting to validate the bonds, from which this timely appeal arises. (App. 288.)

Florida Development Finance Corporation ("FDFC" or "Appellee") is a state agency existing pursuant to chapter 288, part X, Florida Statutes. (App. 290.) Like any statutory entity, it has expressly enumerated powers, contained in section 288.9605, Florida Statutes, and is governed by a governing body, as detailed in section 288.9604, Florida Statutes. (App. 290.) Among its enumerated powers, FDFC may "finance qualifying improvement projects within the state under s. 163.08." § 288.9606(7)(c), Fla. Stat. (2013). FDFC does not have the authority to impose non-ad valorem assessments.

Robert Reynolds ("Reynolds" or "Appellant") is a taxpayer, citizen, and property owner within the State of Florida. Reynolds appeared at the show cause hearing in person and through counsel, and filed papers in the Circuit Court opposing validation of the proposed bonds. (App. 155, 163.)

Appellee's governing body met on January 15, 2014, and at that meeting adopted a Master Bond Resolution which contained forms of several documents, including a Financing Agreement. (App. 22.) The bond resolution was designed to support a Property-Assessed Clean Energy ("PACE") program as envisioned by section 163.08, Florida Statutes. (App. 23.) PACE is a concept delineated in Florida Statutes, providing authority for a local government with assessment power to impose non-ad valorem assessments on real property and benefit that property by providing funding for certain qualifying improvements that are energy efficient, use renewable sources of energy, or improve wind resistance features of the property. § 163.08(3), Fla. Stat. (2013). The design of the bond finance structure is that bonds will be repaid using the proceeds of the non-ad valorem assessments collected annually; there is no other source of revenue legally available under the Master Bond Resolution for repayment of the bonds. (App. 26.)

Appellee filed a complaint in the Second Circuit Court for validation of the proposed bonds, seeking to have validated revenue bonds of up to $2,000,000,000 in value and authority to issue them statewide. (App. 5.) The Circuit Court issued an Order to Show Cause and scheduled a hearing. (App. 2.) Appellant Reynolds filed a Response to the Order to Show Cause, demonstrating that the bonds were not valid because FDFC lacked the authority to impose assessments and FDFC had included a remedy of foreclosure in the event of non-payment of the assessments,

and demonstrating the case was not yet ripe for review because no interlocal agreements purporting to grant the power to assess had yet been entered into between FDFC and any other local government for the purpose of imposing PACE assessments. (App. 155-61.)

At the hearing on the Order to Show Cause, Appellee introduced several documents into evidence, including the Financing Agreement, which was different from the Financing Agreement approved by FDFC at its January 15, 2014 meeting and attached to the Complaint. (App. 168, 176.) No party, except Appellee, had seen the new Financing Agreement until it was introduced during the hearing. (App. 168.) The new Financing Agreement had never been approved by the governing board of FDFC. (App. 182.) Further, FDFC's executive director continued to modify the document even during examination at the hearing. (App. 185.)

The trial court concluded during the hearing that FDFC did not have the statutory authority to impose assessments and that the use of judicial foreclosure in a PACE program would violate Florida law. (App. 219, 223.) However, due to the changes in the documents allowed both before and at the hearing, the trial court decided that it would validate the bonds with the provisions that FDFC could not impose assessments, but only issue the debt, and that judicial foreclosure may not be used. (App. 223.) The final judgment was not clear on these points, and did not

address the ripeness issue. (App. 227.) Appellant timely moved for reconsideration, and, after a hearing, the trial court made minor corrections and issued an Amended Final Judgment validating the bonds without making any mention of the power to assess, the issue of judicial foreclosure, or the ripeness of the case. (App. 288.) This timely appeal follows.[1]

SUMMARY OF ARGUMENT

Appellee and the Circuit Court violated Appellant's due process rights by amending documents attached to the complaint at the hearing and without a motion for leave to amend. This violates established rules of procedure, which allow for amendments only on a motion once the defendant has answered. In the unique context of a bond validation proceeding, this also violates the fundamental due process right to notice, as the constructive notice by publication procedure outlined by the Legislature gives no authority to amend the Complaint once notice has been given and the period for inspection of the Complaint has begun; a defendant who inspects the case before the Complaint or attachments are modified is not properly put on notice of the nature of the proceedings when modification to the pleading occurs at the hearing. Further, by effectively creating a workshop environment where the Court participated in the modification of documents, including limiting the scope of particular provisions and allowing further modification through

[1] Another Appellant, Florida Bankers Association, also filed a Notice of Appeal from the same Amended Final Judgment. That appeal is docketed as SC14-1603.

testimony, the Court placed itself in a legislative role by assuming a law-making power.

The Circuit Court orally announced, and Appellee conceded, that Florida Development Finance Corporation has no power to impose non-ad valorem assessments. Yet the Complaint, attachments to the Complaint, and the Final Judgment all indicate that Appellee will impose assessments in order to support repayment of the proposed bonds. The Circuit Court erred in validating the bonds because there is no lawful source of repayment.

The attachments to the Complaint for Validation included numerous references to the right of Appellee to use judicial foreclosure to enforce its non-ad valorem assessment lien. This is unlawful under section 163.08, Florida Statutes, under which the assessments are imposed. Such assessments are required to be collected pursuant to section 197.3632, Florida Statutes, and that statute in turn requires use of the tax certificate and tax sale method of collection, not judicial foreclosure. The Circuit Court agreed that judicial foreclosure was not allowed, and permitted Appellee to change the attachments to the Complaint to reflect such impermissibility. However, no legislative body approved the documents as changed (despite the Florida Development Finance Corporation's governing board having approved the original document). The Circuit Court erred in allowing such a change. Further, the introduction of judicial foreclosure has torn apart the

carefully constructed balance of interests engaged in by the Legislature, blurring the line between non-ad valorem assessments and mortgages, and rendering a statute that is facially constitutional into an application that violates the constitutional prohibition against impairment of contracts. This was error.

The case should be reversed and remanded to the Circuit Court with instructions that the case be dismissed, correct documents be adopted by Appellee's governing body if the governing body approves, and a new validation proceeding be filed that provides published notice of the correct documentation.

ARGUMENT

This appeal presents several questions regarding the validity of proposed bonds to be issued by Florida Development Finance Corporation, the Plaintiff below and Appellee here, and a state agency that lacks the statutory power to impose assessments. A review of the record reveals a number of problems with the proceedings below, most of which stem from the efforts of the trial court to effect a cure to the improper legislative action of Appellee so as to address Appellant's objections to the bonds while still allowing the bond issuance to go forward. This action by the trial court, while well intentioned, placed the trial court in the shoes of the Legislature and violated separation of powers principles. The issues addressed below demonstrate that the trial court erred by (1) stepping outside of permissible due process boundaries created by the interaction of Chapter 75,

Florida Statutes, with constitutional due process provisions; (2) failing to recognize its own lack of jurisdiction over the cause because no agreement purporting to grant Appellee the power to assess had yet been entered into; (3) failing to ensure that the written final judgment precludes Appellee from imposing assessments, as it lacks the authority to do so; and (4) allowing Appellee to impair the contracts of mortgagees by confusing a non-ad valorem assessment with a securitized loan by inserting an extra-statutory power of foreclosure into the documents approved by the governing body of Appellee. Each of these issues raised is a question of law to be reviewed *de novo* by this Court, and each independently is reversible error.

I. The Actions of the Appellee and the Court in Amending the Complaint and the Documents on Which the Proposed Bonds are Based During the Pendency of the Proceedings Denied Appellant Fundamental Due Process Rights and Was Unauthorized By Law.

The constitutional right to due process involves, at its most basic level, notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). A bond validation proceeding pledging revenues from non-ad valorem assessments[2] clearly has the potential to deprive taxpayers and property owners of property, and accordingly, triggers the protections of the

[2] Though the non-ad valorem assessments proposed here are "voluntary" and advance a compelling state interest, they still involve deprivation of property rights—especially where, as here, they are imposed in violation of state law. The fact that a defendant need not choose to participate is irrelevant, as the property interest for all property owners at the time of validation is identical, none having yet determined whether or not to pursue a PACE improvement on their property.

Due Process clauses of the Florida and federal constitutions. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948-49 (Fla. 2001). While published notice in a bond validation proceeding need not be perfect, it must still be reasonably calculated to appraise the defendants of the nature of the proceeding. *See Mullane*, 339 U.S. at 314.

A. Amendment of Attachments to Pleadings During the Pendency of Bond Validation Proceedings Violates Florida Rules of Civil Procedure and Destroys the Careful Due Process Protections Built into Statutory Bond Validation Procedures.

Chapter 75, Florida Statutes, governs bond validation proceedings. That chapter creates a careful balance of the need for local governments to have the validity of their bond issuances definitively and expeditiously determined with the due process rights of property owners affected by the proposed bond issuance. *See Rianhard v. Port of Palm Beach Dist.*, 186 So. 2d 503, 505 (Fla. 1966). For example, chapter 75 allows for notice by publication, as opposed to personal service, section 75.06, Florida Statutes, severely curtails the availability of discovery, *Rianhard*, 186 So. 2d at 305, and the scheduling of a hearing before giving notice of suit to interested parties, section 75.05, Florida Statutes. In exchange for these curtailments to the due process rights of property owners affected by bond issuance, the Legislature established a few procedural safeguards: a party may appear in the case as an intervenor by simply pleading to the complaint or appearing at the hearing, section 75.07, Florida Statutes, and the nature of the

hearing as one on an order to show cause, rather than a trial, section 75.05, Florida Statutes.

This latter difference is crucial to both the preservation of process due to the defendants in a bond validation case, given the expedited and limited nature of the proceeding, and the conduct of the hearing itself, which should be in the nature of a show cause hearing, not a trial. A show cause hearing is not the final adjudication of a matter, unless no cause is shown why the bonds should not be validated. *See, e.g., Brown v. Reynolds*, 872 So. 2d 290, 296-97 (Fla. 2d DCA 2004) (discussing, in context of a replevin case, nature of show cause hearing and Fla. R. Civ. P. 1.440).

In the instant case, Appellant's due process rights were violated by the seemingly well-meaning actions of the trial court. At the Order to Show Cause hearing, the trial court accepted some of Appellants' arguments, namely that Appellee did not have the authority to seek judicial foreclosure of an assessment lien, which was a feature of the documents attached to the Complaint for Validation and supporting the assessments used to repay the proposed bonds. (App. 95-96, 98.) However, the court did not follow the appropriate procedure for a show cause hearing, which would have been to conclude that good cause had been

shown not to validate the bonds and decline to validate them.[3] Instead, it created a workshop environment where it creatively worked with counsel for Appellee to craft new documents—ones that had never been approved by any legislative or policy-making governing body—that would conform to the requirements of law. (App. 288-90.) It also allowed Appellee to introduce documents it had created immediately before the hearing and which had not been approved by its governing body that purported to cure some of Appellant's concerns. (App. 176.) It then validated the bonds with the requirement that the newly minted documents be used. (App. 223.) This procedure is foreign to bond validation.

Further, any change to the documents available for inspection by the property owners, taxpayers, and citizens who are defendants in a bond validation proceeding cannot be changed after the publication of the Order to Show Cause without violating the principles of due process. Notice is a key feature of compliance with the due process clause. *Mullane*, 339 U.S. at 313. Notice in a typical civil proceeding involves personal service of the Complaint and any

[3] Normal civil litigation procedure might dictate, at this point, that the case proceed to trial. However, in a bond validation proceeding, the vast majority of defendants do not appear at the show cause hearing, and would thus not be apprised of any changes that might be necessary in the case of, for example, an amended complaint. *See* Fla. R. Civ. P. 1.190 (discussing need for notice to defendants of amended complaint). Since a finding that cause had been shown why the bonds should not be validated would result in the need for an amendment, the proper result in such a case would be to dismiss the Complaint and allow for re-filing with the appropriate notice specified by statute.

amendments thereto on the defendant. In a bond validation proceeding, however, initial notice is accomplished through publication of the show-cause order, and there is no provision for accomplishing notice regarding any changes to the complaint. Allowing a complaint to be changed after publication would result in the situation where notice is given as to a different character of taking than the one eventually brought before the Court, which means that a property owner who inspected the proceedings after publication of the notice and found them unobjectionable would never know of a subsequent change that rendered the proceedings problematic or less favorable to the property owner. This Court has disapproved just such a situation. In *Ingram v. City of Palmetto*, 112 So. 861 (Fla. 1927), the trial court in a validation proceeding allowed the City of Palmetto to substantively amend its petition for validation to comply with the requirements of statute that were alleged to have been violated. This Court determined, simply, that an intervenor must be given notice and an opportunity to be heard regarding any changes to the pleadings, and even if a change at the hearing would make a proposed bond issuance valid, such a change does not comply with the procedures set forth by the Legislature and likely violates due process. *Id.* at 862. While the bond validation statutes have been updated since 1927, the fact remains that there is no provision for amending the bond documents or the complaint and there is no authority for a court to enter the policymaking arena and correct documents for a

local government so that they comply with the law. Where a complaint for validation as it existed at the time of publication is insufficient to support the validation of the proposed bonds, the court's responsibility is to deny validation once cause is shown.

This Court should reverse the judgment and remand to the trial court for entry of an order dismissing the cause.

B. The Circuit Court Lacked Jurisdiction to Consider this Case Because It Was Not Ripe for Review.

Circuit Courts in Florida are authorized by law to hear bond validation cases. § 75.01, Fla. Stat. (2013). However, no Florida court has subject-matter jurisdiction to hear a case solely to determine hypothetical questions, or those questions which are not yet ripe for review. *See City of Naples Airport Auth. v. City of Naples*, 360 So. 2d 48, 48 (Fla. 2d DCA 1978).

Appellee does not yet have the authority to levy the Program Special Assessments which are the revenues supporting the repayment of the bonds, as it has never entered into an interlocal agreement purporting to provide it such powers. (App. 191.) Because Appellee lacks the authority to impose assessments, and the repayment of the bonds is predicated on the imposition of such assessments, Appellee does not yet have the authority to issue the bonds, a required element of a valid bond issuance. *Keys Citizens for Responsible Gov't, Inc.*, 795 So. 2d at 944.

Whether Appellee may one day be authorized to issue the described bonds, based on agreements it intends to enter into with public agencies, is a hypothetical question that is not yet ripe for review. A hypothetical question should not be addressed by a Circuit Court, and the Circuit Court's failure to dismiss the case was error. *City of Naples Airport Auth.*, 360 So. 2d at 49. This Court should reverse and remand for dismissal of the cause.

II. Appellee Has No Authority to Impose Assessments Against Real Property, but Has Pledged to Repay the Bonds Using Solely Revenues Derived from Proposed Assessments.

The Florida Development Finance Corporation is a creature of statute, and as such has only the powers provided to it by the Legislature. The Legislature has not seen fit to provide FDFC with the power to impose non-ad valorem assessments on real property. Neither can FDFC obtain assessment powers by interlocal agreement; under the Interlocal Cooperation Act, agencies entering into interlocal agreements may only exercise powers "which such agencies share in common and which each might exercise separately." § 163.01(4). By failing to expressly acknowledge this in its Final Judgment, the trial court validated bonds failing the authority prong test of *Keys Citizens*.

Statutorily-created entities have only the powers "conferred expressly or impliedly by statute of the State." *City of Cape Coral v. GAC Utilities, Inc., of Fla.*, 281 So. 2d 493, 496 (Fla. 1973); *see also, Forbes Pioneer Boat Line v. Bd. of*

Comm'rs of Everglades Drainage Dist., 82 So. 346, 351 (Fla. 1919). FDFC is a statutory entity, created by chapter 288, part X, Florida Statutes. As such, its powers are limited to those enumerated in the statutes. A careful review of section 288.9605, Florida Statutes, which defines the powers of FDFC, reveals that FDFC may enter into interlocal agreements pursuant to section 163.01, borrow money, and hold and encumber real estate, but does not have the expressed or implied power to impose non-ad valorem assessments. This is supported by FDFC's stipulation, at the Order to Show Cause hearing, that it does not have the power to assess.

Neither may FDFC obtain the power to assess through an interlocal agreement. The Florida Interlocal Cooperation Act of 1969, which governs interlocal agreements and is expressly cited in the statute enumerating FDFC's powers, states "A public agency of this state may exercise jointly with any other public agency of the state, of any other state, or of the United States Government any power, privilege, or authority which such agencies share in common and which each might exercise separately." § 163.01(4), Fla. Stat. Thus, a public agency may not, by interlocal agreement, obtain a power which it could not lawfully exercise before the agreement was executed. *See* Op. Fla. Att'y Gen. 84-86 (1984). As FDFC does not have the power to assess at all, it may not exercise the power to assess through operation of an interlocal agreement.

Nevertheless, the bond documents, including the Master Bond Resolution, that form the basis of the complaint that engendered this cause, contemplate imposition of assessments as the sole source of revenue to support repayment of the bonds. The Master Bond Resolution states "the Interlocal Agreements shall be entered into between the Corporation and various Florida local governments pursuant to which the local governments *shall provide the Corporation the authority to levy non-ad valorem assessments* on property owners participating in the Program . . . ." (App. 27 (emphasis added).) The trial court read this language to mean that "[FDFC is] jointly exercising an assessment power. It's proposing to enter into an interlocal agreement, and the assessment power will be exercised by the local entity." (App. 181.) There is no evidence to suggest that any entity other than FDFC would be imposing an assessment, and there is nothing in the Final Judgment that would limit the imposition of assessments to local entities with such power. Without the power to assess, FDFC's assessments against real property would be invalid, and there would be no valid source of repayment for the bonds. Accordingly, the issuance of the bonds would be illegal, and the trial court erred in validating the bonds.

III. The Financing Agreement approved by the Governing Body of the Appellee impaired contracts of Mortgagors By Including Additional Remedies for Failure to Pay Assessments Expressly Forbidden by the Legislature in Its Careful Avoidance of Contract Impairment.

The Legislature worked carefully, when drafting section 163.08, Florida Statutes, to avoid unconstitutionally impairing the contracts of persons secured by liens on real property, particularly mortgagees. Article I, section 10 of the Florida Constitution provides "No bill of attainder, *ex post facto* law or law impairing the obligation of contracts shall be passed." That language echoes that of Article I, section 10 of the United States constitution, which likewise prohibits states from passing any "law impairing the obligation of contracts." This Court, in *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 744 (Fla. 1979), interpreted the Florida constitutional provision in light of and with heavy reliance on the United States Supreme Court's jurisprudence surrounding the federal provision. Based on *Pomponio* and this Court's other decisions, section 163.08, on its face, does not unconstitutionally impair the obligation of contracts. However, by including the remedy of judicial foreclosure in its initial documentation,[4] Appellee's program upsets the balance created by the Legislature and likely violates Article 1, section 10 of the Florida Constitution.

---

[4] The initial documentation attached to the Bond Resolution which was attached to the Complaint clearly included judicial foreclosure. Without notice, at the hearing, Appellee submitted a change to the Appendix to the Bond Resolution that had not been approved by the Governing Board of Appellee in the form of an alternate Financing Agreement. (App. 182.) Appellant is not only unsatisfied with the process of altering the resolution at the hearing but also with the new document, which still contains reference to judicial foreclosure.

Section 163.08, Florida Statutes, expressly and carefully clarifies and distinguishes the relationship of (i) prior contractual obligations or covenants which allow or are associated with unilateral acceleration of payment of a mortgage note or lien or other unilateral modification, with (ii) the action of a property owner entering into a financing agreement pursuant to the section 163.08. The Legislature, in drafting section 163.08, lawfully recognized the financing agreement required therein as the means to evidence a non-ad valorem assessment and renders unenforceable any provision in any agreement between a mortgagee or other lienholder and a property owner which allows for the acceleration of payment of a mortgage, note, lien or other unilateral modification solely as a result of entering into a financing agreement pursuant to section 163.08 which establishes a non-ad valorem assessment. This provision of section 163.08 does not result in a contractual impairment of the mortgage or similar lien which differs from any other lawful non-ad valorem assessment as the value of the prior contract (*e.g.* mortgagee's interest) is not impaired by the financing agreement nor is the prior contract impaired by giving priority to a lien for a subsequent non-ad valorem assessment.

Section 197.122, Florida Statutes, provides that all taxes imposed pursuant to the State Constitution and laws of the state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed. The lien

associated with property taxes is therefore superior to liens arising by virtue of mortgages or other non-governmental encumbrances. *Gailey v. Robertson*, 123 So. 692, 693 (Fla. 1929) ("The mortgagee has no greater vested right ... than the fee-simple owner, and the rights of both must yield alike to the sovereign power when exercised to impose proper and lawful taxes").

Special assessments are not considered taxes under the Florida Constitution. *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992) (declaring that "a legally imposed special assessment is not a tax"). However, a special assessment may nonetheless be vested with lien status coequal with that of property taxes. For example, section 170.09, Florida Statutes, provides that special assessments imposed thereunder "shall remain liens, coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid." Legislation of this kind is not open to the objection that it impairs the obligation of a contract, and it is immaterial whether the enactment authorizing the special assessment existed before or was subsequent to the date of the mortgage lien. *Gailey*, 123 So. at 693. All private rights and interests in real property in a municipality are subject to the power of the municipality to levy taxes and assessments. *Id.* It is well settled that the Legislature may by statute create liens on private property in favor of a municipality, for local improvements, and make such liens superior to other liens, including the lien of a mortgage. The intent to

confer such priority may be implied from the language of the measure in question and from the nature and purpose of the lien. *Lybass v. Town of Ft. Myers*, 47 So. 346, 349 (Fla. 1908). Section 163.08 expressly requires collection on the same bill as for taxes as a non-ad valorem assessment pursuant to section 197.3632, Florida Statutes. Finally, section 163.08(8) provides that non-ad valorem assessments levied thereunder constitute a lien of equal dignity to county taxes and assessments from the date of recordation of the financing agreement. Accordingly, all properly imposed non-ad valorem assessments under section 163.08 are superior and paramount to the interest on such affected property of any owner, lessee, tenant, mortgagee, claimant or other person except the lien of taxes and other non-ad valorem assessments. Such liens do not impair contracts; regardless of the legislative language prohibiting the unilateral acceleration of a mortgage due to the imposition of a PACE assessment, such an acceleration would be as impermissible as would acceleration in the case of a separate, valid assessment being imposed on the property by a local government for some other purpose.

Even if there is an impairment of contract as a result of section 163.08, such impairment is not substantial nor does it constitute an intolerable impairment, and as such does not warrant overturning section 163.08 as there is an overriding necessity for the law. *See* § 163.08(1). Pursuant to section 163.08, any mortgage lien holder on a participating property shall be provided not less than 30 days prior

notice of the property owners' intent to enter into a financing agreement together with the maximum principal amount of the non-ad valorem assessment and the maximum annual assessment amount. Section 163.08 does not limit the authority of the mortgage holder or loan servicer to increase or require monthly escrow payments in an amount necessary to annually pay the qualifying improvement assessment. Section 163.08 additionally requires as a condition precedent to the effectiveness of a non-ad valorem assessment, (i) a reasonable determination of a recent history of timely payment of taxes for at least three (3) years, (ii) the absence of any recent involuntary liens or property-based debt delinquencies for at least three (3) years, (iii) verification that the property owner is current on all mortgage debt on the property, (iv) that, without the consent of the mortgage holder or loan servicer, the total amount of any non-ad valorem assessment for qualifying improvements not exceed twenty percent (20%) of the just value of the property, except that energy conservation and efficiency improvements and renewable energy improvements are not subject to the twenty percent (20%) of just value limit if such improvements are supported by an energy audit which demonstrates that annual energy savings from the improvements equal or exceed the annual repayment of the non-ad valorem assessment, and (v) that any work requiring a license under any applicable law to make the qualifying improvement be performed by a properly certified or licensed contractor. Finally, each financing

agreement (or a memorandum thereof) must be recorded in the public records of the county where the property is located promptly after the execution thereof. Section 163.08 (i) was enacted to deal with broad generalized economic or social problems, (ii) is based on historical principles of law in existence before any affected mortgage or other debt instrument was entered into and operates and will be administered in an area of intense governmental regulation and public scrutiny, and (iii) is, or provides for conditions which are, temporary in nature and thus tolerable in light of covenants contained in mortgage and other debt instruments which may otherwise allow for unilateral acceleration.

While the state and federal constitutions generally prohibit the enactment of laws which result in impairment of contract, state statutes and local legislation providing for the levy of special assessments do not constitute an unlawful impairment, such that a mortgage is not considered impaired by a statute giving priority to a lien for a subsequent special assessment. *See Gailey*, 123 So. at 693; *Lybass*, 47 So. at 349-50.

Some degree of contractual impairment is tolerated where there is a significant and legitimate public purpose behind the enactment of the government regulation. *Pomponio*, 378 So. 2d at 780. In considering whether the government enactment impairs the right of contract, courts consider (1) whether the law was enacted to deal with a broad, generalized economic or social problem; (2) whether

the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and (3) whether the law effects a temporary alteration of the contractual relationships of those within its scope, or whether it works a severe, permanent, and immediate change in those relationships, irrevocably and retroactively. *Id.* at 779.

In the case of qualifying improvements as described in § 163.08, the Legislature has determined that the financing thereof through the execution of financing agreements and the related imposition of non-ad valorem assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants. § 163.08(1)(c). The Legislature has further determined in the general and special law cited in section 163.08 that it is the public policy of the state to play a leading role in developing and instituting energy management programs that promote energy conservation, energy security, and the reduction of greenhouse gasses. As well, in the 2008 general election, the voters of this state approved a constitutional amendment directing the Legislature, by general law, to prohibit consideration of any change or improvement made for the purpose of improving a property's "resistance to wind damage or the installation of a renewable energy source device" in the property taxation process. *See* §

163.08(1)(a). The Legislature and the citizens of Florida have thereby established and expressed the "significant and legitimate public purpose" necessary to support tolerable impairment under *Pomponio*, and the Legislature has carefully distinguished the achievement of that public purpose through assessment from a security or mortgage loan by creating a bright line between the two. Moreover, section 163.08 was enacted to deal with broad economic or social problems, operates and will be administered in an area of intense governmental regulation and public scrutiny, and is, or provides for conditions precedent[5] to the

---

[4] Section 163.08 carefully provides various conditions precedent and requirements which provide guidance, protections and limitations for the benefit of property owners, lienholders, subsequent purchasers, credit markets, vendors, materialmen, tax collectors, the courts and local governments. Such guidance, limitations, protections and preconditions prior to the execution of a financing agreement evidencing the non-ad valorem assessment include:

(1) The local government must reasonably determine that all property taxes and any other assessments levied on the same bill as property taxes are paid and have not been delinquent for the preceding 3 years or the property owner's period of ownership, whichever is less. § 163.08(9).

(2) The local government must reasonably determine that there are no involuntary liens, including, but not limited to, construction liens on the property. § 163.08(9).

(3) The local government must reasonably determine that no notices of default or other evidence of property-based debt delinquency have been recorded during the preceding 3 years or the property owner's period of ownership, whichever is less. § 163.08(9).

(4) The local government must reasonably determine that the property owner is current on all mortgage debt on the property. § 163.08(9).

effectiveness of the subject non-ad valorem assessments which are tolerable in light of the Legislative declaration in section 163.08 that covenants providing for

---

(5) Without the consent of the holders or loan servicers of any mortgage encumbering or otherwise secured by the property, the total amount of any non-ad valorem assessment for a property may not exceed 20 percent of the just value of the property as determined by the county property appraiser. § 163.08(12), Fla. Stat. (2010).

(6) At least 30 days before entering into a financing agreement, the property owner must provide to the holders or loan servicers of any existing mortgages encumbering or otherwise secured by the property a notice of the owner's intent to enter into a financing agreement together with the maximum principal amount to be financed and the maximum annual assessment necessary to repay that amount. § 163.08(13).

(7) Any financing agreement entered into pursuant to section 163.08 (or a summary memorandum of such agreement) must be recorded in the public records of the county within which the property is located by the sponsoring unit of local government within 5 days after execution of the agreement. The recorded agreement provides constructive notice that the assessment to be levied on the property constitutes a lien of equal dignity to county taxes and assessments from the date of recordation. § 163.08(8).

Additionally,

(8) Section 163.08 does not limit the authority of the holder or loan servicer to increase the required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment. § 163.08(13).

(9) Work requiring a license under any applicable law to make qualifying improvements must be performed by a properly certified or licensed contractor. § 163.08(11).

(10) At or before the time a purchaser executes a contract for the sale and purchase of any property for which a non-ad valorem assessment has been levied under section 163.08 and has an unpaid balance due, the seller shall give the prospective purchaser a written disclosure statement describing the assessment. § 163.08(14).

unilateral acceleration solely as a result of entering into a financing agreement are unenforceable. The conditions precedent and requirements under section 163.08 require that any mortgage lien holder on a participating property shall be provided not less than 30 days prior notice of the property owners' intent to enter into a financing agreement together with the maximum principal amount of the non-ad valorem assessment and the maximum annual assessment amount. Section 163.08 provides a reasonable standardized notification opportunity and does not limit the authority of the mortgage holder or loan servicer to increase a required monthly escrow by an amount necessary to annually pay the qualifying improvement assessment. As such, any impairment of the obligation of contract caused by section 163.08 is neither substantial nor intolerable, and the statute is facially constitutional.

However, despite this careful structuring by the Legislature of section 163.08, Appellee has, by including judicial foreclosure as a permissible remedy in its financing agreement[6], made its assessments unconstitutional as applied. Appellee mistakenly treats the financing agreement required by the Legislature as a security agreement, which it is not: the financing agreement is intended solely as evidence of the assessment (and that appropriate procedures have been followed). § 163.08(1)(c); (App. 188.) Initially, judicial foreclosure is expressly forbidden as

[6] (App. 146, 148.)

a remedy for failure to pay an assessment under section 163.08. One statutory requirement for a PACE assessment is that it "shall be collected pursuant to s. 197.3632." § 163.08(4). Turning to section 197.3632, which provides strict rules for the collection of non-ad valorem assessments on the same bill as for property taxes (the "Uniform Collection Method"), there is a provision that "Non-ad valorem assessments collected pursuant to this section shall be subject to all collection provisions of this chapter, including provisions relating to . . . issuance and sale of tax certificates and tax deeds for nonpayment." § 197.3632(8)(a). Section 163.08 is a general law provision, which expressly separates the remedy for collection of a non-ad valorem assessment from that of a contractual lien.[7]

There is no provision in chapter 197 for the use of any method other than the tax certificate sale and tax deed process for enforcing a lien for taxes or assessments collected under section 197.3632. While similar to a judicial foreclosure in that there is an involuntary transfer of ownership of property, the tax deed process is fundamentally different and replete with significant safeguards and opportunities for cure that are not necessarily present in a judicial foreclosure

[7] Even though section 163.08 does not prevent development, through home-rule powers, of a PACE-like non-ad valorem assessment, any local government relying on such powers must still be careful to avoid the introduction of remedies otherwise indicative of a security agreement or else blur the line between a lien levied and imposed for a public purpose and one inuring through a contractual security agreement not on par with taxes but rather on par with other contractual liens. Regardless, Appellee lacks home rule powers and so could not impose this type of assessment.

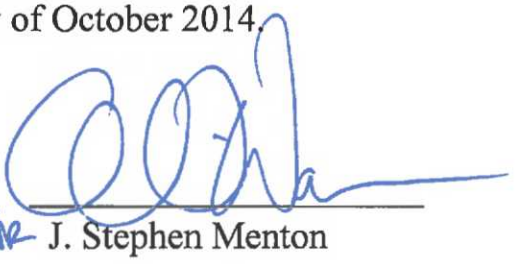
proceeding. By allowing for judicial foreclosure, Appellee has attempted to short-circuit the due process requirements found in chapter 197 and has substantially altered the relationship between non-ad valorem assessments and mortgages sufficient to render Appellee's application of section 163.08 an impairment of contract.

CONCLUSION

Because the Circuit Court violated Appellant's due process rights by allowing amendment of documents, and because the Circuit Court erred in approving the imposition of non-ad valorem assessments by Appellee without the statutory authority to do so, and because the documents attached to the Complaint for Validation included the unlawful remedy of judicial foreclosure, this case should be reversed and remanded to the Circuit Court for entry of an order dismissing the Complaint and requiring that a new proceeding be filed once the deficiencies in Appellee's approach have been cured.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail to Georgia Cappleman at capplemang@leoncountyfl.gov, Ceci Culpepper Berman at cberman@bhappeals.com, Gregory Stewart at gstewart@ngnlaw.com, Lynn Hoshihara at lhoshihara@ngnlaw.com, and L. Thomas Giblin at tgiblin@ngnlaw.com on this 6th day of October 2014.



FOR J. Stephen Menton

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is computer-generated in 14-point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210(a).

J. Stephen Menton