IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1618

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

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REPLY BRIEF of APPELLANT

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ARGUMENT

This Reply Brief addresses both the Answer Brief of Appellee Florida Development Finance Corporation (FDFC) and Appellee the State of Florida. Initially, it is uncertain whether the State of Florida has the authority to file an Answer Brief in this cause, as section 75.05, Florida Statutes, authorizes a State Attorney only to make a defense against a bond validation complaint, not to file a brief in this Court in support of a bond validation judgment. § 75.05(1), Fla. Stat. Nevertheless, this brief addresses the arguments raised by the State Attorney as well as those raised by FDFC. For the following reasons, the judgment of the Circuit Court should be reversed and the cause remanded for entry of an order denying the Complaint for bond validation.

I. FDFC's Lack of Authority to Impose Assessments Is a Substantive Defect Incurable During the Pendency of a Bond Validation Proceeding.

FDFC's proposed bonds are invalid for two substantive reasons. First, as FDFC appears to concede, it does not have any authority to impose assessments as it pled it would do in its Complaint; it has not been (and cannot lawfully be) delegated authority to impose assessments from other governmental agencies; and it has not entered into any form of contractual relationship by which any other government could impose assessments. The assessments are fundamental because they form the sole basis for repayment of the proposed bonds; without the authority to impose the assessments, there is no authority to issue the bonds. Second, FDFC

included in its proposed assessment regime (later abandoned at the hearing) an unlawful enforcement mechanism—judicial foreclosure—which is contrary to section 197.3632, Florida Statutes, specified as the only method for collection of assessments issued pursuant to the Property Assessed Clean Energy (PACE) Act, found in section 163.08, Florida Statutes, and pursuant to which the proposed bonds are to be issued. Again, these assessments are fundamental to FDFC's authority to issue bonds—without a valid repayment mechanism, the bonds are invalid.

FDFC attempts to cast these two problems as somehow technical in nature, equivalent to changing the route of a proposed road, *State v. Florida State Turnpike Authority*, 80 So. 2d 337, 341 (Fla. 1955), or a completion of processes in an order different from those specified by statute, *Rinker Materials Corp. v. Town of Lake Park*, 494 So. 2d 1123, 1125 (Fla. 1986). The change here in whether an assessment complies with a statute is not merely technical in nature—it is substantive. It goes directly to the legality of the revenue source being validated. Unlike in *Rinker Materials*, FDFC did not complete simply procedural tasks in an alternative order so as to achieve substantial compliance with statute, but instead changed a substantive provision from one that made the bonds invalid to one that cured such a substantive defect. Similarly, the defects Appellant identified at the show cause hearing and on appeal are not mere "clerical corrections," *Test v. State*,

87 So. 2d 587, 589 (Fla. 1956), but were fundamental, going directly to the validity of the assessments themselves. This change "affect[ed] . . . the validity of the bond issue." *Id.* FDFC does not point to a single case where this Court has approved a prospective bond issuer's deviation from the substantive, as opposed to procedural, requirements of law in the originally pled documents. Such a workshop atmosphere as occurred here is the province of the legislative body—in this case, FDFC's governing board—not a circuit judge.

FDFC's attempt to dismiss this Court's holding in *Ingram v. City of Palmetto*, 112 So. 861 (Fla. 1927), is unavailing. When FDFC substantively changed the nature of the relief sought, FDFC altered the nature of the proceeding—something that can properly be accomplished only through formal amendment of the pleadings. That FDFC failed to seek and the trial court failed to require a motion for leave to amend does not allow FDFC to do indirectly what it was prohibited from doing directly—change the nature of the relief sought without notice to the defendants. FDFC's concession that it failed to formally amend its complaint does not excuse its failure to afford due process to the defendants.

A. FDFC Indisputably Lacks Any Authority to Impose Assessments that Form the Basis for Repayment of the Bonds and Cannot Gain Such Power from Local Governments.

In its Complaint, FDFC sought specifically to impose assessments itself to support repayment of the proposed bonds. This is patently unlawful, as the statutes

creating and governing FDFC do not authorize it to impose non-ad valorem assessments on real property. § 288.9606, Fla. Stat. FDFC sought to correct the deficiency at the show cause hearing by asserting that it would be granted such powers through interlocal agreement, but this approach is also deficient because an interlocal agreement may only transfer powers that both parties share in common, and FDFC lacks the power to impose any kind of special assessments. § 163.01(4), Fla. Stat. When this problem was noted at the show cause hearing, FDFC offered yet a third option not previously announced, noticed, or cognizable in the pleadings: to allow local governments to impose assessments, then use those assessments to repay the bonds issued by FDFC. While this structure may be legally permissible, its announcement in the middle of the validation hearing, without approval by the governing board of FDFC, is unacceptable as both lacking authorization and as denying defendants due process of law—no person, including Appellant, has prior notice of the proposed change before it was sprung upon the trial court at the show cause hearing or had the opportunity to be heard on the merits of the change by the FDFC governing board.

At all times, the relief sought in the pleadings has referred to the levy of assessments by FDFC, not any other government. The only documents approved by the FDFC governing board, including the form of interlocal agreement, do not provide for imposition of assessments by any party other than FDFC. It was only

after FDFC admitted it had no power to impose assessments and the trial court allowed the proceeding to become a workshop session that FDFC changed its approach, mid-hearing, to achieve validation. The final judgment should be reversed and remanded for denial of the complaint as filed.

B. No Local Government with Authority to Impose Assessments Has Acted to Impose Assessments on Behalf of FDFC.

A complaint for validation of bonds must set forth three elements: (1) the prospective bond issuer has the authority to issue the bonds, (2) the bonds are for a public purpose, and (3) the bonds comport with the requirements of law. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 944-45 (Fla. 2001). FDFC's complaint (notwithstanding the changes made in FDFC's arguments and evidence) fails to demonstrate that there is any authority to impose the assessments, which are the sole revenue source for repayment of the bonds. Not only does FDFC lack the authority to impose assessments, as set forth above, it cannot demonstrate that any governmental authority with the power to impose non-ad valorem assessments has acted to so impose them. While the trial court's final judgment purported to authorize an assessment regime, the trial court never had an opportunity to review any assessment resolution or regime, as no local government with the authority to do so has authorized any assessments—there are simply no details from which the trial court could determine whether such assessments are valid. While FDFC alleged the validity of the revenue source for

its bonds in its Complaint. *Id.* (authorizing bond validation proceedings to consider matters connected with the bond issuance, such as the validity of the revenue source). It failed to prove its own complaint. Without the authority to impose assessments or specify who will impose the assessments, the bonds are invalid. Accordingly, the judgment validating the bonds should be reversed.

II. Appellant's Right to Due Process of Law Was Violated When the Trial Court Allowed FDFC to Make Significant Substantive Changes to Its Complaint for Validation and Its Underlying Bond Documents Without Notice to Any Defendant.

Both FDFC and the State argue that Appellant received due process of law because he had notice of the proceeding as specified in Chapter 75, Florida Statutes, and appeared at the hearing. While due process, at its core, minimally requires notice and an opportunity to be heard, both the State and FDFC attempt to avoid Appellant's argument that due process requires something other than mere notice of a hearing, but instead requires notice of the substantive matters to be considered at that hearing, not trial by surprise or trial by workshop, which is what FDFC and the Circuit Court provided. In *Ingram v. City of Palmetto*, this Court determined that substantive changes to the complaint for validation, even if they cured any defects, were unlawful without providing the defendants an opportunity to interpose a pleading in response to the amendment. 112 So. at 862. *Ingram* further states "Even if such proceeding may be regarded as due process of law, it is not such as contemplated by the statute." *Id.*

In this case, the Legislature has made clear the requirements for comporting with due process in a bond validation proceeding, opting to exchange some of the traditional protections associated with due process in a civil proceeding (such as personal service) for the speed and ease necessary to fulfill the public purpose of a valid bond issuance. *Rianhard v. Port of Palm Beach Dist.*, 186 So. 2d 503, 505 (Fla. 1966). Chapter 75 identifies the type of due process the Legislature has established to secure the protections of bond validation. Neither FDFC nor the Circuit Court have authority to dispense with the standard established by the Legislature, and that standard has not been met here because the hearing involved issues foreign to the complaint and was converted into a workshop session.

Contrary to Appellees' claims, Appellant has properly articulated a property interest sufficient to require due process of law. FDFC argues that because a PACE assessment under its program would be voluntary, Appellant has no property interest that would be deprived by validation of these bonds. Such an argument is fallacious for two reasons. First, the same argument would apply to any property owner, taxpayer, or citizen, who is required to be placed on notice of the proceeding and afforded the opportunity to show cause why the bonds would not be validated under section 75.07, Florida Statutes. If none of those persons has a property interest in opposing the bond validation proceeding, then the proceeding itself is improper and/or superfluous because there is no adverse party (and thus no

case or controversy)—even the State's interest is derived solely as the representative of the property owners, taxpayers, and citizens; it has no independent interest. *See, e.g., Totten v. Okaloosa Cnty. Gas Dist.*, 164 So. 2d 15, 18 (Fla. 1964). This result is patently absurd; the argument should be rejected. Second, Appellee ignores that standing is based on a reasonable expectation of a direct *or indirect* impact based on the result of the litigation. *Public Defender, Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 282 (Fla. 2013) (citing *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006)). Such an impact is present in this case. The judgment issued here would be valid against Appellant and others who later acquire title through him. Regardless of whether Appellant has the present intent to participate in the assessment program, neither he nor any subsequent owner of his real property may participate in the program except on the terms validated by the Circuit Court. Thus, a valuable property right has been determined in the judgment of validation—the right to participate in a PACE program that is free of legal flaws.

In short, Appellant was not provided notice of the legal basis for the assessments and/or the intended revenue source for the bonds as required by section 75.06, Florida Statutes, and that alone is sufficient, under *Ingram*, to warrant reversal and ultimate dismissal of the complaint for validation. The changes during the circuit court hearing—first, to the identity and nature of the

governmental entity who would be imposing assessments and second, to the nature of the enforcement of the assessments—are substantive and substantial, not mere "clerical corrections," and they "affect . . . the validity of the bond issue," as even FDFC appears to concede. *State v. City of Sarasota*, 17 So. 2d 109, 111 (Fla. 1944). Because the assessments, as pled, are invalid and because Appellant was not provided the requisite notice of the nature of the bonds and repayment mechanisms which were approved at the hearing, this Court should reverse the judgment of validation and remand to the trial court for dismissal of the action.

III. FDFC's Complaint for Bond Validation Should Have Been Dismissed as Failing to Present a Case or Controversy Ripe for Review.

FDFC argues that its case below was ripe for consideration because it has the statutory authority to issue bonds and a resolution authorizing the bonds was adopted. FDFC mischaracterizes Appellant's argument regarding ripeness in a bond validation proceeding. Appellant's position is not that a bond must be issued before it can be validated. Rather, Appellant asserts that a government seeking validation of a bond issue together with the assessment regime must have the authority to engage in the activity before seeking validation. While FDFC has general power to issue bonds, it lacks any power to assess. It was only after this problem was pointed out that FDFC proposed to have certain local governments impose assessments on its behalf, then use the proceeds of those assessments to

repay the bonds.[1] This arrangement might have been proper had FDFC sought only to validate its debt, and not additional "matters connected therewith." § 75.09, Fla. Stat. FDFC chose in its Complaint to seek validation of its assessment program in addition to the debt itself. However, FDFC has yet to identify even one local government that has acted to impose such assessments. Instead it identified generally interlocal agreements with several counties,[2] but none of them has anything to do with the current matter—improvements as defined in section 163.08, Florida Statutes. No local government has to date authorized the imposition of such assessments in conjunction with FDFC.

Appellant, and any other defendant, cannot intelligently evaluate whether the assessments are valid without even knowing what governmental entity will be imposing them, much less having the ability to review an assessment resolution, ordinance, or other documentation of the assessment program. FDFC may ultimately be correct in its assertion of the legality of these assessments, but

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[1] Initially, FDFC sought to have local governments delegate those governments' authority to impose assessments to FDFC through an interlocal agreement. However, at the bond validation hearing, Appellant argued that such a procedure would violate section 163.01(4), Florida Statutes, which requires powers delegated from one local government to another to be shared in common. FDFC then altered its approach, mid-hearing and without any action by its governing board, to have local governments impose the assessments themselves. Appellant contends this mid-hearing swap violated his due process rights. Appellant's argument here is based on the new version of FDFC's proposed bond repayment mechanism.

[2] FDFC has, from its Complaint to its Answer Brief, consistently declined to expressly identify the nature of these agreements which address matters unrelated to property assessed clean energy or to the imposition of special assessments.

insufficient information is currently available to reach a conclusion. The Complaint alleges the validity of the assessments pled, and the Final Judgment approves these assessments. Neither the defendants below nor this Court can evaluate whether the assessments are lawful based on the vague and abstract nature of the assessments themselves—they are simply not ripe for review until a local government takes the appropriate action to approve and impose them.

Contrary to FDFC's argument, this case is not "a real, substantial controversy which is definite, rather than an abstract controversy." *Soriano v. Gold Coast Aerial Lift, Inc.*, 705 So. 2d 636, 638 (Fla. 1st DCA 1998). There are many unanswered questions regarding who and how revenues are to be generated and assessments repaid. A ruling that this case is not ripe for review would simply indicate that a bond validation proceeding is not ripe until a government has authority to issue the debt and the lawfulness of matters connected with the bond issuance must be established. This is exactly what the law already is. *See, e.g., Keys Citizens for Responsible Gov't, Inc.*, 795 So. 2d at 944-45. Because FDFC is not yet authorized (and does not yet have a mechanism) to impose assessments, the case is not ripe for review and the cause should be remanded to the Circuit Court for dismissal.

IV. Section 163.08, Florida Statutes, Is Carefully Designed to Comport with the Florida and Federal Constitutions, and Failure to Comply with that Statute Renders the Assessments on Which Bond Repayment Is Based Unlawful and the Bonds Invalid.

Appellant, the State, and FDFC all agree that section 163.08 is constitutional as written. While FDFC spends significant time addressing the facial constitutionality of that section, it fails to adequately address Appellant's argument that the use of judicial foreclosure destroys the constitutional protections designed by the Legislature to protect against impairment of contracts as prohibited by Article 1, Section 10 of the Florida Constitution and by Article I, Section 10 of the United States Constitution. The Legislature carefully designed section 163.08, Florida Statutes, to comply with these constitutional provisions by adding certain safeguards designed to minimize the impact of imposition of PACE-related assessments on mortgage holders. By including the potential of judicial foreclosure in financing documents, FDFC sought to remove certain safeguards and blurred the line between an assessment and a mortgage. Appellant does not dispute that, so long as FDFC's proposed assessments do not feature unlawful enforcement remedies such as the potential for judicial foreclosure and instead utilize only the means specified by statute for enforcement, there is no constitutional problem.

In this case, FDFC's Complaint asked the Circuit Court to validate an assessment regime designed to support the repayment of the proposed bonds that impermissibly sought to include unlawful judicial foreclosure. While FDFC's counsel appears to have recognized this error after filing the Complaint and attempted to cure the problem by removing reliance on judicial foreclosure at the

show-cause hearing, this is a substantive change to the proceeding that was not authorized by law or by leave of the trial court until after the hearing had begun. Further, such change was not authorized by the governing board of FDFC. Such attempt at cure was ineffective to bring the proposed bonds within the confines of the protections found in section 163.08, Florida Statutes, which was carefully designed by the Legislature to address a compelling state interest, in accordance with *Pompanio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979), and to protect existing liens against real property so as to comport with the constitutional prohibition against impairment of contracts. Accordingly, the final judgment should be reversed and remanded for entry of an order denying the Complaint for Validation.

This Court has consistently held that bond validation requires proof of authority to issue the debt, public purpose, compliance with the requirements of law, and lawfulness of any matters connected with the debt issuance. *Keys Citizens for Responsible Gov't, Inc.*, 795 So. 2d at 944-45. *See also Murphy v. Lee Cnty.*, 763 So. 2d 300, 302 (Fla. 2000); *Noble v. Martin Cnty. Health Facilities Auth.*, 682 So. 2d 1089, 1090 (Fla. 1996); *Taylor v. Lee Cnty.*, 668 So. 2d 196, 198 (Fla. 1986); *Wohl v. State*, 480 So. 2d 639, 640-41 (Fla. 1985); *State v. City of Miami*, 379 So. 2d 651, 653-54 (Fla. 1980). If this action was solely about the debt issuance, FDFC would have proven its case—it has the authority to issue bonds,

PACE bonds are for a public purpose, and FDFC has complied with the requirements of law for the purpose of the bonds themselves. However, FDFC also sought to have validated its assessment program, which is connected with the debt issuance. In this regard, FDFC failed to demonstrate the authority to assess and thus to issue the debt as well as failed to prove the legality of its assessments as pled or as revised (as no local government has acted to impose assessments). The resolution of this case turns on whether *Keys Citizens* and its precedent cases, continue to have meaning and a bond validation judgment can only be issued when all elements are met. Because the proposed bonds (and their attendant assessments) do not meet these elements, this case should be reversed and remanded for denial of the complaint for validation.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed and this case remanded for dismissal as unripe or, in the alternative, for denial of the Complaint for validation. While FDFC argues that denial of the complaint is inappropriate, the result is compelled by this Court's precedent, *Ingram*, 112 So. at 862, and by expedience. The only alternative that comports with the due process designed by the Legislature is to return to the published notice stage and republish a new show cause order if and when FDFC amends its Complaint to cure material defects in its approach and documents. The simpler path would be to deny the

Complaint without prejudice to refile once defects had been corrected. Accordingly, upon remand, the trial court should be instructed to dismiss the cause or deny the Complaint.

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, L. Thomas Giblin at tgiblin@ngnlaw.com, Jane Kreusler-Walsh at janewalsh@kwcvpa.com, Rebecca Mercier Vargas at rvargas@kwcvpa.com, Stephanie L. Serafin at sserafin@kwcvpa.com, Raoul Cantero at Raoul.cantero@whitecase.com, Thomas Neal McAliley at nmcaliley@whitecase.com, Jesse Green at jgreen@whitecase.com, and Victoria Avalon at vavalon@sao10.com on this 12th day of January 2015.

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