Filing # 12493154 Electronically Filed 04/14/2014 05:44:17 PM

RECEIVED, 4/14/2014 17:48:48, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

No. SC14-350

SCOTT MORRIS, et al.,

Appellants,

v.

CITY OF CAPE CORAL,

Appellee.

On Direct Appeal from the Circuit Court of the
Twentieth Judicial Circuit in and for Lee County, Florida
Lower No. 13-CA-002406

ANSWER BRIEF OF APPELLEE CITY OF CAPE CORAL

Bryant Miller Olive P.A.
Christopher B. Roe
Elizabeth W. Neiberger
101 North Monroe Street, Suite 900
Tallahassee, FL 32301
Susan H. Churuti
Bryant Miller Olive P.A.
One Tampa City Center, Suite 2700
Tampa, FL 33602

Dolores Menendez
City Attorney
City of Cape Coral
1015 Cultural Park Boulevard
Cape Coral, FL 33915

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment validating municipal debt in a validation proceeding under chapter 75, Florida Statutes. The City of Cape Coral brought this action to validate the proposed issuance of its Fire Protection Assessment Revenue Note, Series 2013 ("Debt"). If the final judgment is upheld, the Debt will be issued to purchase equipment and improve facilities for the City's fire department. (App. 42.)[1] The Debt will be repaid by non-ad valorem special assessments imposed on real property in the City, including property owned by the Appellants (the "fire assessments"). The Appellants opposed validation, arguing that the fire assessments are invalid and, therefore, the City lacks authority to issue the Debt. The trial court concluded the fire assessments are valid and entered a final judgment of validation. (App. 708-45.)

The City's Revenue Crisis and Recovery Strategy

The City is different from most cities in that its property tax base is lopsided: it has a very large residential component, but a very small commercial component. When the real estate market crashed, the City got caught between two sections of the Florida Constitution: (i) article VII, section 9, which allows up to 10 mills of ad valorem tax assessments for municipal purposes; and (ii) article IV, section (d)(1),

[1] References to the Appellants' Appendix are cited as "App." Reference to the Appellee's Appendix, which supplements the Appellants' Appendix, are cited as "Supp. App."

which limits increases to ad valorem tax assessments on properties subject to the homestead exemption to 3% annually. Residential values plummeted, but the City could only increase taxes on residential property by 3% per year. Because commercial property was not a meaningful part of the City's property tax base, it was not able to generate revenue by increasing property taxes on commercial property. Therefore, the City was left to develop a solution under its home rule powers granted under article VIII, section 2(b) of the Florida Constitution.

Like many cities in Florida, the City has always relied on ad valorem property taxes as its main revenue source. (App. 43.) Ad valorem taxes are based on property value. In the wake of the 2008 collapse of the housing market, property values and ad valorem tax revenues plummeted, sending the City into a revenue crisis. (App. 43.) Unable to make up for the lost revenue, the City has been forced to make massive, unsustainable cuts to its core public functions.

Following the market crash, the City knew it needed new revenue sources to stop the downward spiral of budget cuts and protect it from market risks moving forward. (App. 43.) The City first confronted its revenue problem and considered fire assessments as a potential revenue source in 2009, when it obtained a fire assessment study from Burton & Associates, a consulting firm specializing in local government rates and assessments ("Burton"). (App. 789; *see* App. 909.) The City decided not to impose fire assessments at that time.

In 2012, after several years of financial decline, the City hired a new City Manager. Upon arriving at the City, the current City Manager assessed the financial structure of the City's general fund, its core operating budget, and the scope of the City's financial problems. (App. 40, 43, 1062.) The general fund is used to pay for the City's fire and police operations, infrastructure maintenance, parks, and general administrative operations. (App. 40-41, 61.) Because the general fund is heavily reliant on property tax revenues, most of those areas were seriously underfunded. Capital expenditures, such as road maintenance, had not been funded since 2008. (App. 46, 63, 67, 1601-02.) The City Manager concluded that, if the general fund's existing revenue sources and expenditures remained the same, its resources would be depleted by 2016. (App. 40, 63.) He also concluded that the fire department's condition was particularly unstable. (App. 41.)

The City reached a point where it had a choice between making more cost reductions (in the form of layoffs) or increasing its revenue. (App. 1061.) In late 2012, the City retained Burton to develop a financial model that would allow it to increase its general fund revenue and thus move toward economic stability. (App. 790.) Burton presented the City with several options for diversifying its revenue, including fire assessments, during public meetings in March and April 2013. (App. 790.) The fire assessment was an attractive option, as it would provide badly-needed revenue for fire protection services, while freeing up general fund revenue.

At a public meeting in April 2013, the City authorized the City Manager to engage Burton to prepare an updated study recommending a non-ad valorem fire assessment program that would allow the City to recover a portion its fire protection costs. (App. 790, 909.) This effort was part of a larger plan to keep the City solvent. (App. 45, 47-48, 1059, 1062.)

The Fire Assessments

The proposed fire assessments were discussed at many more public meetings over the next several months. Burton presented its preliminary results at a public workshop on June 3, 3013, and presented its final report at the City's public meeting on June 10, 2013. (Supp. App. 1-4)

Burton concluded that the assessments should be imposed on all parcels in the City because they all receive a special benefit from the City's fire protection services and facilities. (App. 912-14.) The report reasoned that the fire department (i) stands ready to respond to fires City-wide (ii) at an equal level of response readiness because fire stations are located throughout the City. (App. 912-14.) Burton explained that the availability of fire protection in and of itself benefits all parcels in the City by (i) enhancing property value, marketability, and potential for development; (ii) limiting liability by containing fire and preventing it from spreading to other parcels; (iii) being able to immediately respond to fire and provide medical aid; and (iv) allowing heightened use and enjoyment of the

property. (App. 914, 916-18.) The report emphasized that the "mere presence and availability of on-call fire protection services and facilities" benefits property "independent of, and enjoyed even in the absence of, a call or need for actual service." (App. 918.) Because all parcels share the benefit, they also share the burden. The benefit is broad, and so is the related burden.

After concluding that all parcels receive a special benefit from the fire protection services, Burton next addressed how the costs of those services should be apportioned among parcels. While all parcels in the City receive a special benefit from the fire department's readiness to respond, improved parcels receive an additional benefit that unimproved parcels do not: protection from loss to structures. (App. 915.) The report explained that the availability of fire protection services protects structures on property by (i) making them insurable by fire insurance and at attractive rates; and (ii) protecting property owners from loss to structures on their property. (App. 914-15.)

Therefore, Burton recommended apportioning costs using a method that would recognize that improved and unimproved parcels receive different levels of special benefit. (App. 915.)

The report classified these levels of benefit by tiers:

	Benefit	Property Receiving Benefit
Tier 1	Response Readiness	All Parcels in City
Tier 2	Protection from Loss of Structures	Improved Parcels in City

(App. 915.)

Based on an analysis of the City's current and historic financial records, the report projected the costs of providing fire protection in each fiscal year from 2014 to 2024. (App. 909.) Then, Burton calculated the percentage of total fire protection costs that the fire assessment revenues would fund.

The report went on to describe a two-step process for apportioning that percentage of total fire protection costs. The first step is to determine which fire protection costs are allocable to the Tier 1 benefit (response readiness), and which are allocable to the Tier 2 benefit (protection from loss of structures). (App. 915-16.) Burton determined that the costs of providing the Tier 1 benefit (response readiness) are those incurred in maintaining a constant state of readiness to respond to every parcel in the City, which are fixed, nondiscretionary, and not incurred in the actual response to calls. (App. 915-16.) Therefore, the report allocated the following costs to Tier 1: personnel costs that must be incurred independent of responses to calls for service, lease payments, and capital expenses. (App. 915-

16.) Under Burton's calculation, Tier 1 costs represent 70% of the City's total fire protection costs. (App. 915-16.)

Burton determined that the remaining 30% of total costs are allocable to the Tier 2 benefit (protection from loss of structures). (App. 916.) These costs are the personnel costs of actually responding to calls for service, fuel, equipment maintenance, and other operating costs. (App. 916.)

The second step of the recommended apportionment process was to allocate (i) the costs of the Tier 1 benefit among all parcels that receive Tier 1 benefit; and (ii) the costs of the Tier 2 benefit among all parcels that receive the Tier 2 benefit. (App. 916.) Burton determined that the Tier 1 costs should be allocated equally among all parcels in the City because each parcel benefits from response readiness in the same degree, regardless of the parcel's character, use, size, composition, or any other attribute. (App. 916.) Therefore, 70% of total fire protection costs were allocated among all parcels (improved and unimproved) in the same dollar amount.

Burton allocated Tier 2 costs among all improved parcels. (App. 917.) The report reasoned that apportionment based in part on the value of the structures that are protected inherently addresses the higher and proportionate benefit accruing to properties facing potentially greater financial loss in the event of fire incident and is a direct and logical means to allocate the costs and benefits of fire protection services and facilities. The report found that the benefit of protection from

structure loss is best represented by: (i) protection from loss of the investment in the structure; or (ii) avoidance of the cost of replacing the structure. (App. 917.) However, neither actual investment cost nor replacement cost is readily available, and each would be extremely expensive to determine annually with respect to each structure on every improved parcel. (App. 917.)

Burton determined that structure values, which are readily available on the Lee County Property Appraiser's data base, are appropriate to use as a surrogate. (App. 917.) This data must be created and maintained under section 193.011(5), Florida Statutes, which prescribes the "factors to consider in deriving just valuation." In making this determination, section 193.011(5) requires each property appraiser to consider "the present ***replacement value*** of improvements thereon". Therefore, Tier 2 costs were allocated based on the value of structures on improved parcels, as an approximation of replacement value. (App. 918.)

Burton calculated the amount of assessment revenue that would be needed to cover 38% of the City's fire protection costs in 2014. After allocating those costs to the benefits they conferred (Tier 1 or Tier 2), Burton calculated the Tier 1 and Tier 2 assessment rates for 2014. The Tier 1 rate is a flat rate of $62.02 and applies to all parcels, regardless of size, development status, or any other factor. The Tier 2 rate is $1.46 per Equivalent Benefit Unit (EBU). Unimproved properties will only be assessed at the Tier 1 rate; improved parcels will be

assessed at the Tier 1 rate plus the Tier 2 rate. The report discussed and analyzed the data supporting Burton's conclusions, calculations, and recommendations.

Burton recommended this two-step approach as the most fair and reasonable way to apportion fire protection costs. The City agreed and approved the report at the June 10 meeting.

Fire Assessment Ordinance and Resolutions

During the June 10 public meeting, the City also approved a proposed ordinance authorizing the City to levy special assessments by resolution ("Assessment Ordinance"). (Supp. App. 1-4.) The City considered the Assessment Ordinance for a second time and adopted it during its public hearing on July 15. (App. 789-90.) The Assessment Ordinance provided that it was adopted under the City's constitutional and statutory "home rule" authority to legislate for municipal purposes. (App. 797.)

Under the Assessment Ordinance, two resolutions are needed to levy fire assessments: an initial assessment resolution and a final assessment resolution. The City must first adopt an initial assessment resolution that, among other things, (i) identifies the fire protection services and facilities that will be funded with the revenue from the fire assessments; (ii) describes how the cost of those fire protection services and facilities will be apportioned among real property within the City; (iii) require an assessment roll to be developed to identify the amount

each parcel will be assessed; and (iv) schedules a public hearing to consider a final assessment resolution imposing the assessments. (App. 799.) To impose the fire assessments, the City must then adopt a final assessment resolution after the public hearing. (App. 801-02.)

The City adopted the initial assessment resolution at a public meeting on July 29, 2013 (App. 815-36), and adopted the final assessment resolution after a public hearing on August 26, 2013 (App. 837-63). At the August meeting, the City discussed that the fire assessments are necessary, as the City will face a budget shortfall without them. (Supp. App. 7.) Like the Assessment Ordinance, both resolutions were adopted under the City's home rule authority.

The Debt

Due to the fire department's severely deteriorated condition, the City could no longer delay purchasing vehicles, facilities, and other fire protection equipment. The City decided the best way to accomplish this is to issue the Debt, which will be secured by the fire assessments. The amount of fire assessment revenue that exceeds the amount needed to service the Debt will be used to pay other expenses relating to fire protection. On August 26, the City adopted an ordinance authorizing it to issue the Debt in an amount of $1.5 million ("Note Ordinance"). (App. 864-77.) As with the Assessment Ordinance, the assessment resolutions and

the Note Ordinance provided that they were adopted under the City's home rule authority. (App. 817, 839, 864.)

Validation Proceedings and Final Judgment

On August 28, 2013, the City filed its complaint to validate the Debt under chapter 75, Florida Statutes, governing bond validations. (App. 878-900.) The trial court issued an order to show cause on September 11, 2013, which provided the date and time the hearing would be held. (App. 901-04.) A copy of the order was published in a local newspaper of general circulation 20 days before the hearing and again the following week, as required by section 75.06(1), Florida Statutes. A copy of the order was also served on the State of Florida. § 75.05, Fla. Stat. The State of Florida did not object to the validation on the merits or to the notice or procedures the City followed with respect to the validation. (App. 9-10, 37-38; Supp. App. 8-9.)

A three-day show cause hearing was held from October 7-9, 2013. Eight property owners, four of which are the Appellants, appeared at the hearing and fully participated in hearing in opposition to the validation. (Supp. App. 10-11). The show cause order scheduled the hearing for an hour, and the trial judge stated at the start of the hearing that objecting parties would be given three minutes to present argument. While none of the objecting parties requested additional time, the trial court quickly determined that much more time was needed, and gave all

objecting parties a full opportunity to examine witnesses and otherwise participate in a three-day hearing. (App. 71-71, 90, 92, 98, 107-08). They each were given 15 minutes to make closing arguments. (App. 417-18.)

The Appellants moved for a continuance on the second day of hearing, which the trial court denied. At the end of the hearing, the circuit court gave all objecting parties 20 days to submit post-hearing legal memoranda in support of their objections, and gave the City 15 days to file a memorandum in response. (App. 414-15.) At the end of the 20-day period, the Appellants submitted a memorandum. (App. 952-1017.) On that same date, a property owner that had not previously appeared in the validation proceeding, Talan Corporation, filed a motion to intervene and an objection to the validation. (Supp. App. 12-27.) The trial court held a hearing on Talan's motion to intervene on November 27, 2013. (App. 1-489, 1018-19.) The City, Talan, and all Appellants attended the hearing and were given the opportunity to call witnesses, cross-examine witnesses, and make legal argument on the issues raised by Talan. (App. 490-707.) The trial court ultimately concluded that evidence closed at the end of the October hearing, so the evidence presented on November 27 was not admitted in evidence. (App. 496.)

On December 11, 2013, the trial court entered its final judgment of validation. The Appellants filed a motion for rehearing, which was denied. This appeal timely followed.

SUMMARY OF ARGUMENT

The Appellants' brief argues that the final judgment should be reversed for five reasons: two substantive and three procedural. They argue that the fire assessments are substantively invalid because the City's apportionment of each the Tier 1 costs and the Tier 2 costs fails to comply with chapter 170, Florida Statutes. As to their procedural arguments, they contend that (i) the trial court abused its discretion in denying their motion for continuance; (ii) the final judgment contains fact findings that are not supported by competent substantial evidence; and (iii) the City denied their procedural due process rights to object to the final assessment resolution.

The Appellants' only substantive arguments are based on noncompliance with a law that does not apply: chapter 170. This Court has squarely held that cities have authority—independent of chapter 170—to impose special assessments under their home rule power to legislate for municipal purposes. Chapter 170 simply supplies an alternative way for cities to impose special assessments. Here, the trial court expressly concluded chapter 170 does not apply because the City validly adopted the assessments under its home rule authority.

To obtain reversal based on the substantive validity of the assessments, the Appellants had to challenge the trial court's decision that chapter 170 does not apply or its conclusion that the assessments are valid under the City's home rule

power. By failing to raise either argument, the Appellants have abandoned any challenge to those issues on appeal. Therefore, the Court has not been presented with any issue that would allow reversal on the substantive validity of the assessments.

Even assuming the Appellants had properly challenged the substantive validity of the assessments, the trial court correctly concluded that the assessments are valid under the City's home rule authority. The City's legislative findings that the assessments were fairly allocated among parcels must be upheld unless ***arbitrary***. The trial court concluded that the City's chosen apportionment method was not arbitrary, and that conclusion is supported by competent substantial evidence.

The City's apportionment was far from arbitrary—it was based on the substantial amount of information, analysis, and recommendations the City obtained and reasonably relied on over a several month public process. The decision to allocate Tier 1 costs equally among all parcels was based on information showing that: (i) all parcels equally benefit from the mere availability of fire protection services, regardless of size or other factors; and (ii) the Tier 1 costs are the fire protection costs incurred in providing continual readiness to serve: costs that are fixed, nondiscretionary, and incurred even in the absence of actual calls for service or deployments. The decision to allocate Tier 2 costs

among improved parcels was based on information showing that (i) all improved parcels benefit by being protected from losing structures due to fire and incurring the costs to replace them; (ii) Tier 2 costs are only the fire protection costs incurred in providing that benefit: costs the fire department incurs to have the ability to suppress fire on structures; (iii) all structures benefit differently because the cost of replacing a burned down structure varies from structure to structure; and (iv) structure value is a reasonable, appropriate, and readily available surrogate for replacement cost. Therefore, the City validly exercised its constitutional and statutory home rule authority in adopting the fire assessments.

The Appellants' procedural challenges should also be rejected. First, the final judgment's reference to a City resolution that was excluded from evidence was harmless error. Talan objected on the basis of perceived data errors in the assessment rules, and the City only attempted to offer the resolution to show that any alleged errors were cured. Because the trial court did not consider Talan's untimely objection or evidence, the reference to the resolution is immaterial to its decision. Moreover, the trial court stated that, even if the alleged data errors existed, the alleged errors would not be enough to deny validation. Because the outcome of the case would not have been more favorable to the Appellants without the trial court's reference to the resolution, the references to the resolution are at most harmless error.

The Appellants' claim that the trial court abused its discretion by refusing to continue the hearing really amounts a complaint about the expedited and summary procedures governing bond validations under chapter 75, Florida Statutes. Chapter 75 only requires notice to be given 20 days before the hearing, and this Court has held that a trial court does not abuse its discretion in denying a continuance if the statutory notice is given and the property owners have an opportunity to present oral argument and submit a post-hearing legal memorandum. That is precisely what happened here. The trial court was well within its discretion in relying on the statutory scheme of chapter 75 and this Court's precedent in denying the request for continuance.

Finally, there is no merit to the Appellants' procedural due process argument. The City went above and beyond the requirements of due process by giving notice by publication and mail to each property owner in the City. While the Appellants argue that the notices did not contain the exact wording contained in the Assessment Ordinance, the distinction they rely upon is trivial. All affected property owners, including the Appellants, were given adequate notice and a real opportunity to be heard, which is all due process requires. Therefore, the final judgment should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The scope of inquiry in a bond validation proceeding, both at the trial court and this Court, is limited to three issues: (1) whether the public body has authority to issue the bonds; (2) whether the purpose of the obligation is legal; and (3) whether the bond issue complies with the requirements of law. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist*., 48 So. 3d 811, 817 (Fla. 2010). In this case, the dispute is over the first prong: the City's authority to issue the Debt. The only issue is whether the fire assessments pledged to repay the Debt are valid. If so, the City has authority to issue the Debt. *City of Gainesville v. State*, 863 So. 2d 138, 141, 143 (Fla. 2003).

A "final judgment of validation comes to this Court clothed with a presumption of correctness." *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008). Therefore, the Appellants have the "burden of demonstrating that the record and evidence fails to support the...trial court's conclusions." *Donovan v. Okaloosa Cnty.*, 82 So. 3d 801, 805 (Fla. 2012). The Court reviews the trial court's fact findings for competent substantial evidence and its legal conclusions *de novo*. *Id.* The trial court's denial of a motion for continuance is reviewed for abuse of discretion. *Id.*

II. THE APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE TRIAL COURT'S CONCLUSION THAT THE ASSESSMENTS ARE VALID UNDER THE CITY'S HOME RULE AUTHORITY

The Appellants argue that there "is no substantial competent evidence to support the findings by City council and the trial court that" either Tier 1 or Tier 2 "of the fire assessment complies with the ***requirements of Florida Statute § 170.201***." (Appellants' Br. 29-41 (emphasis added)). But chapter 170, Florida Statutes, was ***not*** the basis for the trial court's conclusion that the fire assessments are valid. Instead, the trial court determined the fire assessments were validly adopted under the City's constitutional and statutory ***home rule*** power. (App. 28-29.) While cities may choose to impose assessments under chapter 170, it is only an ***alternative*** source of authority for municipal special assessments. *City of Boca Raton v. State*, 595 So. 2d 25, 29 (Fla. 1992). Because the City elected to impose the assessments under its home rule authority—not chapter 170—the legal standards in chapter 170 do not apply. Since the Appellants' brief only argues that the fire assessments do not comply with a law that does not apply, they have waived the right to challenge the trial court's decision that the fire assessments were validly adopted under the City's home rule authority.

A. A city's authority to impose special assessments under its home rule powers is independent of chapter 170

The 1968 Florida Constitution created broad municipal "home rule" powers, the breadth of which was reiterated with the 1973 enactment of the Municipal Home Rule Powers Act. *Boca Raton*, 595 So. 2d at 27-28 (citing § 2(b), art. VIII, Fla. Const.; § 166.21, Fla. Stat.). Under these provisions, cities have home rule authority to exercise any power for municipal purposes that is not expressly prohibited by the Florida Constitution or statute. *Id.* at 28.

In *Boca Raton*, this Court squarely held that chapter 170 does not preempt cities' home rule authority to impose special assessments under the requirements provided in case law. *Id.* at 29-30. This was based on the express language in chapter 170 providing that it "shall be construed as an ***additional*** and ***alternative*** method for the financing of the improvements referred to herein," and that it "shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a ***supplemental, additional,*** and ***alternative*** method of procedure for the ***benefit*** of all cities, towns, and municipal corporations of the state...." *Id.* at 29 (emphasis added) (quoting §§ 170.19, 170.21, Fla. Stat.). After *Boca Raton* was decided, the legislature made it explicit that chapter 170 only supplies another option for cities to impose special assessments. Chapter 170 now also provides: "***In addition*** to other lawful authority to levy and collect special assessments, the governing body of a municipality may levy and collect special assessments to fund

capital improvements and municipal services, including, but not limited to, fire protection...." § 170.201, Fla. Stat. (emphasis added). Therefore, the City had the authority to impose special assessments under its home rule power.[2] *Id.* at 29-30.

B. The Appellants' have waived the right to challenge the fire assessment methodology

The Appellants' brief does not challenge the trial court's conclusions (i) that the fire assessments were adopted under the City's home rule powers, not chapter 170; or (ii) that the fire assessments are valid under the City's home rule powers. Because these points are wholly omitted from the Appellants' initial brief, they have been waived or abandoned on appeal. *E.g., City of Miami v. Steckloff,* 111 So. 2d 446, 447 (Fla. 1959) ("It is an established rule that points covered by a decree of the trial court will not be considered by an appellate court unless they are

[2] Even if the City had elected to impose the fire assessments chapter 170, the City's legislative determinations concerning apportionment nonetheless satisfy section 170.201. That section provides that the "… governing body of a municipality may apportion costs of such special assessments based on … [t]he front or square footage of each parcel of land; ***or*** … [a]n alternative methodology***, so long as the amount of the assessment for each parcel of land is not in excess of the proportional benefits as compared to other assessments on other parcels of land***." (Emphasis added). In the final assessment resolution, the City made legislative findings that the alternative methodology was satisfied: "The Fire Protection Assessment for any Tax Parcel subject thereto ***does not exceed the proportional benefits that such Tax Parcel will receive compared to any other Tax Parcel***." (App. 840 (emphasis added)). No one presented information to the contrary at the City's public hearing on the final assessment resolution. The City's legislative determinations are competent substantial evidence that would support a conclusion that the fire assessments are valid under chapter 170. *Rosche v. City of Hollywood*, 55 So. 2d 909, 913 (Fla. 1952) (in absence of conflicting evidence, city's findings will not be disturbed).

properly raised and discussed in the briefs. An assigned error will be deemed to have been abandoned when it is completely omitted from the briefs."); *Scott v. Jenkins*, 35 So. 101, 104 (Fla. 1902) (where "the appellant[ ] ha[s] not raised [an issue] in this court, the court itself should not *sua sponte* reverse the solemn decrees of the court below.").

By waiving the right to argue that the trial court applied the incorrect legal standard (home rule versus chapter 170) or that the trial court incorrectly concluded that the fire assessments are invalid under the law that it did apply (home rule), the Appellants have failed to present an issue that would make it possible for the Court to reverse the judgment on the substantive validity of the fire assessments. Therefore, points IV and V of the Appellants' brief must be rejected as a matter of law.

The final judgment clearly concluded that the City did not adopt the fire assessments under chapter 170; rather, it imposed them under its home rule authority:

> The City has clearly and sufficiently demonstrated that the Fire Protection Assessments were adopted pursuant to the ***home rule*** provisions of Article VIII, Section 2 of the Florida Constitution and Section 166.021, Florida Statutes, and ***not*** through the authority or procedures set forth in ***Chapter 170, Florida Statutes*** (which by its terms provides a supplemental and alternative process for the levy of special assessments....Accordingly ***Chapter 170***...do[es] ***not apply*** to the Fire Protection Assessments or issuance of the Note.

(App. 735-36 (emphasis added)). The home rule legal standard is referenced throughout the final judgment. (App. 712, 739-40.) Furthermore, the City stated that it was proceeding under its home rule authority in the Assessment Ordinance, initial assessment resolution, and final assessment resolution. (App. 797, 817, 839.) This was also made clear in the City's complaint, legal memorandum, at the hearing, and in Burton's report. (App. 20, 25, 712, 879, 897, 947-50.)

The Appellants had the burden to demonstrate that the trial court applied the incorrect law or that the fire assessments were invalid under the law the trial court applied. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla.1980) ("In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error."). Because the Appellants' have waived the right to challenge the final judgment with respect to either issue, the trial court's conclusion that the assessments are substantively valid must be affirmed.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE FIRE ASSESSMENTS ARE VALID UNDER APPLICABLE SUBSTANTIVE LAW

It is not necessary to address whether the trial court correctly concluded that the fire assessments are valid under the City's home rule authority because the Appellants have failed to present the issue to the Court. Even if they had, the assessments are valid and the final judgment should be affirmed.

Special assessments are a way for cities to generate revenue to pay for services or capital improvements by assessing a charge on properties that receive a special benefit from those services or improvements. While there are some similarities between special assessments and property taxes (for example, they are levied on real property and payment is mandatory), they are not the same. *Boca Raton*, 595 So. 2d at 25. The critical distinction is that "special assessments must confer a specific benefit upon the land burdened by the assessment," and taxes do not. *Id.*

Under Florida case law, a special assessment is validly imposed under a city's home rule powers if it meets a two-prong test:

1. The assessed parcels must receive a special benefit from the improvements or services to be financed by the assessment revenues; and
2. The cost of the improvements or services must be fairly and reasonably apportioned among the parcels receiving the special benefit.

Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 183 (Fla. 1995). The only dispute in this case is whether the City fairly apportioned the special assessments, which goes to the second prong.

The "fair apportionment" prong tests whether the cost of the improvement or service funded by the assessment is "fairly and reasonably" allocated among the

specially benefited properties. *See City of Boca Raton*, 595 So. 2d at 29. The type of apportionment methodology a city chooses is "immaterial" and "may vary widely," depending on the circumstances of the case. *Id.* at 31; *S. Trail Fire Control Dist. v. Sarasota County*, 273 So. 2d 380, 384 (Fla. 1973) (particular basis for apportioning a special assessment is a question of legislative expediency). "And though a court may recognize valid alternative methods of apportionment, so long as the legislative determination by the City is not arbitrary, a court should not substitute its judgment for that of the local legislative body." *City of Winter Springs v. State*, 776 So. 2d 255, 259 (Fla. 2001). The question is always: Is the amount each property is assessed reasonably proportional to the benefit the property receives? *Id.*

The courts' role is not to answer this first question in the first instance. Apportionment of assessments is a legislative function. *City of Boca Raton*, 595 So. 2d at 30. A city's legislative determinations of fair apportionment are presumptively valid and courts must review them under a highly deferential standard. A court cannot disturb a city's legislative determination unless they are arbitrary. *Sarasota Cnty. v. Sarasota Church of Christ, Inc*., 667 So. 2d 180, 183-84 (Fla. 1995). The "***legislative findings*** are ***competent, substantial evidence sufficient*** to support the final judgment" of validation. *Strand v. Escambia County*, 992 So. 2d 150, 156 (Fla. 2008). *Rianhard v. Port of Palm Beach Dist.*,

186 So. 2d 503, 505 (Fla. 1966) (admission of resolution authorizing bond issuance sufficient evidence to support bond validation judgment). Conflicting evidence that depends on the judgment of witnesses is not enough to disturb the City's legislative findings. *Rosche v. City of Hollywood*, 55 So. 2d 909, 913 (Fla. 1952).

Moreover, in all bond validations, the court "must maintain a very deferential standard of review" of the government's legislative determinations. *E.g.*, *Panama City Beach Cmty. Redevelopment Agency*, 831 So. 2d at 665 (emphasis added).[3] The court cannot substitute its judgment for that of a local legislative body. *Town of Riviera Beach v. State*, 53 So. 2d 828, 831 (Fla. 1951). Just as in any other bond validation, here, the City's legislative decisionmaking is entitled to deference.

While the Appellants dislike how the City has apportioned the fire assessments, they have not (and cannot) established that the City's legislative determinations of fair apportionment for Tier 1 or Tier 2 are arbitrary. To the contrary, the trial court concluded that the City's legislative determinations regarding fair apportionment were not arbitrary because they were supported by

[3] *Accord Panama City Beach Cmty. Redev. Agency*, 831 So. 2d at 667 (in bond validations, trial court reviews government's legislative findings to determine whether they are "patently erroneous"); *City of Parker v. State*, 992 So. 2d 171, 178 (Fla. 2008) (legislative determinations entitled to a presumption of correctness in bond validation).

extensive data, analysis, reports and presentations by staff and consultants, all of which were uncontroverted. None of the property owners who objected to the fire assessments at the public hearing on August 26 presented City with evidence to the contrary. See *City of Winter Springs*, 776 So. 2d at 261 ("[a] review of the record in this case yields competent, substantial evidence to support the City's determination of apportionment and, therefore, the City's findings regarding apportionment cannot be said to be 'arbitrary.'").

As to Tier 1, the Appellants argue that it is unfair for the City to assess the same flat rate to all parcels in the City because some parcels are larger than others. The Appellants rest on testimony of the City's fire chief acknowledging that it would take more resources to fight fire on very large parcels. (Appellants' Br. 30.) This argument ignores the fact that the City's methodology is not premised upon the costs incurred in actual responses or deployments, nor does it attempt to predict future demand based upon historic calls for service. The method is instead based on the costs the City must incur each year to maintain continual availability and readiness to serve, regardless of whether a call for service is ever received or the physical characteristics of a given parcel when it does make a call. The costs allocated to Tier 1 are only the fixed costs that the fire department incurs to maintain a constant state of readiness to respond to every parcel in the City in the event of a call: Tier 1 costs are fixed, nondiscretionary, and not incurred in the

actual response to calls. (App. 915-16.) Because costs related to maintaining continual readiness to serve are completely independent of the number or nature of calls actually received in a given year, the Appellants argument must be rejected.

The Appellants next argue that the City's apportionment of Tier 2 costs is improper due to the "use of pure value to determine the fire assessment" (Appellants' Br. 36.) That is wrong. Tier 1 and Tier 2 are not different fire assessments. The City imposed one single assessment. Tiers 1 and 2 are simply used to determine how to fairly allocate costs among properties receiving different levels of benefits: (1) all properties in the City, whether improved or unimproved, receive a uniform level of benefit from the fire department's availability to respond; and (2) improved parcels also benefit from protection of loss of structures, which varies from structure to structure in proportion to the value of the structure. Because an improved property receives both types of benefits, the amount assessed is the Tier 1 flat rate plus the Tier 2 rate calculated for that parcel. While the Tier 2 rate is determined with reference to structure value, Tier 2 is only a single part of the fire assessment.

The Appellants urge the Court to look no further than the use of "value." But value is not an invalid manner of apportionment. To the contrary, this Court has determined that property value ***can*** be used in apportioning special assessments where the amount of benefit is related to property valuation. *See Boca Raton*, 595

So. 2d at 30-32 ("We reject the contention that the assessment cannot be sustained because it will be applied on an ad valorem basis. In fact, in an early case this Court upheld a special assessment for local improvements which was imposed upon an ad valorem basis.") (citing *Richardson v. Hardee*, 85 Fla. 510, 96 So. 290 (1923); *City of Naples v. Moon*, 269 So.2d 355 (Fla.1972) (approving special assessment based in part upon assessed values)). Apportionment may be based on property value and, unless the manner of exaction is arbitrary or a flagrant abuse of power, it must be upheld. *Id*. at 32.

Therefore, the question is not whether value is a factor, but rather whether the allocation is reasonably proportional to the benefit the property receives. Here, the benefit improved properties receive under Tier 2 is protection from the loss of structures on their properties due to fire. The City's consultant determined that the benefit received from the protection from structure loss is best measured by cost the property owner would have to incur to replace the structure if it burned down. It is cost prohibitive to appraise the replacement cost of all structures in the City, and the City's consultant determined that structure value is the best reasonably available proxy for replacement cost. By statute, the property appraiser uses replacement cost in determining structure value. § 193.011(5), Fla. Stat. The Appellants have not offered any argument that this line of reasoning is arbitrary. They simply hang their hat on the City's use of value.

The Appellants argue that the fire assessments are invalid under the Court's decision in *St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs*, 141 So. 2d 744 (Fla. 1962). In doing so, they simply quote a portion of *Higgs* in isolation, without any explanation or analysis. That is not surprising because the use of value in that case is entirely distinguishable from the City's fire assessments. In *Higgs*, the enabling law was unclear whether it authorized imposition of a tax or a special assessment, as the express language of the special law used both interchangeably. *Id.* at 745. There, the county attempted to impose a "special assessment" under circumstances making it clear that it was designed to avoid the property tax exemption for homestead. *Id.* at 744-45. The only component of the "special assessment" was property value. The county did not undertake any analysis whatsoever of how property value related to the benefits. Nor did the county make a legislative determination of fair apportionment. Since the county simply did not consider the issue, its decision to use property value was arbitrary. Moreover, *Higgs* was decided ***before*** municipal home rule was created under the 1968 constitutional amendments.

By contrast to *Higgs*, here, the City made extensive legislative findings on fair apportionment which were supported by competent, substantial evidence in the record. Those legislative findings are entitled to deference. The City conducted a complete and thorough analysis based on its consultant's study and

recommendations. No one presented any information to the contrary at the many public workshops and meetings on the fire assessment methodology. *Rosche*, 55 So. 2d at 913 (city's findings will not be disturbed in absence of conflicting evidence); *Boschen*, 777 So. 2d at 967 (testimony of expert reaching conflicting conclusions not basis for disrupting local government's decision because the "contrary conclusions were never submitted to the City"). The Appellants did not present any evidence to the contrary at the show cause hearing.

The City's apportionment was a proper exercise of its home rule authority. Burton thoroughly explained the different benefits that accrue to which properties and examined the City's financial information to determine which fire protection costs are allocable to which benefits. Burton, a reputable and experienced consulting firm, conducted an extensive assessment study, worked closely with City staff throughout the process, and generated a thorough report containing his recommendations and conclusions. Burton is an expert in area and, without any evidence to the contrary, the City reasonably relied on Burton's extensive analysis and recommendations. *City of Margate v. King*, 167 So. 2d 852 (Fla. 1964) (a public agency, in arriving at its conclusion, was authorized to rely upon the report and appraisal of the engineer involved in the absence of other evidence that would reflect adversely upon the credibility of the report); *Boschen*, 777 So. 2d at 967.

Because the Appellants have failed to show that the City's apportionment of Tier 1 or Tier 2 costs was arbitrary, the trial court should be affirmed.

IV. EVEN IF THE FACT FINDINGS IDENTIFIED BY THE APPELLANTS ARE UNSUPPORTED BY EVIDENCE, THEY ARE NOT GROUNDS FOR REVERSAL

The Appellants claim that the trial court committed reversible error by making certain "fact findings" in the final judgment that allegedly are not based on competent substantial evidence. (Appellants' Br. 9-16.) The basis of the Appellants' claim is that the Court relied on evidence, a resolution adopted by the City, which the Court did not admit into the record. However, because the statements in the final judgment cited by Appellants address objections raised only by Talan after the record closed, which objections the trial court correctly did not consider, the inclusion of these statements was at most harmless error.

Under the harmless error rule, an error is not reversible where there is no reasonable probability that the judgment would be more favorable for the appellant if the error had not been committed. *E.g.*, *Stecher v. Pomeroy*, 253 So. 2d 421, 422 (Fla. 1971). Here, the challenged fact findings are irrelevant to any argument the Appellants made before the trial court. The Appellants cannot appeal based on arguments they failed to raise below. The fact findings are also harmless error because they did not have an effect on the trial court's decision.

The Appellants argue that fact findings contained in paragraphs 31-33 and 37 of the final judgment "prove the trial court relied on matters which were improperly interjected into the November 27, 2013, hearing and not raised on October 7, 8, or 9, 2013." (Appellants' Br. 12.) The Appellants are correct that evidence closed when the October hearing concluded. And the City agrees that the statements the Appellants identify are unrelated to the matters that they or anyone else raised before evidence closed. The statements solely relate to issues raised in Talan's objection filed almost three weeks after the October hearing. However, the trial court's decision did not "rely" on any matters presented after evidence closed.

Trial court scheduled the November 27 hearing for the very limited purpose of considering Talan's motion to intervene and hearing limited evidence and arguments on Talan's objection. Talan's objection argued that (i) there were errors in the data the City used to calculate structure value for Tier 2 (Supp. App. 24-25); and (ii) the City should not have assigned the Tier 2 rate in $5,000 increments (Supp. App. 23-24).

At the November 27 hearing, the City responded to Talan's objections by offering evidence to show that any errors were cured by resolution. (App. 505-06.) Talan called a witness to testify on the two issues it raised in its objection (App. 571-95), and the City called a witness in response to those narrow issues. (App. 605, 607-44, 660-61.) The Appellants were given an opportunity to call witnesses,

but declined to do so. (App. 606, *see id.* 604.) Two of the Appellants elected to cross examine the City's witness, but did not address Talan's issues. (App. 645-60, 662-63.) Another one of the Appellants elected to present argument, but only to object to the admissibility of the City's resolution. (App. 672-75.) The resolution was not admitted in evidence. (App. 675.) While the trial court allowed the testimony, it ultimately decided not to reopen the record, did not allow Talan to intervene, and did not consider the objections raised by Talan. (Supp. App. 28-32.)

The resolution only was offered to rebut Talan's argument that there were data errors. The Appellants' made an objection to exclude the cure from evidence, but they never argued or offered evidence attempting to show there were any data errors in the first place. Because they failed to argue that there were data errors below, they cannot do so on appeal. *See Eagleman v. Korzeniowski*, 924 So. 2d 855, 859 (Fla. 4th DCA 2006) (argument must have been made by the party seeking review). Even if the Appellants theoretically could raise Talan's arguments (which the trial court properly did not consider) on appeal, they have not. Their brief does not argue that there are errors regarding valuation data.

In any event, there is no evidence in the record to support the arguments that the valuation data is incorrect. The trial court did not admit the evidence Talan offered. Without Talan's evidence, there was no need for the City's evidence of a

cure. The trial court's statements that the City cured any errors had no effect on the outcome of the case. Since the statements did not relate to any argument the Appellants raised in opposition to validation and were not properly before the trial court, the final judgment would not have been more favorable for the Appellants if the findings were not included in the final judgment. Moreover, the errors alleged by Talan were minor and would not be a basis to deny validation. (App. 737-38.) Accordingly, the trial court's inclusion of these findings was at most harmless error.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO CONTINUE THE SHOW CAUSE HEARING

The Appellants moved for a continuance on the second day of the October hearing, arguing they were unable to engage in discovery because the order to show cause was only published 20 days before the hearing. (Appellants' Br. 24; App. 92-107.) They claim that the trial court's refusal to grant a continuance was an abuse of discretion. (Appellants' Br. 24-28.)

The trial court concluded that the Appellants failed to established a sufficient basis for a continuance given the expedited nature of bond validations. (App. 106-07.) "Continuances in bond validation proceedings, are controlled by Chapter 75, Florida Statutes," *Klein v. City of New Smyrna Beach*, 152 So. 2d 466, 470 (Fla. 1963), which is "designed to expedite the disposition of proceedings for the validation of bonds," *State v. Fla. State Tpk. Auth*., 134 So. 2d 12, 15 (Fla. 1961).

See also, e.g., Rianhard v. Port of Palm Beach Dist., 186 So. 2d 503, 505 (Fla. 1966) ("It is the intent of the law that validations be expedited at the earliest time reasonably possible."); *City of Oldsmar v. State*, 790 2d 1042, 1049 (Fla. 2001) ("prompt and expeditious disposition of bond validation proceedings" required by law). Without expedited review, the government's ability to issue bonds (and, therefore, obtain needed revenue) would be held hostage to drawn-out litigation. *Id*. By requiring bond validations to be determined swiftly, Florida law recognizes that the decision to issue bonds belongs entirely to the local government, subject only to the Court's review of three narrow issues, the adjudication of which should cause only minimal delay. See *City of Oldsmar*, 790 So. 2d at 1049-50.

Chapter 75 expressly requires courts to "try and determine" bond validations with "the least possible delay." § 75.07, Fla. Stat. To this end, validations are also subject to a summary procedure. After a validation complaint is filed, the court must issue an order requiring all property owners (and other interested parties) to appear at a time and place to show cause why validation should be denied. § 75.05(1), Fla. Stat. Property owners are given notice by publication of the show cause order in a local newspaper. § 75.06(1), Fla. The first publication only needs to be made "20 days before the date set for hearing." *Id.* The Court has repeatedly upheld this process. *E.g., Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth*., 795 So. 2d 940, 949-50 (Fla. 2001).

In denying the motion for continuance, the trial court expressly relied on the chapter 75's statutory scheme and *Strand v. Escambia County*, in which this Court affirmed denial of a continuance on facts that are nearly identical to this case. In *Strand*, a property owner filed a motion for continuance the day before the bond validation hearing on the basis that he just learned of the hearing and needed time to conduct discovery. 992 So. 2d 150, 154 (Fla. 2008). There, as here, there was no dispute that the county published the show cause order in compliance with section 75.06(1). The property owner attended the hearing and had an opportunity to make oral arguments. He was also allowed to file a post-hearing legal memorandum. Because the statutorily required notice was given and the property owner was afforded a full opportunity to present his arguments, the Court concluded that the trial court did not abuse its discretion in denying the motion for continuance. *Id.*

Although the trial court here expressly relied on *Strand*, the Appellants have not addressed the case in their brief. Like in *Strand*, here, the Appellants were given proper statutory notice, an opportunity to present oral argument at the hearing, and a chance to submit post-hearing memoranda. To the extent the facts of this case are distinguishable from *Strand*, they further support the trial court's decision. The Appellants did not make their motion until the second day of the hearing and they fully participated in ***four days*** of hearing. They were on

constructive notice 20 days before the hearing and the fire assessments were the subject of many public meetings before then. The trial court was not required to give them additional time to engage in discovery. *See Rianhard*, 186 So. 2d at 505 (trial court only heard oral argument from property owners and did not abuse its discretion by denying further hearing to hear testimony). Therefore, the trial court's refusal to grant a continuance was not an abuse of discretion.

VI. THE APPELLANTS WERE NOT DENIED PROCEDURAL DUE PROCESS

The Appellants claim that they were denied due process because the City did not fully comply with the notice requirements set forth in the Assessment Ordinance. (Appellants' Br. 17-23.) There is no dispute that the City gave affected property owners two separate types of notice of their right to object to adoption of the final assessment resolution and imposition of the fire assessments: notice by publication in a local newspaper and notice by mail to each property owner in the City. The Appellants argue that each type of notice the City gave failed to inform them of their right to object to the final resolution in the ***precise*** manner required by the Assessment Ordinance.

However, both notices fully complied with the Assessment Ordinance. Even if the Appellants are correct that the notices did not exactly comply with the Assessment Ordinance, they were afforded adequate notice and opportunity to be heard. Therefore, their procedural due process rights were not violated.

Procedural due process requires both fair notice and a real opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc*., 795 So. 2d at 948. "The notice must be of such nature as ***reasonably*** to convey the required information." *Id.* The due process question is not whether the City deviated in any degree from the procedures outlined in in the Assessment Ordinance, but whether any deviation was so substantial as to deny the Appellants fair notice and opportunity to be heard. *Rinker Materials Corp. v. Town of Lake Park*, 494 So. 2d 1123, 1125 (Fla. 1986); *Escott v. City of Miami*, 144 So. 397, 399 (Fla. 1932) (proceedings that substantially complied with the provisions of the city charter did not deprive property owner of due process); s*ee Moody v. City of Vero Beach*, 203 So. 2d 345, 346 (Fla. 4th DCA 1967) ("Irregularities...in administering specific procedures involving special assessments do not render such procedures void if constitutional guarantees are not denied.").

A. <u>The published notice gave the Appellants fair notice and opportunity to be heard on objections to the final assessment</u>

Under the Assessment Ordinance, notice of the hearing on the final assessment resolution must be published in the local newspaper at least 20 days before the hearing. (App. 800, Ord. § 8-42(A)). The notice must, among other things, include the procedure for objection set forth in section 8-44 of the Assessment Ordinance. (App. 800, Ord. § 8-42(B)(6)). There are two subsections in section 8-44 that mention objections:

1. Subsection (A) states: "At the public hearing...the City Council shall receive any oral or written objections of interested persons." (App. 801.)
2. Subsection (C) states: "All written objections to the Final Assessment Resolution shall be filed with the Assessment coordinator at or before the time...of such hearing." (App. 801.)

The following language was included in the notice published by the City 20 days before the hearing:

> A public hearing will be held at 4:30 PM on August 26, 2013 in City Council Chambers of City Hall, 1015 Cultural Park Boulevard, Cape Coral, Florida, to receive public comments on the proposed special assessments. ***All affected property owners have a right to appear at the hearing and to file written objections with the City within twenty days of this notice***.

(App. 833 (emphasis added)). The Appellants argue that this language fails to comply with the Assessment Ordinance because it does not tell property owners to send written objection to the Assessment Coordinator.

In doing so, the Appellants completely ignore subsection (A), and read subsection (C) as form language that must be used in the published notice. But section 8-44 does not require the published notice to contain any precise language whatsoever. Nor does it require the published notice to specifically mention the Assessment Coordinator. The City's interpretation of its own assessment ordinance is entitled to deference. *Donovan v. Okaloosa County*, 82 So. 3d 801, 807 (Fla. 2012) (county's interpretation of its assessment ordinance as allowing

initial and final assessment resolution to be adopted in same public meeting entitled to deference; rejecting property owner's argument that ordinance required separate meeting for each resolution.) The City's interpretation that the language in the published notice complied with section 8-44 is reasonable and should not be disturbed.

But even assuming the published notice failed to comply with section 8-44, the Appellants were given adequate notice of their right to object to the final assessment resolution either in writing or at the hearing. That is all due process requires.

The Appellants also argue that the City did not designate an Assessment Coordinator before the October hearing. First, there is no record evidence that the City failed to designate an Assessment Coordinator. While the Appellants cite the City Manager's testimony that he did not know which persons in the finance department was responsible for performing those duties, that is not evidence that those duties had not been assigned. Second, even assuming the City did not assign the Assessment Coordinator before the October hearing, the Appellants have not explained how their due process rights were denied. Because they have failed to adequately present this argument in their initial brief, it is waived.

The Assessment Ordinance refers to an "Assessment Coordinator," which is defined as the person or entity designated by the City Manager to be responsible

for coordinating the Fire Protection Assessments. The primary functions of the Assessment Coordinator are to facilitate the mailing and publication of notice of the public hearing to consider imposition of the Fire Protection Assessments (as provided in sections 8-42 and 8-43 of the Assessment Ordinance), and to prepare or direct the preparation of the Assessment Roll (as provided in section 8-41).

As stated above, the publisher's affidavit of mailing the notice of the hearing on the final assessment resolution demonstrates compliance with the notice requirements of the Assessment Ordinance (Supp. App. 33-39.) The City engaged Burton for purposes of preparing the assessment study and the assessment roll. The City has therefore established that the requirements of the Assessment Ordinance concerning notice of public hearing and preparation of the assessment roll have been followed. The City was entitled to rely on the report and the expertise of consultants engaged for the project, including preparation of the assessment roll. *Boschen v. City of Clearwater*, 777 So. 2d 958, 967 (Fla. 2001).

It is clear from the minutes of public meetings, the transcript of the August 26 hearing and the various presentations by City staff that the City Manager acted in the facilitative role contemplated by the Assessment Ordinance. There was no deprivation of due process by virtue of any alleged infirmity regarding formal designation of an Assessment Coordinator, and no such formal designation is required under the Assessment Ordinance. The transcript of the hearing on the

final assessment resolution reflects that that some 200 persons called the City and obtained additional information in response to the City's mailed and published notices prior to the hearing. The City provided all process required by the Assessment Ordinance and procedural due process.

B. The mailed notice gave the Appellants fair notice and opportunity to be heard on objections to the final assessment

Section 8-43 of Assessment Ordinance states that the mailed notice must contain "a statement that all affected Owners have a right to appear at the hearing and to file written objections with the City Council within 20 days of the notice."

The notice that was actually mail contained the same language as the published notice:

> A public hearing will be held at 4:30 PM on August 26, 2013 in City Council Chambers of City Hall, 1015 Cultural Park Boulevard, Cape Coral, Florida, to receive public comments on the proposed special assessments. ***All affected property owners have a right to appear at the hearing and to file written objections with the City within twenty days of this notice***.

(App. 835 (emphasis added)). The Appellants claim that the mailed notice fails to comply with section 8-43 of the Assessment Ordinance because the mailed notice stated that written objections could be filed with the "City," whereas section 8-43 states "City Council." Again, nothing in section 8-43 requires the City to use any particular language in the mailed notice. Even if the use of "City" instead of "City Council" can be considered a noncompliance with the Assessment Ordinance, it

still gave the Appellants adequate notice and a meaningful opportunity to be heard on any objections to the fire assessment.

The Appellants did not offer any evidence at the hearing that they were somehow unclear as to their rights to object in writing or in person at the hearing. They did not offer evidence that would suggest that they attempted to object, but were unable to do so. Seventeen property owners objected to the final assessment resolution (App. 1106-46). The Appellants were given ample notice and opportunity to be heard, and their due process rights were not denied.

VII. THE APPELLANTS HAVE ABANDONED THE RIGHT TO CHALLENGE THE ORDER DENYING THEIR MOTION FOR REHEARING

The Appellants' notice of appeal includes the trial court's order denying their motion for rehearing (App. 788), and the Appellants' brief states that the "appeal also involves the denial of the motion for rehearing." However, their initial brief does not include any argument for reversal of that order. Therefore, they have abandoned the right to challenge the denial of rehearing on appeal.

CONCLUSION

The Appellants are not entitled to reversal on their substantive or procedural arguments. By failing to challenge the trial court's conclusion that the City validly imposed the fire assessments under its home rule powers, they have waived the issue on appeal. Since the Court will not address issues the Appellants have

waived, the final judgment cannot be reversed on the substantive validity of the assessments. But assuming the issue was properly raised, the assessments are valid because the City's legislative findings that the fire assessments were fairly apportioned were not arbitrary. In making its legislative determinations, the City reasonably relied on the analysis and recommendations of its consultant. In light of the information before the City when it imposed the fire assessments, and the lack of any evidence showing that it was somehow unreasonable for the City to rely on that information, the Appellants have failed to meet their burden of showing that the City's legislative findings are arbitrary.

The Appellants' procedural arguments should also be rejected. First, the final judgment's reference to evidence that was not admitted was harmless error because it had absolutely no influence on the trial court's decision. Second, because interested persons were given proper statutory notice under chapter 75 and given a full opportunity to present their objections at four days of hearing and in post-hearing memoranda, the trial court did not abuse its discretion in denying a continuance. Finally, the Appellants have not shown that the published or mailed notice of the right to object to the final assessment ordinance failed to comply with the Assessment Ordinance. Even if there were minor defects, the Appellants were still afforded ample notice and opportunity to be heard.

Because the Appellants have failed to establish reversible error, the trial court's final judgment should be affirmed in its entirety.

Respectfully submitted on April 14, 2014.

/s/Christopher B. Roe
Christopher B. Roe
Florida Bar No. 536105
Email: croe@bmolaw.com
Elizabeth W. Neiberger
Fla. Bar No. 0070102
Email: eneiberger@bmolaw.com
Bryant Miller Olive PA
101 North Monroe Street, Suite 900
Tallahassee, Florida 32301
Telephone (850) 222-8611
Facsimile (850) 222-8969
Susan H. Churuti
Florida Bar No. 284076
Email: schuruti@bmolaw.com
Bryant Miller Olive PA
One Tampa City Center, Suite 2700
Tampa, FL 33602
Telephone: (813) 273-6677
Facsimile: (813) 223-2705

Dolores Menendez
Florida Bar No. 96554
1015 Cultural Park Boulevard
Cape Coral, Florida 33915-0027
Telephone: (239) 574-0408
Facsimile: (239) 574-0404
Email: dmenendez@capecoral.net

Attorneys for Appellee City of Cape Coral

CERTIFICATE OF SERVICE

I certify that on April 14, 2014, a true and correct copy of the foregoing was served on the following by email:

Anthony W. Kunasek
Assistant State Attorney
State Attorney's Office
2000 Main Street. 6th Floor
Fort Myers, Florida 33901
akunasek@sao.cjis20.org

Scott Morris
Morris Law Firm, P.A.
514 Southwest 3rd Street
Cape Coral, Florida 33991
scott@morrislawfirm.org
Attorney for Appellants

Mark G. Lawson
James C. Dinkins
Mark G. Lawson, P.A.
Post Office Box 14043
Tallahassee, FL 32317
mlawson@markglawson.com
mlawson@gmail.com
jdinkins@markglawson.com
james.c.dinkins@gmail.com

Major B. Harding
Steven M. Hogan
Ausley & McMullen, P.A.
123 South Calhoun Street
Tallahassee, FL 32301
mharding@ausley.com
shogan@ausley.com
Attorneys for Amicus Curiae, Government Services Group, Inc.

Larry A. Barton
lbperf@juno.com

John Cataldi
jcataldi@comcast.net

/s/Christopher B. Roe
Christopher B. Roe

CERTIFICATE OF COMPLIANCE

I certify that the foregoing was word-processed using Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Christopher B. Roe
Christopher B. Roe