IN THE SUPREME COURT OF FLORIDA
CASE NO: SC14-350

Bond Validation Appeal from a Final Judgment
of the Twentieth Judicial Circuit,
Lee County, Florida

SCOTT MORRIS, JOHN SULLIVAN, LARRY BARTON, RICHARD KUDLA AND WILLIAM DEILE,

Appellants,

v.

CITY OF CAPE CORAL,

Appellee.

APPELLANTS' INITIAL BRIEF

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INTRODUCTION

This is an appeal from a final judgment in a bond validation proceeding entered by the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida on December 11, 2013, and the subsequent denial of the Appellants' Motion for Rehearing on January 10, 2014.

Rather than utilize the full party names, Defendants below and Appellants here are referred to as the "Property Owners." Rather than utilize the full party name, the Plaintiff below and Appellee here will be referred to as "City Council."

The Appendix will be referred to by the symbol "APP" followed by the page number of the appended document, e.g. (APP 0001.)

STATEMENT OF JURISDICTION

Under Florida Statutes section 75.01, a Circuit Court has jurisdiction to determine the validity of bonds, and all matters connected therewith. Pursuant to Florida Rule of Appellate Procedure 9.030(a)(1)(B)(i), this Court has jurisdiction over final orders entered in proceedings for the validation of bonds where provided by general law. This Court has mandatory jurisdiction to hear appeals from final judgments entered in a proceeding for the validation of bonds.

The Florida Constitution at Article V, section 3(b)(2) and Florida Statutes section 75.08 provides that either party may appeal the trial court's decision on the complaint for validation.

STATEMENT OF THE CASE AND THE FACTS

This appeal arises from a final judgment granting City Council's prayer to validate its Fire Protection Assessment Revenue Note, Series 2013, in a principal amount not to exceed $1,500,000. (APP 0878-0900.) The notes are to fund in part the acquisition of certain capital equipment for the fire department. The appeal also involves the denial of the motion for rehearing. The Property Owners file this appeal requesting remand and/or reversal of the final judgment.

City Council first considered the idea of a fire assessment in 2009 as part of a report prepared by Burton & Associates, at which time it was decided by City Council not to proceed. On April 3, 2013, City Council approved Administrative Resolution 2013-13 to engage the services of Burton & Associates to update the report from 2009. (APP 0789-0790.)

City Council held a workshop on June 3, 2013, wherein the initial results of the updated Burton & Associates report dated May 24, 2013, were received. After the workshop the City Manager received the final study dated June 6, 2013. The final study was approved by City Council on June 10, 2013. [1] In addition to approval of the final study, City Council directed the City Manager to bring forth

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[1]A final revised study was issued by Burton & Associates on August 22, 2013, there is no substantial competent evidence in the record to support the findings which City Council made concerning the final revised study at the August 26, 2013, meeting. (APP 1056-1204.)

an enabling ordinance for the fire assessment and an initial assessment resolution. (APP 0789-0790.)

City Council passed Ordinance 41-13, the Fire Protection Assessment Ordinance on July 15, 2013. Ordinance 41-13 described in detail the procedural due process rights as created by City Council for the Property Owners concerning the implementation of the Fire Protection Assessment. (APP 0791-0814.)

City Council passed Resolution 30-13 the Fire Protection Assessment Initial Assessment Resolution on July 29, 2013. (APP 0815-0836.)

City Council passed Resolution 32-13 the Fire Protection Final Assessment Resolution on August 26, 2013. (APP 0837-0863.)

City Council passed Note Ordinance 47-13 on August 26, 2013. (APP 0864-0877.)

City Council's Complaint for Validation was filed in the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida on August 28, 2013. (APP 0878-0900, without attachments.)

The Circuit Court issued an Order to Show Cause on September 11, 2013, for a one hour hearing on October 7, 2013. (APP 0901-0904.)

The one-hour show cause hearing commenced on October 7, 2013, and ended on October 9, 2013. (APP 0001-0489.) (APP 0901-0904.)

Based on Talan Corporation's filings after the conclusion of the show cause hearing, the trial court allowed an additional hearing on November 27, 2013, which was described as both evidentiary and non-evidentiary (APP 0490-0707.) [2]

A final judgment was entered by the trial court on December 11, 2013. (APP 0708-0745.)

A Motion for Rehearing was timely filed on December 23, 2013. The Motion directed the trial court's attention to the final judgment's reliance on facts that were not in evidence. (APP 0746-0786.)

The Motion for Rehearing was denied without hearing on January 10, 2014. This timely appeal followed. (APP 0787.)

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[2] The trial court issued its own order styled "Order Setting Evidentiary Hearing" describing the November 27, 2013, hearing regarding Talan's filings for the stated purpose to allow "limited evidence and arguments to Talan's apportionment methodology objection". (APP 1018-1019.) Yet at the hearing, the trial court indicated it was not receiving additional evidence, and actively precluded parties from introducing new evidence. (APP 0499,0500,0526.) In the final judgment the trial court relied on matters beyond the scope of Talan Corporation's participation in the action which were argued, but not introduced into evidence, on November 27, 2013. (APP 0708-0745.)

SUMMARY OF THE ARGUMENT

Property Owners contend the trial court committed reversible error in more than one area, any of which demand either remand or reversal of the trial court's final judgment.

The trial court committed reversible error by setting forth findings in the final judgment which are not supported by substantial competent evidence. It is abundantly clear that the trial court considered Resolution 56-13, in crafting the final judgment. Resolution 56-13 was passed by City Council on November 25, 2013, only two days before the November 27, 2013, hearing on Talan's motion.

Resolution 56-13 was not introduced as evidence at the November 27, 2013, hearing.[3] City Council's attorney tried to discuss Resolution 56-13 at the November 27, 2013, hearing. Since Resolution 56-13 was not plead in the original complaint, there was a concern that the matter would be tried by implied consent if not objected to.

Scott Morris objected to new matters being brought to the trial court's attention which had not been framed by the pleadings in the case since there had

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[3]Although not introduced as evidence in the case, Resolution 56-13 is part of the record by virtue of a Notice of Filing by City Council's attorney on November 26, 2013. (APP 1020-1028.) It is included as part of the appendix to prove to this Court the trial court relied on it in crafting the final judgment thus committing reversible error.

been no request to amend the original complaint. He was granted a continuing objection to any discussion concerning Resolution 56-13 Various portions of the transcript establish the trial court unilaterally created utter confusion as to the scope and nature of the November 27, 2013, hearing. Was it evidentiary or not? (APP 0001-0489.) (APP 0490-0707.)

The trial court failed to recognize the Property Owners were denied important procedural rights of due process as guaranteed by the United States Constitution, the Florida Constitution and the Fire Protection Assessment Ordinance 41-13 in several areas.

The first due process issue is the failure of the trial court to recognize that the Property Owners did not receive proper notice by mail or by publication of their rights of procedural due process as set forth in Ordinance 41-13.

The second due process issue is the failure of the City Manager to appoint an Assessment Coordinator required by Ordinance 41-13, prior to any court action being filed. The Assessment Coordinator is an important and necessary position in order for the Property Owners to be able to exercise their procedural rights of due process as established by City Council, in Ordinance 41-13. (APP 0791-0814.)

The third due process issue arises as a result of the trial court's denial of the ore tenus motion for continuance made by the Property Owners on October 8,

2013. A review of the transcript of the proceedings shows that the trial court was apparently confused from the inception about the proceedings and the exact nature of what should take place procedurally during the hearing. (APP 0001-0489.)

Additionally, Property Owners contend the fire assessment methodology, developed by Burton & Associates and adopted by City Council is arbitrary in construct and application, is not supported by substantial competent evidence, but instead is based on bald conclusions devoid of any record proof which will satisfy the two prong test for a special assessment. (APP 0905-0951).

The Property Owners contend that the two tier fire assessment methodology is not fairly apportioned between the various parcels. The methodology adopted by City Council is in fact arbitrary in its application.

Finally, Property Owners contend that Tier 2 of the fire assessment methodology adopted by City Council is actually a property tax in disguise as it relies on ad valorem valuation[4] without any substantial competent evidence that the special benefit enhances the value of the structure in a logical relationship to the assessment or that the numbers relied upon are accurate.

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[4]Structure value is defined in Resolution 32-13 as ". . . the sum of the building cost value and the building extra feature value associated with each Tax Parcel in the City as determined by the City through reference to the real property database maintained by the Property Appraiser.
(Emphasis added.) (APP 0842.)

ARGUMENT ISSUE I

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INCLUDING FINDINGS OF FACT IN THE FINAL JUDGMENT WHICH ARE NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

STANDARD OF REVIEW ISSUE I

No less than five paragraphs in the final judgment contain findings of fact which are not supported by substantial competent evidence. This Court reviews the trial court's finding of fact for substantial competent evidence and its conclusions of law, de novo. *Strand v. Escambia County, Florida*, 992 So. 2d 150 (Fla. 2008). The findings will be erroneous if not based on substantial evidence *Holland v. Gross,* 89 So. 2d 255 (Fla. 1956).

This issue concerns the hearing which was held on November 27, 2013, involving Talan Corporation's Motion to Intervene and other procedural motions. Although not introduced as evidence, Resolution 56-13 is part of the record in this case. (APP 1020-1028.)

At the commencement of the hearing on November 27, 2013, the trial court instructed all parties of the scope and purpose of the hearing. The trial court stated the following:

> . . . Again my intent for purposes of today, having previously closed out the evidence, was to hear any additional argument based upon the evidence of record and not to reopen

> everything and drag this thing on for another month, two months, three months, et cetera. We have to have some finality to it based upon the statutory scheme that says we need to proceed forthwith. So that's my intention here today. In regards to Talan's request as intervenor to at least present some argument, what's your request in that regard, sir? (Emphasis added.) (APP 0496.)

This interjected confusion from the very beginning

At the start of the hearing, City Council's counsel, Ms. Churuti attempted to interject new evidence into the hearing based on the following:

> And, Your Honor, in the interest of judicial economy, we'd like to update you on further legislative activity that has occurred with regard to this case. (APP 0497.)

Property Owner Scott Morris, objected as follows:

> Your Honor, I need to pose an objection to that issue particularly because they're going to get into something that is not framed in the original pleadings. They're going to get into a new resolution; and just for the record, I need to timely make an objection according to case law that I won't have implied a consent to that issue be tried. There is no amendment before you at this point, but the issue they're raising has not been raised in the original complaint. (APP 0497.)

The trial court agreed and sustained the objection to new evidence by the following statement:

> We're not opening the matter for purposes of accepting additional evidence. That's already come and gone. (Emphasis added) (APP 0499-0500.)

Counsel for Talan Corporation stated, " I thought this was an evidentiary hearing." To which the trial court responded, "Well, and it was noticed in the event that you needed to present evidence with respect to presenting some argument," [5] The trial court created utter confusion in the proceedings. How can you present evidence to support argument?

City Council's counsel, Ms. Churuti again tried to interject new evidence into the proceedings with the following statement:

> . . . Your Honor, in the interest of judicial economy, I think we can cut off a lot of these arguments because there has been further legislation that's occurred by the legislative body. The city commission, the council, and the City of Cape Coral would like to advise you of that. (APP 0505-0506.)

Property Owner, Scott Morris immediately responded "Again each time that comes up I must voice an objection." (APP 0506.) In response the Court stated, "I will give you a standing objection to that Mr. Morris." (APP 0506.)

Talan's attorney then began to use some demonstrative aids which referred to the new resolution recently passed. In order to make sure the objection had been made clear Scott Morris stated the following:

> So I don't have to keep popping up every single time, Scott Morris, for the record. Just so maybe you can allow me to have a standing objection. I believe some

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[5] This exchange is found at. (APP 0500.)

> of his demonstrative aids include talk about Resolution 56.13, which was just passed last Monday. If I can have a standing objection to that . . . (APP 0508.)

The Court responded " I've already indicated you have a standing objection. Thank you sir." (APP 0508.)

A little later in the hearing on November 27, 2013, the trial court again stated, " At the present time, I'm not reopening the evidence. That includes any revisions to attempt to cure defects or deficiencies." (Emphasis added) (APP 0526.) These statements by the trial court limited the scope of the hearing on November 27, 2013, to argument only and not for the purpose of accepting any additional evidence which was reinforced by granting Scott Morris' objection.

A close examination of the paragraphs in the final judgment that are labeled thirty-first, thirty-second, thirty-third and thirty-seventh 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. Compare final judgment, (APP 0737-0741.) to transcript from October 2013, (APP 0001-0489.) and transcript from November 27, 2013. (APP 0490-0707.)

The thirty-first paragraph of the final judgment states in part that during the proceedings the City identified an issue regarding the valuation data set forth in the spreadsheet obtained from the property appraiser in July 2013, for purposes of

preparing the assessment roll. (APP 0737-0738.) There is no substantial competent evidence in this case to prove this finding. The only discussion of this valuation data occurred during the hearing held on November 27, 2013, which was not evidentiary in nature, (APP 0490-0707.) compared to the transcript of October 2013. (APP 0001-0489.) [6]

The thirty-second paragraph of the final judgment states in part that "Sporadic errors in data do not singularly constitute a basis upon which this Court can invalidate the Note or assessment process..." (APP 0738.) The sporadic errors were not addressed until November 27, 2013, during a hearing that was not evidentiary in nature, (APP 0490-0707.) compared to the transcript of October 2013. (APP 0001-0489.)

The thirty-third paragraph of the final judgment states in part that the City has obtained corrected data from the Property Appraiser and has undertaken corrective measures. The trial court made a specific finding as follows:

> . . . "Such testimony further demonstrated that the variance in valuation data between the corrected July 2013 data file and a similar file obtained in November 2013 represented approximately 0.21% of all Structure Value in the City and was, therefore, a de minimus variation that was not attributable to errors in

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[6]Resolution 56-13, Section 3, subparagraphs (D) and (E) appear to contain almost the exact language used by the trial court in the thirty-first paragraph. This resolution was passed on November 25, 2013, as a direct result of Talan's record filings pointing out the many mistakes in the data. (APP 1020-1028.)

preparation of the Assessment Roll or the data files obtained by the City from the Property Appraiser. . . (APP 0738.)

The thirty-third paragraph clearly considers errors and the correction of errors which was set forth in testimony by Mr. Michael Burton on November 27, 2013, and which was contained in the language of Resolution 56-13. (APP 0738-0739.) (APP 0607-0663.)

The thirty-seventh paragraph of the final judgment states in part that the methodology makes use of perpetual ranges of $5,000.00 increments and rounding conventions. The trial court states further that the uncontroverted testimony offered during this proceeding demonstrated that the use of such ranges is a well established and common practice in assessment apportionment methodology. (APP 0740-0741.) This testimony concerning the rounding methodology was elicited on November 27, 2013. (APP 0636-0663.)

Property Owners surmise the trial court for the most part adopted verbatim the proposed final judgment submitted by City Council's attorney. Without the benefit of the transcript of the entire proceeding before it, the court had no way to really ascertain if the testimony came during the October evidentiary hearing or the non-evidentiary hearing on November 27, 2013. As a result, it is somewhat understandable why such substantial errors were made. However, the errors are not harmless in nature and justify reversal. Particularly since the confusion in the

proceedings was caused by the trial court and not any of the parties.

Blacks Law Dictionary, Fifth Edition, 1979, defines "finding of fact" in part as follows:

> . . . A conclusion by way of reasonable inference from the evidence.

The Florida Supreme Court was concerned with findings of fact by the trial court and whether or not there was substantial competent evidence to support a finding, in the case of *Holland v. Gross,* 89 So. 2d 255 (Fla. 1956).

The appropriate standard of review was explained by the Court at page 258 as follows:

> . . . A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. . . When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantive evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, the decision is "clearly erroneous" and the appellate will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety.

The Second District Court of Appeal in the case of *Savage v. State of*

Florida, 120 So. 3d 619 (Fla. 2nd DCA 2013), set forth an excellent description of the competent and substantial evidence standard which can be applied to the case at bar. The court at page 621 stated the following: [7]

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota, or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definitive probative value (that is, "tending to prove") as to each essential element of the offense charged.

The trial court in the case at bar has committed reversible error by making findings in the final judgment that were not based on any evidence, let alone based on substantial competent evidence. The final judgment should be reversed and remanded for further evidentiary proceedings.

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[7] Actually relying upon the Florida Supreme Court's definition in the case of *De Groot v. Sheffield,* 95 So. 2d 912 (Fla. 1957).

ARGUMENT ISSUE II

II. THE TRIAL COURT'S FINDING THAT CITY COUNCIL COMPLIED WITH PROCEDURAL DUE PROCESS IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AND IS REVERSIBLE ERROR.

STANDARD OF REVIEW ISSUE II

This issue concerns City Council's failure to follow its own procedure for implementation of the Fire Protection Assessment. This Court reviews the trial court's finding of fact for substantial competent evidence and its conclusions of law, de novo. *Strand v. Escambia County, Florida*, 992 So. 2d 150 (Fla. 2008). The findings will be erroneous if not based on substantial evidence *Holland v. Gross,* 89 So. 2d 255 (Fla. 1956).

The Court in *Massey v. Charlotte County, Florida,* 842 So. 2d 142, 146 (Fla. 2nd DCA 2003), described procedural due process in part as follows:

> Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests... Procedural due process requires both fair notice and a real opportunity to be heard "at a meaningful time and in a meaningful manner"... The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding... property rights are particularly sensitive where residential property is at stake... (Emphasis added.)

Keys Citizens For Responsible Government, Inc., v. Florida Keys Aqueduct

Authority. 795 So. 2d 940, 948 (Fla. 2001), stated the following concerning due process:

> . . . The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. . . "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantial rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard. . . the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." Further, the opportunity to be heard must be "at a meaningful time and in a meaningful manner". . .

The initial fire protection assessment ordinance was enacted by City Council on July 15, 2013. Ordinance 41-13 set forth the law as it related to the fire protection assessment and its implementation. (APP 0791-0814.) Several portions of the ordinance must be examined for Property Owners to illustrate that the denial of due process has occurred.

§ 8-35 Definitions, states that an "Assessment Coordinator" (Emphasis added.) means the person or entity designated by the City Manager to be responsible for coordinating the Fire Protection Assessments. (APP 00794.)

One would anticipate that this crucial position would have been filled at the

time the ordinance was passed or immediately thereafter, particularly since the administration had known for months that it was pursuing a fire protection assessment. The Assessment Coordinator is the point person for proper administration of the entire fire assessment program from the notices, to handling objections, to preparation of the roll, to billing and collection, to appeals of improper assessments. The position is crucial to handle due process issues.

§ 8-40 of the ordinance at subsection (6) states the Assessment Coordinator will "(a) prepare the initial Assessment Roll, as required by § 8-41 hereof, (b) publish the notice required by § 8-42 hereof, and (c) mail the notice required by § 8-43 hereof using information then available from the Tax Roll." (APP 0799.)

§ 8-42 (A) of the ordinance requires the Assessment Coordinator to publish or direct the publication of a notice regarding the fire protection assessment. § 8-42 (B) states that the published notice shall conform to the requirements of the Uniform Assessment Collection Act and shall include "(4) the procedure for objecting provided in § 8-44 hereof." (APP 0800.)

§ 8-43 (A) of the ordinance requires the Assessment Coordinator to mail or direct to be mailed a notice to property owners of the proposed fire protection assessment. § 8-43 (B) states the notice shall contain "(B) (7) 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. . . " (Emphasis added.) (APP 0800-0801.)

The ordinance at § 8-44 (C) states in part the following:

> All written objections to the Final Assessment Resolution shall be filed with the Assessment Coordinator at or before the time or adjourned time of such hearing. . . (Emphasis added.) (APP 0801.)

It is a fundamental concept in Florida Law that, where a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and obvious meaning. *Florida Department of Revenue v. New Sea Escape Cruises, LTD.,* 894 So. 2d 954 (Fla. 2005).

The first denial of the Property Owners' rights of due process occurred concerning the notice of publication attached to the fire protection initial assessment resolution. (APP 0833-0834.) The published notice states, in paragraph two, that "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." (Emphasis added.) The published notice, introduced as evidence, does not comply with the mandate of § 8-42 of the ordinance which required written objections to be filed in accordance with § 8-44 of the ordinance, which references the Assessment Coordinator, as required by § 8-44 (C). (APP 0800-0801.) Again, a fundamental concept in Florida Law that where a statute is clear and unambiguous and conveys

a clear and definite meaning, the statute must be given its plain and obvious meaning. The failure to follow the published notice requirement is a failure to follow the plain meaning of the ordinance. *Florida Department of Revenue v. New Sea Escape Cruises, LTD.,* 894 So. 2d 954 (Fla. 2005).

The second denial of the Property Owners' rights of due process concerns the notice by mail, attached to the fire protection initial assessment resolution. (APP 0835-0836.) The notice, does not contain the language mandated by § 8-43 of the ordinance, which required objections to be filed with Cape Coral, not the City. (APP 0800-0801.) The notice, contains the same language that was in the notice of publication, and neither complies with the requirements § 8-42, § 8-43, or § 8-44 of the ordinance. (APP 0799-0802.) The failure to follow the mailed notice requirements is a failure to follow the plain meaning of the ordinance. *Florida Department of Revenue v. New Sea Escape Cruises, LTD.,* 894 So. 2d 954 (Fla. 2005).

The third denial of the Property Owners' rights of due process concerns the failure to appoint the Assessment Coordinator prior to the Show Cause hearing in October 2013. The following exchange proves the point:

> Mr. Deile: Okay, in the documents that establish this assessment, it talks about a position called the assessment coordinator. Is this a full-time or a part time job; do you know?

Mr. Szerlag: Frankly, I'm not aware of a position called assessment coordinator in the City of Cape Coral. I think that would refer to someone that's currently in - - within the finance department that would be the point person for collection of this assessment.

Mr. Deile: In the resolution, it says that the assessment coordinator, using his good judgment, has authority to add people to the exempt list, are you aware of that?

Mr. Szerlag: Yes.

Mr. Deile: What guidelines have you been, will be given to this assessment coordinator?

Mr. Szerlag: I would defer that question to our bond counsel as they drafted the resolution. (APP 0398.)

This evidence was never controverted by City Council at the hearing, yet the trial court ignored the evidence when it made a finding, in the final judgment, in paragraphs numbered thirty-ninth and forty-fourth, without substantial competent evidence to support the findings.

Thus, the question arises as to whether the administration, intentionally, made this process misleading by failure to follow City Council's directives or whether it was, simply, negligent in performance of its mandatory duties. There is no substantial competent evidence to support the findings of the trial court holding that the Property Owners received proper notice when in fact they received

conflicting notices.

The denial of the Property Owners' rights of due process was before the trial court at two different times. First, the court stated it would consider all arguments raised in legal memorandums so long as they were directed to the evidence in the case.[8] Property Owner Scott Morris's memorandum in opposition to the complaint for validation raised the matter before the trial court. (APP 0952-1017.) The matter was also raised in the Appellants' Motion for Rehearing. (APP 0746-0786.)

Property Owners contend that even if this Court would decide that the matter was not properly raised in the trial court, that the matter is one of fundamental error and can be addressed by this Court for the first time, on appeal because it goes to the very foundation of the City Council's cause of action. In order for the bond validation process to be a success, City Council must prove it complied with all the constitutional requirements of due process. Proper adherence to due process requirements is a fundamental requirement for the City Council's to be successful in the cause of action. *Universal Insurance Company of North America v. Warfel,* 82 So. 3d 47 (Fla. 2012); *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970).

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[8]The trial court indicated it would consider all arguments based on evidence in the record. (APP 0484-0485.)

ARGUMENT ISSUE III

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS DENIAL OF THE PROPERTY OWNERS' ORE TENUS MOTION FOR CONTINUANCE.

STANDARD OF REVIEW ISSUE III

The granting or denial of a motion for continuance is clearly a matter that is within the discretion of the trial judge and should not be overturned unless an abuse of discretion can be established by the complaining party. *Strand v. Escambia County, Florida*, 992 So. 2d 150 (Fla. 2008).

On the morning of October 8, 2013, Property Owner Scott Morris made an ore tenus motion for continuance which was joined in by the other Property Owners. The purpose of the motion was to obtain a continuance so that discovery could be obtained, which had not occurred because of the very short time period between the Order to Show Cause and the actual hearing. (APP. 0092-0106.)

As evidenced by the Order to Show Cause, the hearing had only been scheduled for period of one hour. (APP 0901-0904.) Furthermore, there is no representation in any of the paperwork filed in the record, that the date and time of the hearing was coordinated with any of the Property Owners who had entered an appearance in the case.

At the commencement of the hearing the trial court stated " Given the number of defendants, there will be a three-minute time limitation. Please do not

simply repeat what others have already said if you wish to speak." Absolutely no direction was given by the trial court as to whether or not evidence would be admitted, if witnesses could be presented or if cross examination would be allowed. The only parameters the trial court established early on was that the Property Owners could only speak for three minutes each. (APP 0006.)

The bond validation hearing was a first for the Property Owners and also appeared to be a first for the trial court as there seemed to be confusion regarding the exact procedure to utilize. Property Owners tried to make the argument to the trial court that they had been denied the ability to engage in discovery, the ability to obtain any substantial competent evidence of their own to present to the court to show cause why the City Council's complaint should not be granted.

Counsel for City Council stated the following concerning the request for a continuance:

> In this case, the parties received a notice of bond validation as required by Florida law, which is more notice than the 20-day published notice required by Section 75.06. So, generally speaking, in a bond validation case, Your Honor, we do anticipate that the discovery will be taken in an expedited fashion.
>
> Generally, the circuit judges with whom I have been dealing in bond validation cases keep the trial date for the bond validation the same and have a case management order ordering the discovery to take place prior to trial. (Emphasis

added.) (APP 0096-0097.)

The trial court denied the motion for continuance, apparently not because it was untimely, but only upon the trial court's, interpretation that the bond validation statute does not contemplate a discovery process, even though City Council's attorney admitted that it was part of the normal process. After its denial of the motion for continuance, the Court apparently ignored its three minute time limit.

The trial court abused its discretion in not granting the motion for continuance. There was no argument presented that granting the motion would be prejudicial to City Council. There was substantial argument presented that the Property Owners would be greatly prejudiced by denial of the motion. Property Owners asked the Court to consider the following as examples of the severity of the prejudice to they would suffer if the trial court denied their motion for continuance:

1. The published notice for the hearing indicated it would be for one hour but eventually continued for four days, forcing the Property Owners to scramble, as best they could, for, those four days of hearings;

2. Property Owners were given no opportunity to depose any persons involved with the fire assessment including Mr. Burton, the City Manager, the City Attorney, the Business Manager, the Finance Director, the City Clerk, the Fire Chief, members of City Council or individuals with the Lee County Property

Appraiser's office.

3. Property Owners were given no chance to conduct document discovery. The State Attorney [9] indicated that he received the documents, however no documents were provided to any of the Property Owners, prior to the hearing. Property Owners had no chance to examine any exhibits before or during trial.

4. Property Owners were given no opportunity to retain an expert witness for examination of the Burton & Associates' report and the report's conclusions of "special benefit" to the burdened properties.

5. No case management conference was held to assure that there was a level playing field for all parties.

6. Insufficient time to retain legal representation.

City Council would not have been prejudiced by granting the motion for continuance and setting the hearing within sixty days, then allowing time for discovery. Great injustice and prejudice was created against the Property Owners by the trial court's denial of the motion for continuance.

The trial court's denial of a motion for continuance was brought before the Appellate Court in a dissolution of marriage action in *Fleming v. Fleming,* 710 So.

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[9] The representative for the State of Florida did not ask one single question during four days of hearings, yet is believed to have represented the interests of the State of Florida. (APP 0001-0707.)

2d 601, 603 (Fla. 4th DCA 1998), wherein in reversing the trial court, the Appellate Court stated the following:

> A motion for continuance is addressed to the sound judicial discretion of the trial court and absent abuse of that discretion the court's decision will not be reversed on appeal. . . Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance include whether the denial of the continuance creates an injustice for the movant; whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance.

The trial court's denial of a motion for continuance was before the Appellate Court in a termination of parental rights action in the case of *In the Interest of D.S. B.R. R.R. and C.R. Children, M.R. mother v. Department of Children and Family Services,* 849 So. 2d 411, 414 (Fla. 2nd DCA 2003), wherein the Appellate Court in reversing the trial court stated the following:

> . . . when denial of continuance creates injustice, the appellate court's obligation to rectify the injustice outweighs the policy of not disturbing trial court's ruling, particularly when the opposing party would suffer no injury or great inconvenience.

There is nothing within the bond validation statutes which disallows discovery. Discovery procedures are available in all civil cases and there is not a valid reason why the procedures are not available in bond validation cases.

ARGUMENT ISSUE IV

IV. THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING BY CITY COUNCIL AND THE TRIAL COURT THAT TIER 1 OF THE FIRE ASSESSMENT COMPLIES WITH THE REQUIREMENTS OF FLORIDA STATUTE §170.201.

STANDARD OF REVIEW ISSUE IV

This Court reviews the trial court's finding of fact for substantial competent evidence and its conclusions of law, de novo. *Strand v. Escambia County, Florida*, 992 So. 2d 150 (Fla. 2008). The findings will be erroneous if not based on substantial evidence *Holland v. Gross,* 89 So. 2d 255 (Fla. 1956).

Florida Statute §170.201 (a) and (b) authorizes municipalities to apportion the costs of special assessments in two different ways as follows:

> (a) The front or square footage of each parcel of land; or (b) An 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.

Some explanation of the methodology for the Tier I of the fire assessment is necessary to the understanding why it is arbitrary and without evidence to support it. According to the Burton & Associates Fire Assessment Study Final Report Revised, August 22, 2013, Tier 1 is called Response Readiness. It is described in the study as follows:

> The City maintains the facilities, equipment and personnel

> necessary to provide fire protection services on a 24 hour a day, seven days a week, year-round basis to all parcels in the City. This state of response readiness is provided by the fixed costs of the system that are not discretionary and that are not deployed in the actual response to calls. . . (APP 0915-0916.)

According to the legislation passed by City Council which employs the methodology crafted by Burton & Associates, all unimproved parcels of land will be assessed the same dollar amount, regardless of size, regardless of location and regardless of whether they are residential or commercial. The Tier 1 assessment is based on a fixed dollar amount per parcel identification number assigned by the Lee County Property Appraiser.

At the evidentiary hearing in October, 2013, the Chief of the Fire Department was asked if it would take more resources to fight a fire on a 100 acre parcel than it would on an 80 x 125 lot. His answer was, unequivocally yes. (APP 0118-0119.) Property Owners contend the assessment for a small parcel is in excess of the proportional benefit it receives as compared to other assessments on larger parcels. In reality, the small parcel owner is subsidizing the cost of the Tier 1 assessment for the larger parcel owner. How can this be a fair apportionment based on the requirements of the law?

Burton & Associates' report relied on by City Council does not contain substantial competent evidence to support the conclusions that all parcels benefit

equally, regardless of their size and makeup. Since the report fails to be supported by substantial competent evidence, it means the findings by the City Council are likewise not supported by substantial competent evidence. *Panama City Beach Redevelopment Agency v. State of Florida*, 831 So. 2d 662 (Fla. 2002). The transcript of the proceedings from City Council on August 26, 2013, establishes a lack of substantial competent evidence for the legislative findings. (APP 1056-1204.)

Cape Coral is unique in that there are many undeveloped areas which have parcels that range from 40 x 125 lots to hundreds of acres. A couple of examples will make the point. Assume a lot exists that measures 40 x 125 feet for a total of 5,000 square feet. Compare this against a parcel which contains 223.89 acres or 9,752,648 square feet based on 43, 560 square feet per acre.

According to the fire protection assessment which has been adopted by City Council the initial assessment for a vacant parcel with one parcel identification number is $62.02. How can this be an apportionment that follows the mandate in §170.201 (b)? Is it fair, just and equitable to assess each 40 x 125 foot lot the same amount as the 223.89 acre parcel? The 223.89 acre parcel contains 9,752,648 square feet which is 1,950 times larger than the 40 x 125 lot. The assessment for the 40 x 125 lot is clearly in excess of the proportional benefit received by the 40 x 125 foot lot when compared to the 223.89 acre parcel. The entire scheme smells of

discrimination against small land owners. Thus, the apportionment methodology is arbitrary.

Blacks Law Dictionary, Fifth Edition, 1979, defines arbitrary in part as follows:

> . . . Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment. . .

Fisher v. Board of County Commissioners of Dade County, 84 So. 2d 572 (Fla. 1956), has not been overturned by the this Court. It is an important case to examine as it relates to the substantial competent evidence which Burton & Associates must have to support their conclusions.

The Florida Supreme Court stated in part the following at pages 575, 576, and 577 of its opinion.

> . . . Although the County Engineer submits the "opinion" that special assessments on all real property within the district, including homesteads, should be in proportion to "assessed valuation of such real property" because in his opinion "this is in proportion to the benefit to be received", nevertheless, in Section 6-02 of the report it is readily admitted that "no exact valuation of benefits has been made" . . .
> . . . In fact, except for the bald conclusions submitted there is nothing in this record to show any actual attempt to evaluate the benefits to be received by the various properties abutting the streets to be improved. The unsupported conclusion of the County Engineer under the circumstances revealed in this record regardless of his ability and integrity cannot be accepted as

> determinative of the constitutional question involved. . . . A "special benefit assessment" must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency. The actual cost of the improvement must be directly related to the "special benefit" alleged to be received by the property improved.

The Burton & Associates report relied upon by City Council as their substantial competent evidence for the two tier approach, contains the following statement to justify the benefit for a vacant parcel based on readiness to serve:

> A given parcel is benefitted over time by that availability alone, even when that parcel does not generate a call for service, through increased value and marketability, heightened use and enjoyment of the property and reduced insurance premiums. (APP 0918.)

No substantial competent evidence was received by City Council or to the trial court to prove increased value and marketability, heightened use and enjoyment of the property and reduced insurance premiums. (APP 1056-1204.) (APP 0001-0489.)

It is hard to believe that someone may purchase fire insurance for a vacant parcel of land. Each case must turn on its own set of facts and evidence. The City Council received no testimony from any real estate professional that validated the claim that the assessment increased value and marketability. No testimony was provided by any insurance professional that the fire assessment provides the

benefit of reducing fire insurance costs for parcels of property, particularly vacant parcels. (APP 1056-1204.) There must be at least a scintilla of evidence to support the findings. None was provided in the case at bar. *Savage v. State of Florida, supra* and *Fisher v. Board of County Commissioners of Dade County, supra.*

ARGUMENT ISSUE V

V. THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING BY CITY COUNCIL AND THE TRIAL COURT THAT TIER 2 OF THE FIRE ASSESSMENT COMPLIES WITH THE REQUIREMENTS OF FLORIDA STATUTE §170.201.

STANDARD OF REVIEW ISSUE V

This Court reviews the trial court's finding of fact for substantial competent evidence and its conclusions of law, de novo. *Strand v. Escambia County, Florida*, 992 So. 2d 150 (Fla. 2008). The findings will be erroneous if not based on substantial evidence *Holland v. Gross,* 89 So. 2d 255 (Fla. 1956).

Florida Statute §170.201 (a) and (b) authorizes municipalities to apportion the costs of special assessments in two different ways as follows:

> (a) The front or square footage of each parcel of land; or (b) An 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.

Tier 2 of the methodology is called Protection from Loss of Structures and is explained in the Burton & Associates report in part as follows:

> The costs associated with protection from loss of structures on property include all other costs that are not included in the Tier 1 - Response Readiness Benefit cost pool. These costs include the portion of personnel costs involved in actually responding to calls for service, plus other costs that are incurred relative to variable drivers, such as fuel, equipment maintenance, and other operating costs . . . (APP 0916.)

Property Owners contend that Tier 2 of the fire protection assessment advocated by Burton & Associates is apportioned in an arbitrary manner and looks more like a property tax in disguise. The use of pure value to determine the fire assessment makes this a case of first impression in Florida which makes it all the more important to get it correct.

Black's Law Dictionary, Fifth Edition, 1979, defines ad valorem in part as follows:

> According to value. A tax imposed on the value of property. . . . A tax levied on property or an article of commerce in proportion to its value, as determined by assessment or appraisal. (Emphasis added.)

How does the Plaintiff propose to implement Tier 2 ? First, according to Ordinance 41-13, the City Manager is to appoint an individual or entity to serve as the Assessment Coordinator. (APP 0791-0814.) The Assessment Coordinator will utilize certain information (what information is unclear), which is compiled by the independent Lee County Appraiser's office. The Assessment Coordinator will then, unilaterally (and without any apparent oversight or guidelines), determine the structure value (without including the value of land) for parcels in Tier 2. (APP 0905-0951.) Structure value is defined in the Final Assessment Resolution 32-13 as follows:

> . . . the sum of the building cost value and the building

> extra feature value associated with each Tax Parcel in the City as determined by the City through reference to the real property database maintained by the Property Appraiser. (Emphasis added.) (APP 0842.)[10]

The original complaint filed herein relied upon a resolution which stated that the structure value, on which a property owner will be assessed for the fire protection assessment will be determined by a City employee and not set by the independent Lee County Property Appraiser. This completely destroys any checks and balance which exist by having the Lee County Property Appraiser determine the value. It opens up the procedure to an arbitrary and potentially discriminatory calculation. The value is calculated without regard to any homestead exemption, disability exemption or other exemptions recognized under the law.

The City Council wants this Court to correct a deficiency in its bond validation complaint by recognizing Resolution 56-13 which was not introduced in evidence and was not raised in the pleadings to support the bond validation.

The Tier 2 calculation works like this: Once the dollar amount of structure value is determined, that number is divided by $5,000.00. The resulting number, (the Equivalent Benefit Unit or EBU) is multiplied by the dollar amount of the

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[10] Resolution 56-13 at section 6 (D) change the definition of structure value to ". . . the sum of the building cost value and the building extra feature value associated with each Tax Parcel in the City as determined solely by the Property Appraiser." (APP 1027.)

assessment per EBU to determine the total dollar value for the assessment for the Tier 2 parcel, (APP 0905-0951.)

Assume that the structure value is $200,000.00. Division by $5,000.00 results in 40 Equivalent Benefit Units. Assume that the assessment is the maximum amount authorized in the final assessment resolution which is $3.31 per EBU. The assessment would be $132.40 for this parcel in Tier 2. One has to remember however, that for an improved piece of property the total assessment consists of adding Tier 1 and Tier 2. The higher the structure value, the more money generated for the fire protection assessment.

In Tier 2, a commercial property face a much greater financial impact based on structure value. For example, assume that the Wal-Mart store located at 1619 Del Prado Blvd, in Cape Coral, Florida currently has an assessed value of $6,496,849.00. Assume that the structure has, approximately 178,522 square feet. The structure value in many cases may actually exceed the assessed value set by the property appraiser, even though the value of the land is deducted from the computation. A great deal of the structure value depends on any improvements in addition to the actual building. Further, assume that the Lee County Property Appraiser's data sheet, indicates that the Wal-Mart parcel has a building cost of $5,253,833 and improvements of $1,814,503 for a potential structure value of $7,068,336. Divide the structure value by $5,000.00 and you get, approximately,

1,417 Equivalent Benefit Units. When you multiply this by the maximum allowable assessment of $3.31, the assessment is $4,690.27 for Tier 2.

The argument that the Tier 2 methodology is not an ad valorem tax simply violates all notions of common sense. The higher the value of the structure the higher the dollar amount of the assessment. How can this not be a tax based, solely, on value, and therefore, illegal as a special assessment?

St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So. 2d 744 (Fla. 1962), is another Supreme Court case which is still valid law. Therein the Florida Supreme Court stated the following, concerning a special assessment:

> To be legal, special assessments must be directly proportionate to the benefits to the property upon which they are levied and this may not be inferred from a situation where all property in a district is assessed for the benefit of the whole on the theory that individual parcels are peculiarly benefitted in the ratio that the assessed value of each bears to the total value of all property in the district. This point was definitely settled by this court in Fisher v. Board of County Commissioners of Dade County, supra.

Based upon on this case, Property Owners assert that the Tier 2 methodology does not comply with the requirements of Florida Statute §170.201 (a) and (b) and is, on its face, arbitrary.[11]

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[11] See proposed final judgment submitted by Talan Corporation. (APP 1029-1055.) Also memorandum in support of final judgment. (APP 1205-1232.)

Furthermore, the Burton & Associates report fails to contain substantial competent evidence as required by the Court in *Fisher v. Board of County Commissioners of Dade County*, 84 So. 2d 572 (Fla. 1956).

It is assumed that City Council will argue the cases of *City of Boca Raton, Florida v. State of Florida,* 595 So. 2d 25 (Fla. 1992), as support for its position that the fire protection assessments can be based on value. This case however involved a downtown improvement, and not a fire assessment. The case at bar is one of first impression in Florida. Property Owners were unable to find any Florida Supreme Court cases which validated anything remotely similar to that which Burton & Associates has advocated regarding a special assessment for fire protection.

Previous fire assessment cases, generally, base the assessment on the square footage of the property, sometimes in conjunction with the character of the property. By upholding the validation by the trial court, this Court would embark down a road never traveled, thus opening the door for local governments to continue to erode the constitutional protections for the Property Owners, not only in the case at bar, but also in the entire State of Florida.

Although it may have been cleverly disguised, it appear that the Burton & Associates Tier 2 methodology carries all of the indicia of a tax, solely based upon value rather than on special assessment. *Collier County, Florida v. State of*

Florida, 733 So. 2d 1012 (Fla. 1999); *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995).

CONCLUSION

Justice Wells' dissent in the case of *Lake County, Florida v. Water Oak Management Corporation*, 695 So. 2d 667 (Fla. 1997), contains a reasoned and valid explanation of how the Florida Supreme Court has moved gradually away from the time-honored principle of stare decisis regarding special assessments. [12]

Property Owners request this Honorable Court grant them relief, in the alternative as follows:

1. Rule that they have been denied their rights of procedural due process by City Council's failure to follow its own due process rules. As a result, the City Council must restart its fire assessment process from the beginning and comply with all ordinances and resolutions which it may enact.

2. Set aside the final judgment and remand the matter back to the trial court based upon reversible errors which occurred by making findings without substantial competent evidence to support them.

3. To provide for a new evidentiary hearing allowing Property Owners a reasonable time to conduct discovery.

4. In the alternative, to rule that the methodology adopted

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[12] Also see Law Review Article by Pamela M. Dubov, Circumventing the Florida Constitution: Property Taxes and Special Assessments, Today's Illusory Distinction, 30 Stetson l. Rev. 1469 (2001).

by City Council in this case is not supported by substantial competent evidence and therefore does not comply with the statutory framework of special assessments as set forth in Florida Statute §170.201 (b).

5. Finally, to rule that the Tier 1 method is arbitrary and that the Tier 2 method is arbitrary and is in reality nothing more than a property tax.

6. In the alternative, grant the relief this Court determines is fair, just, and equitable under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appellants' Initial Brief has been served by e-mail to Anthony W. Kunasek, Assistant State Attorney, at akunasek@sao.cjis20.org; Delores Menendez at dmenendez@capecoral.net; Susan H. Churuti at schuruti@bmolaw.com; Christopher B. Roe at croe@bmolaw.com; Ryan b. Hobbs at rhobbs@bmolaw.com; Mark G. Lawson at lawson@MarkGLawson.com; and James C. Dinkins at jdinkins@MarkGLawson.com; Elizabeth W. Neiberger at eneiberger@bmolaw.com; Major B. Harding at mharding@ausley.com; Steven M. Hogan at shogan@ausley.com on this 18th day of March, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P.9.100(1), I certify that this computer generated initial brief is submitted in Times New Roman 14-point font, in black and distinct type, double-spaced and with margins of no less than one inch. As such this brief in compliance with Fla. R. App. P.9.100(1).

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