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IN THE SUPREME COURT OF FLORIDA
No. SC14-710

ROBERT R. REYNOLDS,

Appellant,

v.

LEON COUNTY ENERGY
IMPROVEMENT DISTRICT, et. al.

Appellees.

Bond Validation Appeal from the Circuit Court of the
Second Judicial Circuit in and for Leon County, Florida
Lower No. 13-CA-003396

ANSWER BRIEF OF APPELLEE LEON COUNTY ENERGY IMPROVEMENT DISTRICT

Herbert W.A. Thiele
Leon County Attorney
301 S Monroe Street, Ste. 202
Tallahassee, FL 32301

Bryant Miller Olive P.A.
Susan H. Churuti
One Tampa City Center, Ste. 2700
Tampa, FL 33602
JoLinda Herring
1 SE Third Avenue, Ste. 2200
Miami, FL 33131
Elizabeth W. Neiberger
101 N Monroe Street, Ste. 900
Tallahassee, FL 32301

Attorneys for Appellee Leon
County Energy Improvement
District

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment validating the Leon County Energy Improvement District's ("District") authority to issue $200 million in bonds ("Bonds") to fund a "property assessed clean energy" ("PACE") program. The Bonds will be used to provide up-front financing to property owners who wish to make energy saving improvements to their buildings. The PACE program is entirely voluntary with each property owner. Property owners who choose to participate in the program will enter financing agreements with the District agreeing to repay the improvement costs over the long-term through special assessments added to their annual property tax bills. The Bonds will be repaid with the special assessment revenues.

On appeal, Reynolds argues that the validation judgment must be reversed because the assessments are invalid. He contends this is because the District's form of financing agreement provides judicial foreclosure as a remedy for a property owner's default and allows the District to assign its assessment rights to third parties. (Appellant's Br. 12-18.)

Project to Be Financed by the Bonds

The District is a dependent special district created by Leon County to implement a PACE program to promote energy efficiency and conservation in the

community. (App. 19-25.)[1] *See* § 163.08(2)(a) (dependent special districts among the local governments authorized to implement PACE programs); § 189.402(1), Fla. Stat. (authorizing counties to create dependent special districts). As a dependent special district, the District is entirely controlled by the County. § 189.403(2)(a), Fla. Stat.

The program is authorized under the PACE Act, section 163.08, Florida Statutes. PACE programs help property owners make energy saving improvements by allowing them to voluntarily finance 100% of the improvement costs with their local government. §163.08(1)(b), (2)(a), Fla. Stat. Property owners who choose to participate in the program repay the improvement costs over the long-term through a non-ad valorem special assessment added to their annual property tax bills. § 163.08(3)-(4), Fla. Stat. A consensual lien attaches to the improved property to secure payment of the assessments. § 163.08(8), Fla. Stat.

PACE programs benefit participating property owners, stimulate the local economy, and help achieve the state's energy conservation objectives. *See* § 163.08(1)(a)-(b), Fla. Stat. In enacting the PACE Act, the legislature found (i) there is "a compelling state interest" in enabling property owners to voluntarily finance energy saving improvements; and (ii) the financing mechanism authorized

[1] References to the Appendix to the Appellant's Initial Brief are cited as "App." References to the Appendix to the District's Answer Brief are cited as "Supp. App."

is "necessary" for the "prosperity and welfare of the state and its property owners and inhabitants." § 163.08(1)(b)-(c), Fla. Stat.

What makes PACE programs financially feasible for local governments is the ability to (i) issue bonds to fund the improvements; and (ii) pledge the special assessments to repay the bonds. § 163.08(3), (7), Fla. Stat. The District will use the Bond proceeds to finance improvements under the PACE program; the Bonds will be repaid with the special assessment revenues.

The Master Resolution and Form Financing Agreement

The Leon County Board of County Commissioners, sitting as the District's board of directors, adopted a Master Resolution authorizing the Bonds and directing its counsel to file a validation proceeding at a noticed public meeting on November 19, 2013. (App. 26-31.) Attached to the Master Resolution is a form Financing Agreement to be entered with property owners who choose to participate in the program when it is implemented. (App. 32-45.)

The Master Resolution is the document that will become the contract between the District and the bondholders when the Bonds are sold. (App. 30 (Resolution § 15)). Section 6 of the Master Resolution states that the "Financing Agreements [entered with property owners] shall be in compliance with and satisfy the requirements of the PACE Act." (App. 28-29 (Resolution § 6)). It also

provides that the Financing Agreement attached to it is only a form, which the District can revise:

> The text and form of the Financing Agreement is attached hereto as Exhibit 'A' with such insertions and variations as may be necessary and desirable, as same are authorized or permitted by the PACE Act, this Resolution, or by subsequent resolution or resolutions of the District adopted prior to the execution thereof....

(*Id.*) The Master Resolution also authorizes the District's designated officers "to do all acts and things required of them to be consistent with" the Master Resolution. (App. 30 (Resolution § 13)). The Master Resolution and form Financing Agreement each contains a severability clause allowing any invalid provisions to be stricken without affecting the validity of the remainder of the document. (App. 30 (Resolution § 16); App. 37 (Fin. Agreement § 19)).

The PACE Act requires the special assessments to be collected using the "uniform collection method" set forth in section 197.3632, Florida Statutes, which does not presently authorize foreclosure for collection of delinquent special assessments. Section 4 of the form Financing Agreement governs collection of the assessments. (App. 34-35.) In relevant part, Section 4 provides:

> The Assessment shall be paid and collected on the same bill as real property taxes using the uniform collection method authorized by Chapter 197, Florida Statutes. The Property Owner agrees and acknowledges that if any Assessment installment is not paid when due, the District shall have the right to seek all appropriate legal remedies to enforce payment and collect the Assessment or amounts due hereunder, including but not limited to foreclosure[.]

(*Id.*) It also provides that the District or its assignee "may exercise its foreclosure rights with respect to the delinquent Assessment installments[.]" (*Id.*) Section 17 states that the District may assign any of its rights, including "the right to judicial foreclosure." (App. 37.)

Proceedings Below

The District filed the validation complaint with the trial court on December 5, 2013. (App. 5-18.) On January 8, 2014, the trial judge entered an order to show cause scheduling the validation hearing for March 10, 2014. (App. 67-70.) As required by chapter 75, Florida Statutes, the order was published in a newspaper of general circulation in Leon County on February 2 and 9, 2014. (App. 66.) The State Attorney filed an answer to the complaint stating that there was no objection to validation. (Supp. App. 21-23.) The validation hearing was held as scheduled on March 10.[2] (App. 171.) Reynolds did not appear at the

[2] Reynolds states that at some point (apparently after the time and date set for the hearing) the clerk of court's docket indicated that the hearing was canceled, and a deputy clerk confirmed over the phone that no hearing was held. (Appellant's Br. 5 n.3.) But he does not contend that this occurred before the hearing or suggest it is the reason he failed to appear at the hearing. He acknowledges that the docket notation does not prevail over the final judgment, which states the hearing was held as scheduled (App. 171), and does not make any argument relating to the docket notation. Nevertheless, the District wishes to clarify that the hearing was held at the date and time designated in the show cause order. It appears that the docket notation was a clerical error that occurred *after* the hearing was held. The docket has since been corrected. The hearing was not cancelled by the District, the State Attorney, or the judge, and none of them received any notice that the hearing was cancelled by anyone else.

hearing. (Appellant's Br. 1 n.1.) Nor did he file any written objection to the validation. No one opposed validation at the hearing or otherwise.

The trial court entered a final judgment validating the bonds on March 10, 2014. (App. 171-84.) The final judgment recognizes that the Financing Agreement is a form that has not been entered into with any property owner. (App. 176.) It requires the District to collect assessments using uniform collection method. (App. 177-78). The judgment contemplates that the financing agreements actually "entered into" will comply with the PACE Act. (App. 176-80, 183.)

Reynolds filed his notice of appeal on the last day of the 30-day period for filing appeals. Prior to that time, he had no involvement in the case and had not made any communications with the circuit court, the District, or its counsel.

To date, no financing agreements have been entered into with property owners and the Bonds have not been issued or marketed.

SUMMARY OF ARGUMENT

This appeal should be dismissed because Reynolds lacks standing. Section 75.08, Florida Statutes, authorizes any "party" to the bond validation to appeal the trial court's judgment. Whether someone is a "party" to the proceedings for purposes of appeal is controlled by section 75.07, Florida Statutes. Under section 75.07, a property owner may become a "party" if he or she (i) will be "adversely affected" if the bonds are issued; and (ii) objects to validation "at or before" the time set for the show cause hearing. Reynolds has not satisfied either requirement. First, Reynolds did not even attempt to appear below. Second, his initial brief does not claim he will be affected (adversely or otherwise) if the Bonds are issued. Even if his brief claimed an adverse affect, unsubstantiated assertions made in an appellate brief are not enough to establish that he had standing to participate below. Evidentiary questions about whether he will be adversely affected should have been presented to the trial court to resolve in the first instance. If they had been presented to the trial court, the District would have had an opportunity to examine Reynolds as a witness on the issue of standing. Appeals are not evidentiary proceedings and it would be unfair to allow him to offer evidence on adverse effect now. This is especially true given that there is a real question of whether he will be adversely affected, as the PACE assessments are entirely

voluntary with each property owner. Since Reynolds did not become a "party" under section 75.07, he is not a "party" authorized to appeal under section 75.08.

While the published notice of the show cause hearing must be directed to large groups of persons in general terms, including property owners, it is simply a means to effect personal jurisdiction on all persons who could conceivably have an interest in the proceeding. § 75.06, Fla. Stat. The notice itself is not sufficient to make someone a "party" for purposes of appeal.

Even assuming Reynolds had standing, his arguments should be rejected on the merits. He challenges provisions in a ***form*** Financing Agreement which has not been entered into with any property owner and which the District has authority to revise at any point before doing so. The form Financing Agreement is valid as it stands because it only authorizes the District to enforce its legally available remedies. Even if the Court determines the provisions are improper, there is no need for reversal. The Court has authority to strike the offending provisions under the severability clause or, alternatively, order the District to revise the form Financing Agreements. If remand is required, the Court should direct the trial court to strike the provisions (or require the District to eliminate them) without requiring a new validation proceeding.

ARGUMENT

I. STANDARD OF REVIEW

Reynolds correctly states that the scope of inquiry in a bond validation proceeding 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, Reynolds challenges the first prong: the District's authority to issue the Bonds. His only argument is that the special assessments that will be used to repay the Bonds are invalid. If the special assessments are valid, the District has authority to issue the Bonds and the final judgment should be affirmed. *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, Reynolds has the burden of showing reversible error. *Donovan v. Okaloosa Cnty.*, 82 So. 3d 801, 805 (Fla. 2012). This appeal only involves issues of law and interpretation of written documents, which are both reviewed *de novo*. *E.g.*, *id.*; *Crawford v. Barker*, 64 So. 3d 1246, 1251 (Fla. 2011).

II. REYNOLDS LACKS STANDING BECAUSE HE DID NOT BECOME A PARTY BELOW UNDER SECTION 75.07, FLORIDA STATUTES

This appeal should be dismissed because Reynolds did not become a "party" to the proceedings before the trial court as required by section 75.07, Florida Statutes. Nor did he make any attempt to do so. Therefore, he is not "party" for purposes of the provision authorizing appeal, section 75.08, Florida Statutes. Because Reynolds lacks appellate standing, there is no need for the Court to reach his arguments on the merits. *Int'l Longshoremen's Ass'n v. Fisher*, 800 So. 2d 339, 340 (Fla. 1st DCA 2001) (appellant's failure to demonstrate appellate standing is dispositive).

A. A person who lacks standing to appear before the trial court under section 75.07 does not have standing to appeal under section 75.08

A final judgment validating bonds is "forever conclusive as to all matters adjudicated" and the validity of the bonds "shall never be called in question in any court by any person or party." § 75.09, Fla. Stat. To achieve such a broad preclusive effect, section 75.06, Florida Statutes, provides the due process necessary for the trial court to have personal jurisdiction over everyone who could conceivably have a judiciable interest in the bond validation.

When a validation complaint is filed, the trial court must issue a show cause order directed to property owners, taxpayers, citizens, and interested persons "in general terms and without naming them," requiring them "to appear at a designated

time and place...and show why the complaint should not be granted and the...bonds...validated." § 75.05, Fla. Stat. Section 75.06, titled "Publication of notice," requires the show cause order to be published in the local newspaper at least 20 days before the hearing. The publication effects constructive service of process on all persons who might be interested, making them parties over which the trial court has jurisdiction to bind:

> By this publication all property owners, taxpayers, citizens, and others having or claiming any right, title or interest in the county, municipality or district, or the taxable property therein, are made parties defendant to the action and the court has jurisdiction of them to the same extent as if named as defendants in the complaint and personally served with process.

§ 75.06(1), Fla. Stat.; *see Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 949 (Fla. 2001) (constructive service by publication under section 75.06 satisfies Florida and federal due process requirements). Here, there is no dispute that the District strictly complied with these notice requirements. Reynolds does not argue that his due process rights were violated in any way.

While section 75.06 requires the show cause order to be directed to these broad categories of persons in general terms, it does not answer the question of who may participate as a "party" before the trial court. That question is answered by section 75.07, which provides:

> Intervention; hearings.—Any property owner, taxpayer, citizen or person interested may ***become a party*** to the action by moving against or pleading to the complaint at or before the time set for hearing.

(Emphasis added.) The term "intervention," as used in the heading to this section and the case law, is used loosely to mean the appearance of a particular individual to participate in the hearing, and is often used interchangeably with "appearance." *E.g.*, *Rich v. State*, 663 So. 2d 1321, 1324-25 (1995).

This Court has interpreted section 75.07 to mean that only those property owners, taxpayers, citizens, or interested persons who will be "adversely affected" if the bonds are issued have standing to appear before the trial court. *Id.*; *Belmont v. Town of Gulfport*, 97 Fla. 688 (Fla. 1929); *City of Fort Myers v. State*, 176 So. 483, 484 (Fla. 1937), *overruled on other grounds*, 198 So. 814 (1940). In *Belmont*, the Court considered whether a citizen of the town issuing the bonds was allowed to participate in the validation hearing under the predecessor to section 75.07, which provided: "Any taxpayer or citizen may become a party to said proceedings[.]" 97 Fla. at 689 (citing § 5108, Comp. Gen. Laws (1927) (Supp. App. 2-3.)) The Court concluded that the appellant's status as a citizen of the town seeking validation was not enough to give him standing to intervene before the trial court:

> The construction of the word 'citizen' as used in that statute is that it means a citizen whose rights or interests as an individual are involved. It means a citizen having a justiciable interest in the litigation, and does not mean to confer upon a citizen possessing no justiciable

> interest in the litigation the right to make himself a party to such litigation to raise questions which do not affect his rights either as a taxpayer or a citizen. Nor was it the intention of the Legislature when using the word 'citizen' in that statute to constitute every nontaxpaying citizen a guardian of the rights of the public. Under our government the rights and interests of citizens constituting the public are provided protection by the interposition of duly qualified public officials upon whom the law imposes that burden.

Id. at 689-90. Since the proposed bonds would not have a direct legal effect on the appellant, he lacked standing. Similarly, in *Fort Myers*, the Court determined that a "taxpayer" of the government issuer has standing to intervene if the taxpayer would be "adversely affected" by the outcome. *Fort Myers*, 176 So. at 484.

In *Rich*, the Court confirmed that (i) the current version of section 75.07 controls who has standing to appear in a validation proceeding and (ii) *Belmont* and *Fort Myers* are still controlling. 663 So. 2d at 1323-24. In addition to "citizens" and "taxpayers," the current version of section 75.07 also allows "property owners" and "person interested" to become parties. *Rich* interpreted the meaning of "person interested." *Id.* at 1323. The Court explained that, under *Belmont* and *Fort Myers*, the terms "taxpayer" and "citizen" mean a taxpayer or citizen who is "subject to gaining or losing something as a result of a bond issuance." *Id.* at 1324. The Court concluded that "these interpretations are equally applicable to the term 'person interested.'" *Id.*

The appellants in *Rich* claimed they were entitled to appear at the validation hearing because they paid contractual user fees that would be pledged to repay the

bonds. *Id.* at 1322-23. The bonds would not change the amount of the fees. *Id.* at 1323. Because the appellants would "be in the same position after the issuance of the bonds as before the issuance of the bonds," they would not be "adversely affected" and lacked standing. *Id.* at 1322-23. Therefore, the trial court properly refused to allow them to participate in the hearing.

Because section 75.07 controls who can participate as a "party" before the trial court, a lesser standard cannot control who is a "party" entitled to appeal under section 75.08. Otherwise, someone prohibited from participating at the trial level could take the case up on appeal to this Court. This would be at odds with the statutory scheme designed to quickly obtain a final adjudication of the validity of bonds. *Vrchota Corp. v. Kelly*, 42 So. 3d 319, 322 (Fla. 4th DCA 2010) ("If some of the words of the statute, when viewed as one part of the whole statute or statutory scheme, would lead to an unreasonable conclusion or a manifest incongruity, then the words need not be given a literal interpretation."); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452 (Fla. 1992) (courts must give effect to all statutory provisions and construe provisions of related statutes in harmony). It would also make section 75.08 a drastic departure from the fundamental workings of our justice system. *See City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1282 (Fla. 1983) (the "law favors a rational, sensible construction").

Here, Reynolds's brief states that he "owns real property in the District." (Appellant's Br. 1.) Under *Belmont*, *Fort Myers*, and *Rich*, a "property owner" for purposes of section 75.07 means an owner of property within the issuing government who will be "adversely affected" by the bonds. Assuming Reynolds does in fact own property in the District, he does not claim that he would be "adversely affected" if the bonds are issued. In fact, he does not contend he would be affected in any way whatsoever.

Even of his brief asserted that he will be adversely affected, his unsupported assertions are insufficient to establish standing. Evidentiary questions about whether Reynolds will be "adversely affected" should have been presented to the trial court. Section 75.07 requires persons to become parties at or before the show cause hearing for good reason: If Reynolds attempted to appear before the trial court, the District would have had an opportunity to examine him as witness or otherwise offer evidence on the issue of standing. Appeals are not evidentiary proceedings, *Altchiler v. Dep't of Prof'l Reg., Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983), and Reynolds should not be allowed to offer evidence on his property ownership or whether he will be "adversely affected" in his reply brief, an appendix, or otherwise.

There is a very real question of whether Reynolds will be "adversely affected." Participation in the PACE program is entirely ***voluntary*** with each

individual property owner. Special assessments are only imposed on property owners who choose to finance improvements under the program. Reynolds is not required to participate in the program; he is not even required make energy saving improvements to his property. Whatever Reynolds's reason for filing this appeal—whether mere curiosity, officious intermeddling, to litigate the interests of others who have not objected, or otherwise—it is not a substitute for having an actual stake in the case and appearing before the trial court. It is the State Attorney, not individual citizens, who is charged with protecting the interests of the public in validation proceedings. § 75.05(1), Fla. Stat. The State Attorney concluded the proposed Bonds are valid. (Supp. App. 11-13.)

If Reynolds were allowed to offer evidence on appeal, the District would have no opportunity to examine him on whether or how his interests will be adversely affected. *See Belmont*, 663 So. 2d at 1324 (persons would not be "adversely affected" where their only interest arose from contractual user fees that would not change as a result of bond issue). The Court's role is to correct errors made by the trial court. Because Reynolds failed to appear below, there is no decision on standing to review or correct. The Court should decline to decide these factual questions in the first instance. The purpose of bond validations is to quickly adjudicate the validity of bonds, which would be frustrated if the Court were to entertain evidentiary and other issues raised for the first time on appeal.

Because Reynolds did not have standing to participate in the trial court proceedings as a "party" under section 75.07, he cannot be a "party" entitled to appeal under section 75.08.

B. A person who fails to appear before the trial court under section 75.07 lacks standing to appeal under section 75.08

Even if Reynolds is a property owner who will be "adversely affected" by the Bonds, he did not become a "party" below under section 75.07. Under the current version of section 75.07, an individual only "become[s] a party to the action ***by moving against or pleading to*** the complaint ***at or before the time set for hearing***." (Emphasis added.) This is consistent with the published show cause order, which requires taxpayers, citizens, property owners, and other interested persons to appear at the hearing to show cause why the bonds should not be validated. §§ 75.05, 75.06, Fla. Stat.

Belmont and *Fort Myers* did not involve timing issues because they dealt with individuals who attempted to participate at or before the hearing. *Belmont*, 97 Fla. at 689; *Fort Myers*, 176 So. at 484. Additionally, the version of the statute then in effect simply stated that a "taxpayer or citizen may become a party," without specifying how or when. § 5108, Comp. Gen. Laws (1927) (Supp. App. 2-3). The current version of section 75.07 was in effect at the time *Rich* was decided, but *Rich* also dealt with individuals who answered the complaint before the hearing and attempted to participate at the hearing. 663 So. 2d at 1323.

Although the "how" and "when" components of section 75.07 were not at issue, *Rich* reaffirmed that section 75.07 governs whether someone becomes a "party" to the validation proceedings. 663 So. 2d at 1323-24. Because Reynolds did not even attempt to appear below, he did not become a "party" to the action under section 75.07. It follows that he is not a "party" allowed to appeal under section 75.08.

Reynolds's brief does not contain any legal argument or analysis on the issue of standing. In a footnote in the facts section of his brief, he states that he has standing to appeal even though he did not appear below, followed by a citation to *Meyers v. City of St. Cloud*, 78 So. 2d 402 (Fla. 1995). (Appellant's Br. 1 n.1.) In *Meyers*, the Court allowed individuals who were undisputedly "taxpayers" and "citizens" for purposes of the statute to appear for the first time by filing a notice of appeal. 78 So. 2d at 403-04.

Meyers does not apply for two reasons. First, unlike this case, in *Meyers* there was no dispute about whether the appellants were "adversely affected," so as to come within the meaning of "taxpayers" and "citizens" under the statute. In *Rich*, the Court rejected the appellants' argument that they were allowed to appear for the first time on appeal under *Meyers*. 663 So. 2d at 1324. *Rich* explained that *Meyers* did not apply because it did not interpret the meaning of "interested person" (or any other term delineating who is allowed to become a party), and

rejected the appellants' argument without further analysis. *Id. Meyers* does not apply here for the same reason it did not apply in *Rich—Meyers* did not address whether the appellants were actually "taxpayers" and "citizens" (*i.e.*, adversely affected taxpayers and citizens) because it was not disputed. *Rich* is the most recent case where the issue of standing has actually been raised. While two subsequent cases make passing reference to *Meyers* in footnotes, standing was not challenged in either case. *Lozier v. Collier Cnty.*, 682 So. 2d 551 (Fla. 1996); *Rowe v. St. Johns Cnty*, 668 So. 2d 196 (Fla. 1996) (Supp. App. 19-20).

Second, the statute in effect when *Meyers* was decided did not require intervention to occur "at or before" the hearing. § 75.07, Fla. Stat. (1955) (Supp. App. 6.) Instead, it expressly allowed courts to grant intervention anytime after the hearing. *Id. Meyers* allowed a post-hearing intervention by appeal, as authorized by the then-existing statute, when there was no dispute about whether the appellants were "adversely affected." *Meyers* does not apply here.

C. <u>*Meyers* should be overruled to the extent it purports to give appellate standing to persons who lacked standing and failed to appear before the trial court</u>

As explained above, there is no need to overrule *Meyers* to conclude that Reynolds lacks standing: there was no question about whether the appellants would be adversely affected and the law then in effect allowed intervention after the validation hearing. However if the Court determines that *Meyers* is controlling, it

should be overruled to the extent it grants appellate standing to persons who lacked standing to appear before the trial court and who made no effort to do so.

A fundamental principal of our justice system is that persons must appear and raise their arguments at the trial level. *Dickinson v. Segal*, 219 So. 2d 435, 436 (Fla. 1969) ("the general rule—universally—is that intervention may not be allowed after final judgment."). They cannot wait and raise them on appeal. It is "the function of the appellate court to review errors allegedly committed by the trial court, not to entertain for the first time on appeal issues which the complaining party could have and should have, but did not, present to the trial court." *E.g.*, *Herskovitz v. Hershkovich*, 910 So. 2d 366, 367 (Fla. 5th DCA 2005). Similarly, only persons who appear as parties before the trial court and are "injuriously affected" by the final judgment have standing to appeal. *King v. Brown*, 55 So. 2d 187, 188 (Fla. 1951). The statutory language and framework of chapter 75 do nothing to change these fundamental rules.

Meyers incorrectly based its conclusion on dicta contained in *State v. Sarasota County*, 159 So. 797 (Fla. 1935). *Meyers*, 78 So. 2d at 405 (Matthews, C.J., dissenting). The issue in *Sarasota* was whether the trial court had jurisdiction to enter a new final judgment on remand from the first appeal to this Court. *Sarasota*, 159 So. at 798-99. In the second appeal, the Court explained that the trial court retained subject matter jurisdiction and personal jurisdiction. *Id.* The

Court stated that the trial court had personal jurisdiction based on the original notice published under the predecessor to section 75.06. *Id.* In *Meyers*, the Court took the broad language in which *Sarasota* addressed the issue of personal jurisdiction as binding on the issue of whether someone is a "party" for purposes of the provision authorizing appeal. 78 So. 2d at 403.

Like its predecessor, section 75.06 simply lays out a method for effecting service of process on large groups of unknown persons by publication. The language stating the publication makes these persons "parties" is in the sentence defining the extent of the trial court's jurisdiction. § 75.06(1), Fla. Stat. Read in context, section 75.06 only gives notice to, and establishes personal jurisdiction over, those who might have a judiciable interest in the proceeding.

After all, sections 75.05 and 75.07 are clear that individuals who seek to oppose validation must actually appear by the time of the show cause hearing. And section 75.07 dictates what is required for an individual to participate in the action as a true party. Because the Court has applied section 75.07 to determine when a taxpayer or citizen of the issuing government may participate in a validation proceeding, any argument that section 75.07 only applies to those taxpayers, citizens, or property owners outside of the issuing government must be rejected. *Belmont*, 97 Fla. at 688; *Fort Myers*, 176 So. at 484.

The Court's conclusion that the State Attorney and the issuing government are the only "necessary parties" to a bond validations supports a limited reading of the term "party" in section 75.06. As the Court has explained,

> Property owners, taxpayers, citizens, and interested persons shall be notified of the complaint "in general terms and without naming them" and may answer the complaint or intervene. §§ 75.05, 75.07.
>
> ...
>
> Under chapter 75 it appears that the only parties absolutely necessary to a bond validation are the issuing entity and, if the conditions necessitating a defense are met, the state.

Broward Cnty. v. State, 515 So. 2d 1273, 1274 (Fla. 1987) (internal citation omitted). The Court could not have reached this result if publication of the notice alone were enough to make a person a true party. In effect, the Court has already implicitly acknowledged that a person only becomes a true party by appearing before the trial court, as required by sections 75.05 and 75.07.

Finally, the purpose of chapter 75 is "to afford a quick, speedy and expeditious method of handling validation proceedings" and, to that end, a "time was fixed for all interested persons to intervene." *State v. Fla. State Imp. Comm'n*, 75 So. 2d 1, 6 (Fla. 1954). Given this legislative intent, together with the fact that chapter 75 satisfies due process requirements, chapter 75 cannot be construed to grant appellate standing to someone who did not have standing or attempt to appear below. Reynolds and everyone else who failed to appear below "never became parties to the proceeding and are not proper parties on the appeal...and

have no standing in this Court." *Id.* Because Reynolds lacks standing, this appeal should be dismissed.

III. THE PROVISIONS REGARDING FORECLOSURE AND ASSIGNMENT IN THE FORM FINANCING AGREEMENT DO NOT MAKE THE ASSESSMENTS INVALID

Even if Reynolds had standing, his arguments on the merits do not establish reversible error.

A. The form Financing Agreement is valid and no revision is required

The form Financing Agreement is valid because it does not allow the District to do anything that is prohibited by law. The PACE Act, in its current form, (i) does not expressly authorize the government to assign the special assessments to third parties; and (ii) requires the District to collect assessments using the uniform collection method under section 197.3632, which does not presently authorize judicial foreclosure. § 163.08(4), Fla. Stat. The statutory limits on collection and assignment of assessments cannot be waived by agreement with property owners. Simply put, the Financing Agreement has no power to create remedies beyond what is authorized by statute.

The form Financing Agreement does not purport to create unauthorized remedies. It simply authorizes the District to pursue all legal remedies, even if the law is changed to make them more expansive in the future. The form Financing Agreement expressly requires the District to collect assessments using the proper

statutory method. Section 4 provides: "The Assessment shall be paid and collected on the same bill as real property taxes ***using the uniform collection method authorized by Chapter 197, Florida Statutes***." (App. 34 (emphasis added)). In the very next sentence, it goes on to state: "The Property Owner agrees and acknowledges that if any Assessment installment is not paid when due, the District shall have the right to seek ***all appropriate legal remedies*** to enforce payment and collect the Assessment or amounts due hereunder, including but not limited to foreclosure[.]" (*Id.* (emphasis added)). Therefore, the District can only enforce that remedy if foreclosure becomes an "appropriate legal remed[y]" due to subsequent statutory changes.

Future statutory changes are a realistic possibility. PACE is a new and developing area of law. Other states have enacted PACE legislation authorizing foreclosure and assignment, Conn. Gen. Stat. § 16a-40g(h); Mich. Comp. Laws § 460.943; The White House, Office of the Vice President, *Pol'y Framework for PACE Financing Programs* 2, 6 (2009) (recognizing foreclosure as remedy) (Supp. App. 14-18), and the Florida legislature may choose to do the same.

Furthermore, the validation judgment does shield any part of the form Financing Agreement from being held invalid or unenforceable in a later enforcement action. Because the form Financing Agreement contains a

severability clause, it acknowledges that a court in a later action is not bound by provisions or remedies that are contrary to law. (App. 37 (Fin. Agreement § 19)).

B. The severability clauses in the Master Resolution and form Financing Agreement allow invalid provisions to be stricken

If the Court determines that the form of Financing Agreement cannot be validly entered into as it stands, it should strike the foreclosure and assignment provisions under the severability clauses contained in the Master Resolution and the form Financing Agreement. (App. 30 (Resolution § 16; App. 37 (Fin. Agreement § 19)). Appellate courts have authority to strike improper provisions from local legislation containing a severability clause. *Phantom of Clearwater, Inc. v. Pinellas Cnty.*, 894 So. 2d 1011, 1021 (Fla. 2d DCA 2005) (striking invalid provision from ordinance). Like all local government resolutions, the Master Resolution is considered legislation. It follows that the Court has authority to eliminate any provisions that may be invalid and affirm the validation judgment.

The foreclosure and assignability clauses can be severed easily from the form Financing Agreement without affecting the remainder of the form. It would be a waste of judicial resources to remand the case to the trial court to strike the provisions. This is especially true given that no financing agreements have been entered into.

C. The District has authority to revise the form Financing Agreement to eliminate a remedy against property owners before any financing agreements are actually executed and before the Bonds are sold

The Master Resolution gives the District authority to make "such insertions and variations" to the form Financing Agreement "as may be necessary and desirable" before any financing agreement is executed. (App. 29 (Resolution § 6)). Because no financing agreements have been executed, the form Financing Agreement is just that—a form. Reynolds cites no authority for his position that the District cannot revise the form Financing Agreement post-validation hearing. (Appellant's Br. 9-12.) The Master Resolution (which was an exhibit to the complaint) put anyone who might wish to object on notice that the form could be revised at any time before execution. (App. 29.) In any event, no one will be affected if the District deletes the foreclosure and assignment provisions.

The District can eliminate remedies available to bondholders because the Bonds have not yet been marketed or sold. The form Financing Agreement is attached to the Master Resolution, which is presently nothing more than a proposed contract between the District and future bondholders. (App. 30 (Resolution § 15)). The contract will take effect only when the Bonds are sold. (*Id.*) Before the Financing Agreements are entered into and before the Master Resolution becomes a binding contract, the decision to reduce the remedies available to future bondholders rests entirely with the District. *See Jackson Lumber Co. v. Walton*

County, 116 So. 771, 775 (Fla. 1928) (stating that there was "no good reason why the board could not subsequently amend their original resolution so as to make it prescribe a definite rate within the statutory limit, provided no rights of third parties created on the basis of their original resolution had arisen which would be prejudiced or impaired by their subsequent amendment").

It is unnecessary and would be inefficient to require a new validation action based on revisions to the form Financing Agreement that would not disadvantage prospective PACE participants. While a new validation proceeding might be required for a government issuer to add new remedies against property owners post-validation, here, the revision would work to eliminate a purported remedy against property owners.

The final judgment recognizes that the Financing Agreement is merely a form and it does not prohibit the District from making any changes. (App. 176.) Since final judgment and Master Resolution require the financing agreements actually entered into to comply with the PACE Act, any revisions required to conform to the PACE Act are consistent with their terms. (App. 176, 178, 180 (Judgment ¶¶ 14, 19, 21); App. 28-29 (Resolution § 6)). This is especially true given that the final judgment (like the form Financing Agreement itself) explicitly requires the District to collect assessments using uniform collection method. (App. 177-78 (Judgment ¶ 17); App. 34-35 (Fin. Agreement § 4)).

If the Court determines that it must remand this case to the trial court, it should (i) do so with instructions to strike the offending provisions or require the District to amend the form Financing Agreement without requiring a new validation hearing; and (ii) order that the final judgment will be affirmed upon doing so. *State v. City of Venice*, 2 So. 2d 365, 367-68 (Fla. 1941) (remanding with directions to amend bond resolution and providing that the final judgment of validation would stand affirmed upon amendment).

CONCLUSION

The Court should dismiss this appeal for lack of standing. Reynolds did not have standing to appear as a party below under section 75.07 because (i) he did not appear before the trial court at or before the show cause hearing or otherwise; and (ii) cannot offer evidence on appeal to resolve whether he is a property owner who will be "adversely affected" if the bonds are issued, as that issue should have been presented to the trial court. Therefore, Reynolds is not a "party" who is authorized to appeal under section 75.08.

If this appeal is not dismissed for lack of standing, the final judgment should be affirmed on the merits. The foreclosure and assignment provisions in the form Financing Agreement are not enforceable under present law, but may become enforceable if the PACE Act is amended in the future. Even if the provisions must be eliminated from the form Financing Agreement, reversal is not required. The

Court may strike the offending provisions under the severability clauses contained in the Master Resolution and the form Financing Agreement. Alternatively, the District may revise them on its own because no financing agreements have been entered into and the Bonds have not been sold. If the Court determines that it must remand this case back to the trial court, it should do so with directions to the trial court to strike the foreclosure and assignability provisions without requiring a new validation hearing.

Respectfully submitted on June 13, 2014.

/s/Herbert W.A. Thiele
Herbert W.A. Thiele
Leon County Attorney and
Counsel for District
Florida Bar No. 261327
301 South Monroe Street, Suite 202
Tallahassee, Florida 32301
Telephone: (850) 606-2500
Facsimile: (850) 606-2501
Primary Email: thieleh@leoncountyfl.gov
Secondary Email: andersone@leoncountyfl.gov

and

BRYANT MILLER OLIVE P.A.

/s/Elizabeth W. Neiberger
Susan H. Churuti, B.C.S.
Florida Bar No. 284076
One Tampa City Center, Suite 2700
Tampa, Florida 33602
Telephone: (813) 273-6677
Facsimile: (813) 223-2705
Primary Email: schuruti@bmolaw.com

Secondary Email: khall@bmolaw.com
JoLinda Herring
Florida Bar No. 0094366
1 SE Third Avenue, Suite 2200
Miami, Florida 33131
Primary Email: jherring@bmolaw.com
Secondary Email: arequejado@bmolaw.com
Elizabeth W. Neiberger
Florida Bar No. 0070102
101 North Monroe Street, Suite 900
Tallahassee, Florida 32301
Telephone: (850) 222-8611
Facsimile: (850) 222-8969
Primary Email: eneiberger@bmolaw.com
Secondary Email: jbrown@bmolaw.com

Attorneys for Appellee Leon County Energy Improvement District

CERTIFICATE OF SERVICE

We certify that on June 13, 2014, a true and correct copy of the foregoing has been furnished by email to:

J. Stephen Menton
Rutledge Ecenia, P.A.
119 S. Monroe Street, Suite 202
Tallahassee, Florida 32301
smenton@rutledge-ecenia.com

Georgia Ann Cappleman
Assistant State Attorney
Leon County Courthouse
301 South Monroe Street, Suite 475
Tallahassee, Florida 32301
capplemang@leoncountyfl.gov

/s/Elizabeth W. Neiberger
Elizabeth W. Neiberger

/s/Herbert W.A. Thiele
Herbert W.A. Thiele

CERTIFICATE OF COMPLIANCE

We 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/Elizabeth W. Neiberger
Elizabeth W. Neiberger

/s/Herbert W.A. Thiele
Herbert W.A. Thiele