Filing # 13847022 Electronically Filed 05/19/2014 09:09:03 PM

RECEIVED, 5/19/2014 21:13:50, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-710

L.T. CASE NO. 13-CA-003396

ROBERT R. REYNOLDS,

Appellant,

v.

LEON COUNTY ENERGY IMPROVEMENT DISTRICT, ET AL.,

Appellee.

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

INITIAL BRIEF of APPELLANT

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

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

TABLE OF CITATIONS

Cases

Statutes

STATEMENT OF THE CASE AND FACTS

This appeal arises out of a bond validation case wherein Appellee, the Leon County Energy Improvement District ("Appellee" or the "District"), sought validation under the provisions of chapter 75, Florida Statutes, of not to exceed $200,000,000 in revenue bonds to implement a property assessed clean energy ("PACE") program. (App. 5.) The District is a dependent special district of Leon County, Florida, including all properties within Leon County, created in 2010 for the purpose of facilitating energy efficiency and renewable energy improvements to residential and commercial properties within Leon County. (App. 19-20.) Appellant, Robert Reynolds, is a former member of the Florida Legislature and owns real property within the District.[1] Following a final judgment validating the bonds, Appellant timely appealed. (App. 171-84, 185.)

The Board of County Commissioners of Leon County adopted Ordinance number 10-12 (the "Ordinance") on April 13, 2010, creating the Leon County Energy Improvement District. (App. 84.) The Ordinance grants specific powers to the District, including the power to borrow money and issue bonds or similar evidence of indebtedness, to assess non-ad valorem assessments, to foreclose liens

[1] Appellant did not appear in the proceeding before the circuit court, except to file the Notice of Appeal that led to this appeal. Appellant is entitled to appeal pursuant to section 75.08, Florida Statutes. *Meyers v. City of St. Cloud*, 78 So. 2d 402, 404 (Fla. 1955).

arising from the imposition of non-ad valorem assessments, and to provide financing to owners of real property for the purpose of constructing certain energy efficiency, renewable energy, and wind resistance improvements to that real property. (App. 76-77.) The Ordinance does not provide the District with home rule powers. The Ordinance also provides specific limitations on the use of certain powers, including that the cost of any improvements financed be assessed on the related property as set forth in a written agreement, that all assessments levied pursuant to the Ordinance be coequal with the lien of state, county, and municipal taxes, and that certain other financing requirements be met before a financing can be completed. (App. 76-82.)

From 2010 through 2012, the District expended and consumed several thousands of Leon County taxpayer dollars in legal fees for outside counsel and untold county legal staff time and resources to unsuccessfully challenge the federal housing authoritiesbureaucracy on business and policy issues concerning "conforming" mortgage loans.[2] *Leon Cnty., Fla. v. Fed. Hous. Fin. Agency*, 700 F.3d 1273 (11th Cir. 2012). After four years, the District has yet to fund or impose

[2] A "conforming" mortgage loan is one that meets certain guidelines as set forth by the conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation—the Federal Housing Finance Agency. A common example is the maximum size of the loan, which for most counties in the United States is $417,000. These government-sponsored private entities do not purchase non-residential or "non-conforming" mortgage loans.

any assessment under section 163.08 under any financing agreement for any improvements.

Subsequently, on November 19, 2013, the District adopted Resolution 2013-01 authorizing the issuance of not-to-exceed $200,000,000 in revenue bonds to fund the energy and wind-resistance improvements contemplated in the Ordinance (the "Bond Resolution"). (App. 84-89.) The Bond Resolution indicates that the bonds will be secured and repaid "solely from the proceeds of non-ad valorem assessments imposed pursuant to the Financing Agreements" with respect to the improved properties. (App. 87.) Attached to the Bond Resolution is "Exhibit 'A', Form of Financing Agreement." (App. 90.) This Financing Agreement was made a part of the Bond Resolution and, by the terms thereof, is central to the sole revenue stream from which the proposed bonds will be repaid. (App. 87, 90.)

Section 4 of the Financing Agreement, entitled "Collection of Assessment; Lien," reads as follows:

> The Assessment, and the interest and charges thereon resulting from a delinquency in the payment of any installment of the Assessment, shall constitute a lien against the Property equal in dignity with county taxes and assessments, and when due shall be superior to all other liens, title and claims, including any mortgage, until paid. The Assessment shall be paid and collected on the same bill as real property taxes using the uniform method of collection 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, and seek

> recovery of all costs, fees and expenses (including reasonable attorneys' fees and costs and title search expenses) in connection with the enforcement and foreclosure actions. The Property Owner acknowledges that, if bonds are sold or if the District enters into another financing relationship to finance the Final Improvements or an Abandonment Payment, the District may obligate itself, through a covenant with the owners of the bonds or the lender under such other financing relationship, to exercise its foreclosure rights with respect to delinquent Assessment installments under specified circumstances.

(App. 92-93.) Section 17 of the District's Financing Agreement, respecting the ability to assign rights under the agreement, reads in part "The District has the right to assign or delegate . . . this Agreement and any or all of its rights (including . . . the right to pursue judicial foreclosure of the Assessment lien . . .)." (App. 95.) Section 17 further provides that "no agreement or action of the Property Owner will serve to impair in any way the District's rights, including, but not limited to, the right to pursue judicial foreclosure of the Assessment lien or the right to enforce the collection of the Assessment . . . ." (*Id.*)

On December 5, 2013, the District filed a Complaint for Validation of Bonds, initiating the action that is now on appeal. (App. 5.) Attached to the Complaint were a printout of Ordinance 10-12, the Bond Resolution, a printout of section 163.08, Florida Statutes, and a copy of the District's Financing Agreement. (App. 19-63.) These four documents, together with a copy of the Third Party Administration Agreement between the District and Ygrene Energy Fund

Florida, LLC, were the subject of a stipulation as to admissibility between the District and the State. (App. 71-74.)

Pursuant to a published Order to Show Cause, the trial court apparently held a hearing on March 10, 2014.[3] (App. 171.) Only the four documents attached to the Complaint were admitted into evidence at the final hearing. (App. 172, 174-76.) After the scheduled hearing, the trial court issued its final judgment validating the proposed bonds and expressly indicating that "the validity of the Financing Agreements . . . are [*sic*] hereby validated and confirmed, are for proper, legal, and paramount public purposes and are fully authorized by law." (App. 183-84.) This timely appeal follows. (App. 185.)

[3] The circuit court docket indicates that the hearing was canceled, and a deputy clerk orally confirmed that no hearing was held. However, quite the contrary, the order on appeal indicates that the hearing occurred. Appellant understands that order is entitled to a presumption of correctness which the docket printout alone cannot overcome.

SUMMARY OF ARGUMENT

The scope of inquiry in a bond validation proceeding is limited to three issues: whether the entity proposing to issue the bonds has the authority to do so, whether the bonds are proposed for a valid public purpose, and whether the issuance of the proposed bonds is legal. In determining whether the entity proposing to issue revenue bonds has the authority to do so, it is proper to inquire as to whether the stream of revenue pledged to support repayment of the bonds is legal. In the instant case, that stream of revenue, as the District placed it before the circuit court, does not comport with the requirements of law, and the District consequently has no authority to issue the bonds.

The District's proposed bonds are supported solely by revenues from non-ad valorem assessments evidenced by general law pursuant to a required financing agreement signed by the property owner. The specific Financing Agreement evidencing the District's assessment regime has been incorporated into the bond resolution. The District relies on section 163.08, Florida Statutes, for authority to enter into these financing agreements and to impose the related assessments. Section 163.08 authorizes this type of assessment in carefully limited circumstances, one of which is that the assessment shall only be collected using the uniform method of collection prescribed in section 197.3632, Florida Statutes. No

provision of Florida law allows for the enforcement of an assessment lien that must be collected pursuant to section 197.3632 by any method other than the tax certificate and tax deed sale process outlined in chapter 197.

The repayment of the proposed bonds is based upon assessments that are only imposed after execution of a Financing Agreement which in this case impermissibly purports to grant the District the ability to foreclose its assessment lien through a judicial foreclosure process, instead of the tax certificate and tax deed process required by statute. The improper collateral remedy in the Financing Agreement—which is integral to the validity of the assessment—renders the assessment unlawful, as the assessment fails to comply with section 163.08. In addition, the District's Financing Agreement impermissibly purports to allow the alienation or assignment of the assessments. Consequently, because the assessments are unlawful non-ad valorem assessments, the District lacks the authority to issue bonds dependent on the revenues from those assessments for repayment.

ARGUMENT

This Court should reverse the final judgment and remand the cause to the circuit court for entry of an order denying validation of the bonds because the assessment regime and revenue stream proposed to support the bonds are inconsistent with the provisions of section 163.08 and are unlawful. The District has no authority to issue bonds based on such unlawful assessments.

A bond validation proceeding is limited to three issues: (i) whether the entity proposing the bond issuance has the authority to issue the bonds, (ii) whether the purpose of the proposed bonds is legal, and (iii) whether the bond issuance complies with the requirements of law. *Murphy v. Lee Cnty.*, 763 So. 2d 300, 302 (Fla. 2000). Also, where bonds are supported by a defined pledged revenue stream, the validity of the source of the pledged revenue is a subset of the authority prong, may be properly determined in a bond validation proceeding, and is not a collateral issue. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 946-47 (Fla. 2001). The argument presented in this appeal is based on the impropriety of the assessments, and the covenants associated therewith, which are pledged to support the repayment of the proposed bonds, and include an inappropriate, non-statutorily based judicial foreclosure remedy. The

bonds are invalid because the District lacks the authority to issue them as supported by a flawed assessment.

Validation is a civil proceeding carefully designed by statute to both afford an expedited process for a local government to obtain the repose and certainty necessary, from a practical standpoint, to market the debt instruments, and to ensure that the fundamental due process rights of the defendants against whom the judgment will be forever enforceable are protected despite the lack of personal service or ability to engage in the full civil litigation process. *See* §§ 75.05, 75.06, Fla. Stat. Part of the statutory design includes a requirement that the State Attorney represent the defendant property owners, taxpayers, and citizens affected by the issuance of the bonds. § 75.05(1).

The validation process is intentionally narrow. *Noble v. Martin Cnty. Health Facilities Auth.*, 682 So. 2d 1089, 1090 (Fla. 1996). However, the scope of the validation proceedings does include "any question of law or fact affecting the validity of the bonds." *Keys Citizens for Responsible Gov't*, 795 So. 2d at 947. This means that matters affecting the propriety and validity of the pledged revenue stream, including "the legality of the financing agreement upon which the bond is secured," are at issue. *Id.* at 946 (quoting *State v. City of Port Orange*, 650 So. 2d 1, 3 (Fla. 1994)). Proceedings under chapter 75 are neither designed nor intended for negotiation or remediation after pleading, due in part to the exceptional notice

by publication.[4] A court should not allow a complex bond validation issue to be initiated and then, after the complaint is filed, permit revisions, remediation, negotiations, or changes to the pleadings or otherwise allow curative or corrective actions, or modification of evidence or documents pled and relied upon. *See id.* at 948-49. This is particularly true in the instant case, where the required show cause hearing has long since been noticed and concluded, the deficient local legislation and improper assessment regime has been relied upon, and a ruling has been rendered. To allow a revision or remediation at this stage would improperly circumvent and/or expand the generous due process features of the published notice and show cause process afforded to governmental entities to expedite validation at the expense of the rights of taxpayers and constituents. Such a result is particularly unwarranted where a defendant taxpayer demonstrates the State Attorney charged with requiring "strict proof," on behalf of the taxpayers and citizens, overlooked or did not identify the defect or defects which render the bonds invalid.

[4] There is no requirement that a property owner, taxpayer, or citizen who is notified of the proceeding by publication be in any way kept abreast of changes to the complaint or the documents upon which the bond is based subsequent to that notice. If a bond validation plaintiff were permitted to amend the complaint or the documents upon which its bonds rely after such notice, the property owners, taxpayers, and citizens are provided no method to inform them that they needed to review the new documents and re-evaluate whether to participate in the proceeding.

The *quid pro quo* for expedited validation proceedings is that fundamental fairness and due process concerns dictate any corrective, curative, or remedial actions by a district or government that are necessary to generate a revenue stream or to correct flaws in the required documentation are beyond the scope of the validation proceeding. This Court must invalidate the bonds and invite the government to take necessary curative or remedial actions, refile, provide new notice, and conduct a subsequent expedited proceeding which affords all property owners, taxpayers, and citizens the opportunity to review claims of validity based on the corrected documents and decide anew whether to object to the validation. To do otherwise, no matter how simple the claimed cure or remediation might be, would circumvent, frustrate, and effectively suspend the minimal due process features of the validation process.

The Proposed Assessments Are Supported by a Financing Agreement that Includes Judicial Foreclosure of the Assessment Lien in Violation of Section 197.3632, Florida Statutes.

The proposed assessments are authorized by the general law provisions of section 163.08, Florida Statutes. This statute, which provides authority to impose special assessments pursuant to financing agreements between local governments and property owners whereby the local government provides funding for a qualified energy-efficiency, renewable energy, or wind resistance improvement to the real property owned by the property owner, and the property owner consents to

a non-ad valorem assessment on the property to repay the cost of the improvement.[5]

The defects raised here[6] are based on the District's erroneous and unsupported assertion, apparently made to attract credit, of the right to and promise of exercise of judicial foreclosure powers. Such foreclosure powers are nowhere mentioned or authorized in section 163.08 or otherwise granted by general law. The District's failure to respect the difference between a secured loan, with its attendant foreclosure remedy, and a non-ad valorem assessment collected pursuant to section 197.3632, with its attendant tax certificate and tax deed remedy, ineffectively advances the compelling state interests outlined in section 163.08, inequitably treats lienholders[7] with liens junior to the lien for taxes and non-ad

---

[5] The District is a dependent special district as defined in section 189.403(2), Florida Statutes, and as such has only the powers specifically granted it in the ordinance creating the District. *Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist.*, 82 So. 346, 350 (Fla. 1919).

[6] Appellant does not assert that assessments imposed pursuant to section 163.08 are inherently defective. Rather, Appellant contends that the District must comply with the requirements of that section and, in particular, the "uniform collection method" discussed below. To the extent the District has not done so, it must take corrective action and file anew its complaint for validation.

[7] The defective foreclosure remedy asserted by the District unlawfully affects all lienholders not on parity with the lien of taxes, not just those who hold "conforming" mortgages that were the subject of Leon County's lawsuit against the Federal Housing Finance Agency. Adherence to the provisions of section 163.08, careful administration and underwriting in the imposition of the proposed non-ad valorem assessments, and full advance disclosure to the affected property owners presents an effective alternative to the District's attempt to exclude any property otherwise capable of securing a conforming mortgage loan. A simple

valorem assessments, and treads against the constitutional prohibition on the lending of credit otherwise carefully avoided by the Legislature in section 163.08.

Section 163.08 sets forth specific requirements for assessments imposed pursuant thereto. § 163.08(4)-(15), Fla. Stat. One of those requirements is that a property owner may apply to the local government for funding to finance a qualifying improvement and enter into a financing agreement; and, where the costs incurred for such purpose are collected as a non-ad valorem assessment, the assessment "shall be collected pursuant to s. 197.3632." § 163.08(4), Fla. Stat.

Section 197.3632, in turn, prescribes a method for collection of non-ad valorem assessments on the same bill as for property taxes generally known as the "uniform collection method." Section 197.3632 provides a series of requirements, timelines, and procedures for the use of the uniform collection method; absent strict adherence to these procedures, non-ad valorem assessments may not be collected on the same bill as for property taxes. *See Escambia Cnty. v. Bell*, 717 So. 2d 85, 88 (Fla. 1st DCA 1998). One of the limitations contained within section 197.3632 is found in paragraph (8)(a): "Non ad-valorem assessments collected pursuant to this section shall be subject to all collection provisions of this chapter,

---

disclosure that the section 163.08 non-ad valorem assessment may need to be paid upon refinancing or sale before a new mortgage lender will agree to the loan effectively dispenses with the business and policy concerns raised in Leon County's unsuccessful lawsuit against the Federal Housing Finance Agency.

including provisions relating to . . . issuance and sale of tax certificates and tax deeds for nonpayment." § 197.3632(8)(a), Fla. Stat.

Chapter 197 provides a detailed method for enforcing the lien of property taxes and non-ad valorem assessments collected pursuant to the uniform collection method. Subsection 197.402(3) discusses the initial step in enforcing the payment of such taxes or assessments. Couched in mandatory language, that subsection reads "[e]xcept as provided in s. 197.432(4), on or before June 1 or the 60th day after the date of delinquency, whichever is later, the tax collector shall advertise once each week for 3 weeks and shall sell tax certificates on all real property having delinquent taxes." § 197.402(3), Fla. Stat. The specific tax certificate sale procedure is described in section 197.432; subsection (2) of that statute provides "[a] lien created through the sale of a tax certificate may not be enforced in any manner except as prescribed in this chapter." § 197.432(2), Fla. Stat. Once a tax certificate is sold, two years after the taxes became delinquent, the holder of the tax certificate may apply for a tax deed, and a detailed process described in section 197.502 must take place before a tax deed is issued and title to a property rests in the new owner. Section 197.122(2) provides "[a] lien created through the sale of a tax certificate may not be foreclosed or enforced in any manner except as prescribed in this chapter."

While the process for issuance and sale of tax certificates and tax deeds superficially appears similar to judicial foreclosure of a mortgage lien or mechanic's lien, the process is actually quite different and replete with different types of safeguards to the rights of the original property owner. Chapter 197 in its entirety contains only seven references to "foreclosure" and none authorize judicial foreclosure in any way.[8] Judicial foreclosure is an entirely separate legal proceeding governed by chapter 702, Florida Statutes.

The non-ad valorem assessments authorized by section 163.08 may only be collected pursuant to the "uniform collection method," which in turn specifies that the only way to enforce such a levy is through the provisions of chapter 197. Chapter 197 provides an explicit mechanism for enforcement involving the sale of tax certificates and tax deeds, and does not allow for any other method of enforcement, such as judicial foreclosure.

The District also attempts to include, in its Financing Agreement, language that would allow it to alienate or assign the assessments to a private entity. (App.

---

[8] Section 197.122(2) provides "[a] lien created through the sale of a tax certificate may not be foreclosed or enforced in any manner except as prescribed in this chapter"; section 197.312 provides that payment of taxes by a mortgagee when the mortgagor qualifies for tax deferral does not give the mortgagee the right to foreclose; sections 197.443 and 197.444 provide for refunds of monies paid when a tax certificate is cancelled or corrected; sections 197.572 and 197.573 refers to the tax certificate and tax deed process as a "tax lien foreclosure proceeding" and relate solely to the preservation of certain easements and restrictive covenants in the event of the issuance of a tax deed. *See also*, section 197.122(2), Fla. Stat.

128.) The exercise of this purported right would be in direct contrast with Florida law. While a governmental entity with the power to assess can pledge the revenues collected from an assessment, or obligate itself to collect an assessment, *see City of Boca Raton v. State*, 595 S. 2d 25, 28 (Fla. 1992), the assessment itself is not property that can be bought or sold. Instead, it is inherently the result of imposition and levy of a special assessment by a governmental entity.

The financing agreement required by section 163.08(4), Florida Statutes, is simply evidence that a property owner has been afforded due process: notice and an opportunity to be heard regarding the assessment and constructive notice of the existence of the assessment on the property as required by the Legislature. Such a financing agreement is not a security instrument, and the plain language of the statute is clear that the sole means of collection and enforcement of the assessment is through the process described in section 197.3632, Florida Statutes, and no other. Any attempted assignment or alienation by the District of the assessment would improperly convert the financing agreement into a security instrument or evidence of collateral, which it is not, and which it was carefully constructed and intended by the Legislature not to become.

The District included in its Bond Resolution, attached to its Complaint for Validation and introduced as evidence in the circuit court proceeding, a Financing Agreement that it sought to have approved by the circuit court. (App. 142-70.)

The Final Judgment below specifically provides that "the validity of the Financing Agreements . . . are [*sic*] hereby validated and confirmed, are for proper, legal, and paramount public purposes and are fully authorized by law." (App. 183-84.) The Financing Agreement is critical to the validity of the bonds, because without it, no assessments under section 163.08 can be imposed and therefore none of the pledged revenues can be collected. If the Financing Agreement is invalid, then the revenue stream pledged to support repayment of the bonds is similarly invalid, and the District would have no authority to issue the bonds.

The Financing Agreement approved by the circuit court clearly spells out the remedies for failure to timely pay the assessment installments when collected on the same bill as for property taxes pursuant to section 197.3632. The remedies in the Financing Agreement include "the right to seek . . . foreclosure" (App. 125), that "the District may obligate itself . . . to exercise its foreclosure rights" (App. 126), and that "no agreement or action of the Property Owner will serve to impair in any way the District's rights, including, but not limited to, the right to pursue judicial foreclosure of the Assessment lien." [Emphasis added.] (App. 128.)

There is no evidence of any intent by the District to limit itself solely to the tax certificate and tax deed process prescribed by section 197.3632. In only one instance does the foreclosure remedy appear to be at all limited: the first reference to foreclosure appears to be an example of a "legal" remedy. (App. 125.) Even if

the remaining references to foreclosure were similarly qualified—they are not—the term "legal remedies" is vague, as it could mean either "remedies allowed by law" or "remedies pursued through the practice of law." The repeated and unqualified references to foreclosure as a right of the District pursuant to the Financing Agreement, and the improper attempts to allow alienation or assignment of the assessments in a manner inconsistent with the general law provisions of section 163.08, impermissibly seek to create rights and remedies that exceed the underlying statutory design. Significantly, no evidence of any intent by the District to limit itself solely to the tax certificate and tax deed process prescribed by section 197.3632 exists. Accordingly, the Final Judgment's approval of the Financing Agreement entered into evidence, erroneously sanctions foreclosure as a valid remedy for failure to pay an installment on an assessment purported to be imposed pursuant to section 163.08.

This improper enforcement method and the erroneous attempts to permit the alienation or assignment of the assessments render the Financing Agreement invalid, and without a valid financing agreement, the assessments and assessment regime dependent thereon are contrary to general law, unlawful, and improper. The proposed assessments as structured are unlawful and insufficient to support repayment of the bonds, and therefore the District lacks the authority to issue the proposed bonds.

CONCLUSION

For the reasons stated herein, this Court should reverse the final judgment and remand with instructions that the circuit court decline to validate the proposed bonds and invite the District to undertake curative, remedial, or other actions before re-filing a subsequent complaint for validation.

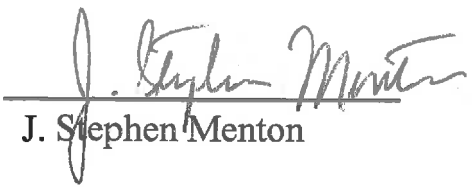
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail to JoLinda Herring at jherring@bmolaw.com, Susan H. Churuti at schuruti@bmolaw.com, Elizabeth Nieberger at eneiberger@bmolaw.com, Herbert Thiele at thieleh@leoncountyfl.gov, and Georgia Cappleman at capplemang@leoncountyfl.govthis 19 day of May, 2014.

J. Stephen Menton

CERTIFICATE OF COMPLIANCE

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



J. Stephen Menton